NATIONAL UNIVERSITY
LIBRARY SAN DIEGO

NON CIRCULATING

607

Digitized by the Internet Archive
in 2023 with funding from
Kahle/Austin Foundation

https://archive.org/details/californiareport2092vari_209-212

# CALIFORNIA REPORTER

*Covering Cases Reported in*

PACIFIC REPORTER

## 209 P.—212 P.

*Cite by Volume and Page*

*of the*

PACIFIC REPORTER

*Thus:*

209 P. 23

ST. PAUL, MINN.
WEST PUBLISHING CO.
1956

COPYRIGHT, 1922, BY WEST PUBLISHING CO.
Pacific Reporter, Vol. 209, Nos. 1-8; Vol. 210, Nos. 1-3.

COPYRIGHT, 1923, BY WEST PUBLISHING CO.
Pacific Reporter, Vol. 210, Nos. 4-7; Vol. 211, Nos. 1-4; Vol. 212, Nos. 1-6.

COPYRIGHT, 1956, BY WEST PUBLISHING CO.

Cal.Rep. 209-212 P.
2-1967

# CASES REPORTED

## Vols. 209–212 P.


| | P. Vol. | Page |
|---|---|---|
| Abbey v. Board of Directors of Honcut-Yuba Irr. Dist., App. | 209 | 709 |
| Abrams v. Daugherty, App. | 212 | 942 |
| Adaian v. Boranian, App. | 211 | 806 |
| Aetna Life Ins. Co. of Hartford, Conn.; Ogilvie v., Sup. | 209 | 26 |
| Agnew v. Daugherty, Sup. | 209 | 34 |
| Aguirre; Altube v., App. | 212 | 217 |
| Akley v. Bassett, Sup. | 209 | 576 |
| Albert Steinfeld & Co. v. Broxholme, App. | 211 | 473 |
| Alberti; McClure v., Sup. | 212 | 204 |
| Alderson; Berry v., App. | 211 | 836 |
| Allen v. San Francisco Wholesale Dairy Produce Exch., App. | 210 | 41 |
| Althouse v. Provident Mut. Building-Loan Ass'n, App. | 209 | 1018 |
| Altube v. Aguirre, App. | 212 | 217 |
| American Film Co.; Blackwell v., Sup. | 209 | 999 |
| American Products Co.; Anheuser-Busch Brewing Ass'n v., App. | 211 | 817 |
| Amort; People v., App. | 212 | 50 |
| Anderson v. Anderson, App. | 211 | 827 |
| Anderson; People v., App. | 211 | 254 |
| Anderson-Cottonwood Irr. Dist.; Whiteman v., App. | 212 | 706 |
| Anglo-California Trust Co. v. Wallace, App. | 209 | 78 |
| Anheuser-Busch Brewing Ass'n v. American Products Co., App. | 211 | 817 |
| Applegarth v. Weintraub, App. | 212 | 36 |
| Armas v. Armas, App. | 209 | 256 |
| Atchison, T. & S. F. Ry. Co. v. Railroad Commission, Sup. | 211 | 460 |
| Atlas Development Co. v. National Surety Co., Sup. | 212 | 196 |
| Austin; Scott v., App. | 209 | 251 |
| Baboo Singh v. Cross, App. | 212 | 951 |
| Baker v. Miller, Sup. | 212 | 11 |
| Baldwin; MacKeown v., App. | 211 | 477 |
| Bank of Italy, Fresno Branch; Pacific Acceptance Corporation v., App. | 209 | 1024 |
| Bannon; People v., App. | 209 | 1029 |
| Bar Ass'n of San Francisco v. Devall, App. | 210 | 279 |
| Barberich v. Pooshichian, App. | 211 | 236 |
| Bartlett v. Dunscomb, App. | 209 | 74 |
| Bartmann; Giovannoni v., App. | 211 | 844 |
| Bassett; Akley v., Sup. | 209 | 576 |
| Bateman v. Kellogg, App. | 211 | 46 |
| Beletich; Martello v., App. | 211 | 20 |
| Bell v. Sage, App. | 212 | 404 |
| Belshaw's Estate, In re, Sup. | 212 | 13 |
| Bernheim; Taylor v., App. | 209 | 55 |
| Berry v. Alderson, App. | 211 | 836 |
| Bertaina; People's State Bank v., App. | 210 | 432 |
| Beyerle v. Clift, App. | 209 | 1015 |
| Blaggi v. Ramont, Sup. | 209 | 892 |
| Bibby v. Pacific Electric Ry. Co., App. | 209 | 387 |

P.


| | Vol. | Page |
|---|---|---|
| Billig v. Southern Pac. Co., Sup. | 209 | 241 |
| Birch v. Orange County, App. | 210 | 57 |
| Bishop v. Superior Court in and for Los Angeles County, App. | 209 | 1012 |
| Blackwell v. American Film Co., Sup. | 209 | 999 |
| Board of Dental Examiners of California; Jacobs v., Sup. | 209 | 1006 |
| Board of Directors of Honcut-Yuba Irr. Dist.; Abbey v., App. | 209 | 709 |
| Board of Education of City of San Rafael v. Davidson, Sup. | 210 | 961 |
| Board of Sup'rs of City and County of San Francisco; Palace Hotel Co. of San Francisco v., App. | 209 | 256 |
| Board of Sup'rs of Sonoma County; Wright v., Sup. | 212 | 921 |
| Boranian; Adaian v., App. | 211 | 806 |
| Boyle; Gallagher v., App. | 209 | 82 |
| Braden v. Mitchell, App. | 210 | 43 |
| Breeden; Hayes v., Sup. | 212 | 205 |
| Brero; Jacobus v., Sup. | 212 | 617 |
| Brewer v. Railroad Commission of California, Sup. | 210 | 511 |
| Brewer v. Railroad Commission of California, Sup. | 210 | 521 |
| Brittenbaker v. Buck, App. | 209 | 264 |
| Brooking; Krauskopf v., App. | 211 | 469 |
| Brown v. Chowchilla Land Co., App. | 210 | 424 |
| Broxholme; Albert Steinfeld & Co. v., App. | 211 | 473 |
| Bruns; Singer v., App. | 212 | 955 |
| Bryant; Pavilion Ice Rink v., App. | 209 | 76 |
| Bryson v. Underhill, Sup. | 211 | 801 |
| Buck; Brittenbaker v., App. | 209 | 264 |
| Bullard v. Bullard, Sup. | 209 | 361 |
| Bullis; McCready v., App. | 210 | 638 |
| Burg Bros.; McGowan v., App. | 210 | 545 |
| Burke, Ex parte, Sup. | 212 | 193 |
| Burns v. Jackson, App. | 211 | 821 |
| Burns v. Ross, Sup. | 212 | 17 |
| Butte County; Wild Goose Country Club v., App. | 212 | 711 |
| Bybee; Miles v., App. | 211 | 251 |
| Byers; Phillips v., Sup. | 209 | 557 |
| Caire; Capuccio v., Sup. | 209 | 367 |
| Caire; Rossi v., Sup. | 209 | 374 |
| Cairns v. Haddock, App. | 212 | 222 |
| California Drilling & Machinery Co. v. Crowder, App. | 209 | 68 |
| California Notion & Toy Co. v. Industrial Accident Commission, App. | 210 | 524 |
| California State Automobile Ass'n; Kish v., Sup. | 212 | 27 |
| Cape; Yraceburn v., App. | 212 | 938 |
| Cape; Yraceburn v., App. | 212 | 942 |
| Capuccio v. Caire, Sup. | 209 | 367 |
| Carr v. International Indemnity Co., App. | 209 | 83 |
| Carrick; O'Malley v., App. | 212 | 45 |
| Carroll's Estate, In re, Sup. | 210 | 817 |
| Carruthers; Kall v., App. | 211 | 43 |
| Carse v. Marsh, Sup. | 210 | 257 |
| Carter v. Rowley, App. | 211 | 267 |
| Casdorf; People v., App. | 212 | 237 |
| Cassella; People v., App. | 209 | 40 |
| Castagnetto v. Superior Court in and for Mariposa County, Sup. | 209 | 548 |
| Castagnetto v. Superior Court in and for Mariposa County, Sup. | 209 | 549 |
| Cate, In re, App. | 212 | 694 |
| Ceinar v. Hawes, App. | 211 | 849 |
| Central California Berry Growers' Ass'n; Lachman Co. v., App. | 209 | 379 |

P.


| | Vol. | Page |
|---|---|---|
| Central California Berry Growers' Ass'n; Lachman Co. v., App. | 209 | 381 |
| Chanan Singh v. Cross, App. | 212 | 946 |
| Charles Nelson Co. v. Pacific Wharf & Storage Co., App. | 209 | 51 |
| Charlton Silk Co. v. Jones, Sup. | 212 | 203 |
| Cheda v. Cheda, App. | 209 | 70 |
| Cheda's Estate, In re, App. | 209 | 70 |
| Chowchilla Land Co.; Brown v., App. | 210 | 424 |
| Chrisman v. Superior Court of California in and for Fresno County, App. | 210 | 632 |
| Cioli v. Kenourgios, App. | 211 | 838 |
| City and County of San Francisco; Morris v., App. | 210 | 824 |
| City Council of City of Los Angeles; Moore v., App. | 209 | 64 |
| City of Oakland; Great Western Power Co. of California v., Sup. | 209 | 553 |
| City of Pasadena; Manning v., App. | 209 | 253 |
| City of South San Francisco v. Santa Clara Valley Land Co., App. | 212 | 953 |
| Clark v. Oxner, Sup. | 212 | 13 |
| Clarke Co. v. Walker, two cases, Sup. | 211 | 1 |
| Clark's Estate, In re, Sup. | 212 | 622 |
| Clark Wise & Co.; Meyercord v., App. | 210 | 829 |
| Clift; Beyerle v., App. | 209 | 1015 |
| Coast Securities Co.; Rogers Lamb Co. v., App. | 209 | 246 |
| Cockerill v. Tobin, App. | 209 | 1022 |
| Coffer; La Barre v., App. | 211 | 246 |
| Coleman; Union Trust Co. of San Francisco v., Sup. | 209 | 571 |
| Coleman's Estate, In re, Sup. | 209 | 571 |
| Collins; People v., App. | 212 | 701 |
| Collins; People v., App. | 212 | 705 |
| Connick's Estate, In re, Sup. | 209 | 356 |
| Cook, In re, App. | 210 | 528 |
| Coryell; Lindemann v., App. | 212 | 47 |
| Crain v. Sumida, App. | 211 | 479 |
| Crawford; Krieg v., App. | 210 | 636 |
| Creelman; Freeman v., App. | 212 | 56 |
| Cross; Baboo Singh v., App. | 212 | 951 |
| Cross; Chanan Singh v., App. | 212 | 946 |
| Cross; Hernam Singh v., App. | 212 | 952 |
| Cross; Meeker v., App. | 211 | 229 |
| Crowder; California Drilling & Machinery Co. v., App. | 209 | 68 |
| Cuneo v. United Railroads of San Francisco, App. | 210 | 1118 |
| Currie v. Title Insurance & Trust Co., App. | 212 | 409 |
| C. W. Clarke Co. v. Walker, two cases, Sup. | 211 | 1 |
| Dabney v. Wilhelm, Sup. | 212 | 203 |
| Daugherty; Abrams v., App. | 212 | 942 |
| Daugherty; Agnew v., Sup. | 209 | 34 |
| Davidson; Board of Education of City of San Rafael v., Sup. | 210 | 961 |
| Davidson; Imperial Valley Long Staple Cotton Growers' Ass'n v., App. | 209 | 58 |
| Davie; Whitehead v., Sup. | 209 | 1008 |
| Davis v. Fell, App. | 211 | 30 |
| Davis; Wyseur v., App. | 209 | 213 |
| Day; Heberling v., App. | 209 | 908 |
| De Armond; Newton v., App. | 212 | 630 |
| Deases; People v., App. | 212 | 407 |
| Devall; Bar Ass'n of San Francisco v., App. | 210 | 279 |
| Diamond v. Superior Court of California in and for City and County of San Francisco, Sup. | 210 | 36 |
| Dickson v. Parker, App. | 212 | 42 |
| Domenigoni v. Imperial Live Stock & Mortgage Co., Sup. | 209 | 36 |

| | Vol. | Page |
|---|---|---|
| Donnelly; People v., Sup. | 210 | 523 |
| Doran v. Foster, Sup. | 209 | 548 |
| Dorn's Estate, In re, Sup. | 212 | 206 |
| Dugan; Guscetti v., App. | 212 | 397 |
| Duncan v. Wolfer, App. | 212 | 390 |
| Dunne v. White, App. | 210 | 839 |
| Dunscomb, In re, App. | 209 | 74 |
| Dunscomb; Bartlett v., App. | 209 | 74 |
| Dunstan; People v., App. | 211 | 813 |
| Eagle Lake Lumber Co.; Sharp v., App. | 212 | 933 |
| Early; Gaver v., App. | 209 | 390 |
| Early; Gaver v., App. | 209 | 394 |
| Elkus; People v., App. | 211 | 34 |
| Emerson; Martin v., App. | 211 | 832 |
| Ensign; Federal Const. Co. v., App. | 210 | 536 |
| Evans v. Shockley, App. | 209 | 42 |
| Fahey v. Madden, App. | 209 | 41 |
| Farrell; People v., App. | 212 | 932 |
| Fawkes v. Reynolds, Sup. | 211 | 449 |
| Federal Const. Co. v. Ensign, App. | 210 | 536 |
| Federal Mut. Liability Ins. Co. v. Industrial Accident Commission of California, Sup. | 210 | 628 |
| Feeney v. Standard Oil Co., App. | 209 | 85 |
| Fell; Davis v., App. | 211 | 30 |
| Ferraris v. Ferraris, App. | 211 | 470 |
| Fetters; Siegman v., App. | 210 | 49 |
| Fidelity Savings & Loan Ass'n v. Schaefer, App. | 210 | 47 |
| Finmand; Pabst v., Sup. | 211 | 11 |
| Flinn v. Shafter Realty Co., Sup. | 212 | 194 |
| Forward v. San Diego County, Sup. | 209 | 993 |
| Forward v. San Diego County, Sup. | 211 | 458 |
| Foster; Doran v., Sup. | 209 | 548 |
| Francis v. Merkley, App. | 210 | 437 |
| Francis v. Superior Court of Kern County, App. | 209 | 80 |
| Franck v. Spencer, Sup. | 210 | 417 |
| Franck's Estate, In re, Sup. | 210 | 417 |
| Freeman v. Creelman, App. | 212 | 56 |
| Freiden v. Industrial Accident Commission of California, Sup. | 210 | 420 |
| Galente; Ohanesian v., App. | 211 | 238 |
| Gallagher v. Boyle, App. | 209 | 82 |
| Ganz v. J. D. & A. B. Spreckels Securities Co., App. | 212 | 43 |
| Garcia; People v., App. | 211 | 58 |
| Garcia v. Sainz, App. | 210 | 534 |
| Garibaldi v. Zemansky, Sup. | 209 | 575 |
| Garin v. Pelton, App. | 209 | 377 |
| Garin v. Pelton, App. | 209 | 378 |
| Gaudreau; Reuter v., App. | 209 | 216 |
| Gause v. Pacific Gas & Electric Co., App. | 212 | 922 |
| Gaver v. Early, App. | 209 | 390 |
| Gaver v. Early, App. | 209 | 394 |
| General Accident, Fire & Life Assur. Corporation, Limited, of Perth, Scotland, v. Industrial Accident Commission of California, Sup. | 210 | 820 |
| Georgeson v. Steinhofer, Sup. | 210 | 817 |
| Gibbons v. Yosemite Lumber Co., Sup. | 211 | 4 |
| Giovannoni v. Bartmann, App. | 211 | 844 |
| Gobbi; Valentini v., App. | 212 | 718 |

| | Vol. | P. Page |
|---|---|---|
| Golden Eagle Milling Co. v. Old Homestead Bakery, App. | 211 | 56 |
| Graff; People v., App. | 211 | 829 |
| Gray v. Yarbrough, App. | 212 | 226 |
| Great Western Power Co. of California v. City of Oakland, Sup. | 209 | 553 |
| Griffey v. Pacific Electric Ry. Co., App. | 209 | 45 |
| Griffith v. Oak Ridge Oil Co., Sup. | 212 | 913 |
| Grinbaum v. Superior Court of City and County of San Francisco, Sup. | 209 | 1005 |
| Guarantee Mortg. Co.; J. Nakata v., App. | 212 | 937 |
| Guarantee Mortg. Co.; K. Ishii v., App. | 212 | 937 |
| Guenther; Pallett v., App. | 210 | 969 |
| Gunther v. McCormick, App. | 212 | 715 |
| Guscetti v. Dugan, App. | 212 | 397 |
| Haddock; Cairns v., App. | 212 | 222 |
| Haering; Hurt v., Sup. | 211 | 228 |
| Hahn; People v., App. | 209 | 268 |
| Hall v. Mitchell, App. | 211 | 853 |
| Halpern v. Superior Court in and for Alameda County, Sup. | 212 | 916 |
| Hamaker v. Pacific Gas & Elecric Co., App. | 211 | 265 |
| Hamon's Estate, In re, App. | 212 | 399 |
| Hansen v. Northwestern Pac. R. Co., App. | 209 | 63 |
| Hardisty; Wilcox v., App. | 212 | 633 |
| Harpold v. Superior Court in and for City and County of San Francisco, App. | 209 | 219 |
| Harrison, Petition of, App. | 211 | 26 |
| Haslett Warehouse Co.; Wells Fargo Nevada Nat. Bank v., App. | 212 | 647 |
| Hawes; Ceimar v., App. | 211 | 849 |
| Hayes v. Breeden, Sup. | 212 | 205 |
| Heath; MacRae v., App. | 212 | 228 |
| Heberling v. Day, App. | 209 | 908 |
| Heiken; People v., App. | 210 | 635 |
| Heller; Hopkins v., App. | 210 | 975 |
| Helmuth v. Industrial Accident Commission of California, App. | 210 | 428 |
| Hengehold v. National Creamery & Produce Co., App. | 212 | 239 |
| Henry v. Willett, App. | 212 | 698 |
| Herbert; People v., App. | 210 | 276 |
| Hernam Singh v. Cross, App. | 212 | 952 |
| Hersom v. Hersom, App. | 212 | 717 |
| Hildebrand; Martin v., Sup. | 212 | 618 |
| H. Liebes & Co. v. United States Casualty Co., App. | 211 | 842 |
| Hobson v. Hunt, App. | 211 | 242 |
| Hollman v. Wolf, App. | 212 | 40 |
| Holman v. Musser, App. | 212 | 33 |
| Honey v. Pacific Automobile Indemnity Exch., Sup. | 212 | 199 |
| Hopkins v. Heller, App. | 210 | 975 |
| Houghton; Kales v., Sup. | 212 | 21 |
| Houghton v. Kluegel, App. | 211 | 819 |
| Howe; Martin v., Sup. | 211 | 453 |
| Hunt; Hobson v., App. | 211 | 242 |
| Hunter; People v., App. | 210 | 968 |
| Hurt v. Haering, Sup. | 211 | 228 |
| Hutchinson v. Miller & Lux, App. | 212 | 394 |
| Hutchinson v. United States Fidelity & Guaranty Co., App. | 209 | 249 |
| Huxley v. Minor, App. | 211 | 807 |
| Imperial Live Stock & Mortgage Co.; Domenigoni v., Sup. | 209 | 36 |
| Imperial Valley Long Staple Cotton Growers' Ass'n v. Davidson, App. | 209 | 58 |
| Industrial Accident Commission; California Notion & Toy Co. v., App. | 210 | 524 |

| | Vol. | P. Page |
|---|---|---|
| Industrial Accident Commission of California; Federal Mut. Liability Ins. Co. v., Sup. | 210 | 628 |
| Industrial Accident Commission of California; Freiden v., Sup. | 210 | 420 |
| Industrial Accident Commission of California; General Accident, Fire & Life Assur. Corporation, Limited, of Perth, Scotland v., Sup. | 210 | 820 |
| Industrial Accident Commission of California; Helmuth v., App. | 210 | 428 |
| Industrial Accident Commission of California; Press Pub. Co. v., Sup. | 210 | 820 |
| Industrial Accident Commission of California; Pruitt v., Sup. | 209 | 31 |
| Industrial Accident Commission of California; Standard Lumber Co. v., App. | 212 | 720 |
| Industrial Accident Commission of California; Union Iron Works v., Sup. | 210 | 410 |
| Industrial Accident Commission of California; Zurich General Accident & Liability Ins. Co. v., App. | 210 | 51 |
| Industrial Loan & Investment Co. of San Francisco v. Superior Court of California in and for City and County of San Francisco, Sup. | 209 | 360 |
| International Indemnity Co.; Carr v., App. | 209 | 83 |
| Isaac Upham Co. v. United States Fidelity & Guaranty Co., App. | 211 | 809 |
| Ishii v. Guarantee Mortg. Co., App. | 212 | 937 |
| Jackson; Burns v., App. | 211 | 821 |
| Jackson; People v., Sup. | 212 | 4 |
| Jacobs v. Board of Dental Examiners of California, Sup. | 209 | 1006 |
| Jacobus v. Brero, Sup. | 212 | 617 |
| Janeway & Carpender v. Long Beach Paper & Paint Co., Sup. | 211 | 6 |
| J. D. & A. B. Spreckels Securities Co.; Ganz v., App. | 212 | 43 |
| J. H. McDougall Co.; Lockhart v., Sup. | 212 | 1 |
| J. Nakata v. Guarantee Mortg. Co., App. | 212 | 937 |
| Jo Fong; People v., App. | 210 | 548 |
| Johnson v. Krier, App. | 210 | 966 |
| Jones; Charlton Silk Co. v., Sup. | 212 | 203 |
| Jones v. O'Toole, Sup. | 212 | 9 |
| Jones v. Sturzenberg, App. | 210 | 835 |
| Jones; Whitworth v., App. | 209 | 60 |
| Jordan, Ex parte, Sup. | 212 | 913 |
| Kahn; Levy v., App. | 210 | 40 |
| Kales v. Houghton, Sup. | 212 | 21 |
| Kall v. Carruthers, App. | 211 | 43 |
| Keiser; Schomig v., Sup. | 209 | 550 |
| Kellogg; Bateman v., App. | 211 | 46 |
| Kempner; Kohn v., App. | 211 | 805 |
| Kendrick, Ex parte, App. | 212 | 226 |
| Kenourgios; Cioli v., App. | 211 | 838 |
| Kerr, In re, Sup. | 212 | 913 |
| Key v. Vidovich, App. | 209 | 375 |
| Khan v. Zemansky, App. | 210 | 529 |
| King v. Railroad Commission of California, Sup. | 212 | 200 |
| Kirchmann; White v., App. | 211 | 246 |
| Kirkpatrick v. Pye, App. | 210 | 438 |
| Kish v. California State Automobile Ass'n, Sup. | 212 | 27 |
| K. Ishii v. Guarantee Mortg. Co., App. | 212 | 937 |
| Kluegel; Houghton v., App. | 211 | 819 |
| Knauf v. Stain, App. | 211 | 29 |
| Knauft's Estate, In re, App. | 211 | 29 |
| Koford; Murphy v., Sup. | 209 | 360 |
| Kohn v. Kempner, App. | 211 | 805 |
| Kohn v. National Film Corporation of America, App. | 212 | 207 |

P.


| | Vol. | Page |
|---|---|---|
| Kolb, Ex parte, App. | 212 | 645 |
| Krauskopf v. Brooking, App. | 211 | 469 |
| Krieg v. Crawford, App. | 210 | 636 |
| Krier; Johnson v., App. | 210 | 966 |
| Kurtz v. Kurtz, Sup. | 210 | 959 |
| Kurtz's Estate, In re, Sup. | 210 | 959 |
| La Barre v. Coffer, App. | 211 | 246 |
| Lachman Co. v. Central California Berry Growers' Ass'n, App. | 209 | 379 |
| Lachman Co. v. Central California Berry Growers' Ass'n, two cases, App. | 209 | 381 |
| Laer; Luckenbach v., Sup. | 212 | 918 |
| Laguna Beach Co.; Phillips v., Sup. | 211 | 225 |
| Lake Tahoe Ry. & Transp. Co.; Placer County v., App. | 209 | 900 |
| Lane v. Starkey, App. | 210 | 277 |
| Lauman; People v., App. | 210 | 421 |
| Leal v. Martin, App. | 211 | 853 |
| Leballister v. Morris, App. | 211 | 851 |
| LeBaron; Rodgerson v., App. | 209 | 216 |
| Lee Yick; People v., Sup. | 209 | 538 |
| Leoni v. Quinn, Sup. | 209 | 551 |
| Lesser; Sanfilippo v., App. | 210 | 44 |
| Lester; Markus v., App. | 211 | 240 |
| Levy v. Kahn, App. | 210 | 40 |
| Lewald Co.; Western Fuel Co. v., Sup. | 210 | 419 |
| Liebes & Co. v. United States Casualty Co., App. | 211 | 842 |
| Lindemann v. Coryell, App. | 212 | 47 |
| Lips; People v., App. | 211 | 22 |
| Lloyd; Pacific Slope Securities Co. v., App. | 212 | 930 |
| Lockhart v. J. H. McDougall Co., Sup. | 212 | 1 |
| Long Beach Paper & Paint Co.; Janeway & Carpender v., Sup. | 211 | 6 |
| Look; Schurman v., Sup. | 210 | 816 |
| Los Angeles County v. Luscher, App. | 209 | 899 |
| Los Angeles Inv. Co. v. Wilson, App. | 212 | 211 |
| Los Angeles & S. L. R. Co. v. Railroad Commission, Sup. | 211 | 460 |
| Luckenbach v. Laer, Sup. | 212 | 918 |
| Luscher; Los Angeles County v., App. | 209 | 899 |
| Lusher, Ex parte, App. | 209 | 223 |
| Lynn; Miller v., App. | 211 | 466 |
| McCallum v. Stull, App. | 211 | 466 |
| McCarthy v. Madison, Sup. | 212 | 7 |
| McClung v. Watt, Sup. | 211 | 17 |
| McClure v. Alberti, Sup. | 212 | 204 |
| McCormick; Gunther v., App. | 212 | 715 |
| McCready v. Bullis, App. | 210 | 638 |
| McCullagh v. Railroad Commission of California, Sup. | 210 | 264 |
| McDonald; Newell v., App. | 212 | 389 |
| McDougall Co.; Lockhart v., Sup. | 212 | 1 |
| McGowan v. Burg Bros., App. | 210 | 545 |
| McGuire; Pryor v., App. | 210 | 532 |
| MacKeown v. Baldwin, App. | 211 | 477 |
| McLain, Ex parte, Sup. | 212 | 620 |
| McLean v. Mooser, App. | 210 | 827 |
| McMillan; People v., App. | 212 | 38 |
| McPherson v. Walling, App. | 209 | 209 |
| McPherson v. Walling, App. | 209 | 212 |
| MacRae v. Heath, App. | 212 | 228 |
| Madden; Fahey v., App. | 209 | 41 |

P.


| | Vol. | Page |
|---|---|---|
| Madison; McCarthy v., Sup. | 212 | 7 |
| Manning v. City of Pasadena, App. | 209 | 253 |
| Marcus Land & Investment Co.; Shurtleff v., App. | 211 | 244 |
| Markarian v. Mooradian, App. | 210 | 737 |
| Markus v. Lester, App. | 211 | 240 |
| Marsh; Carse v., Sup. | 210 | 257 |
| Marsh; Matovich v., Sup. | 210 | 259 |
| Mar Shee v. Maryland Assur. Corporation, Baltimore, Sup. | 210 | 269 |
| Martello v. Beletich, App. | 211 | 20 |
| Martin v. Emerson, App. | 211 | 832 |
| Martin v. Hildebrand, Sup. | 212 | 618 |
| Martin v. Howe, Sup. | 211 | 453 |
| Martin; Leal v., App. | 211 | 853 |
| Martin v. Sutter, App. | 212 | 60 |
| Martinez; People v., App. | 210 | 61 |
| Marty; People v., App. | 210 | 964 |
| Marui; People v., Sup. | 211 | 8 |
| Maryland Assur. Corporation, Baltimore; Mar Shee v., Sup. | 210 | 269 |
| Mathews, Ex parte, App. | 209 | 220 |
| Matovich v. Marsh, Sup. | 210 | 259 |
| Matoza v. Southern Pac. Co., App. | 211 | 252 |
| Meeker v. Cross, App. | 211 | 229 |
| Mehesy v. Mission Garage, App. | 212 | 643 |
| Melville; Robertson v., App. | 212 | 723 |
| Mercado; People v., App. | 209 | 1035 |
| Merchants' Protective Corporation; People v., Sup. | 209 | 363 |
| Merkley; Francis v., App. | 210 | 437 |
| Meyercord Co. v. Clark Wise & Co., App. | 210 | 829 |
| Miles v. Bybee, App. | 211 | 251 |
| Milk Producers' Ass'n of Central California; People v., App. | 212 | 957 |
| Miller, Ex parte, App. | 212 | 54 |
| Miller; Baker v., Sup. | 212 | 11 |
| Miller v. Lynn, App. | 211 | 466 |
| Miller v. Superior Court of California in and for Los Angeles County, App. | 210 | 835 |
| Miller v. Superior Court of California in and for Los Angeles County, two cases, App. | 210 | 832 |
| Miller & Lux; Hutchinson v., App. | 212 | 394 |
| Miller & Lux v. San Joaquin Agr. Co., App. | 209 | 592 |
| Minor; Huxley v., App. | 211 | 807 |
| Minor's Estate, In re, App. | 211 | 807 |
| Mission Garage; Mehesy v., App. | 212 | 643 |
| Mitchell; Braden v., App. | 210 | 43 |
| Mitchell; Hall v., App. | 211 | 853 |
| Mit Singh; People v., App. | 209 | 1013 |
| Monteverde v. Superior Court of Sacramento County, App. | 212 | 690 |
| Mooradian v. Markarian, App. | 210 | 737 |
| Moore v. City Council of City of Los Angeles, App. | 209 | 64 |
| Mooser; McLean v., App. | 210 | 827 |
| Morck, Ex parte, Sup. | 212 | 616 |
| Morris v. City and County of San Francisco, App. | 210 | 824 |
| Morris; Leballister v., App. | 211 | 851 |
| Motor Transit Co. v. Railroad Commission of California, Sup. | 209 | 586 |
| Murphy, Ex parte, Sup. | 212 | 30 |
| Murphy v. Koford, Sup. | 209 | 360 |
| Musser; Holman v., App. | 212 | 33 |

| | Vol. | P. Page |
|---|---|---|
| Nakata v. Guarantee Mortg. Co., App. | 212 | 937 |
| National Creamery & Produce Co.; Hengehold v., App. | 212 | 239 |
| National Film Corporation of America; Kohn v., App. | 212 | 207 |
| National Surety Co.; Atlas Development Co. v., Sup. | 212 | 196 |
| Navarro; People v., App. | 212 | 403 |
| Needham v. Sisters of Mercy, App. | 210 | 830 |
| Nelson Co. v. Pacific Wharf & Storage Co., App. | 209 | 51 |
| Newell v. McDonald, App. | 212 | 389 |
| Newman; Tahoe Pines Co. v., App. | 210 | 445 |
| Newton v. De Armond, App. | 212 | 630 |
| Nojiri; Shimizu v., App. | 211 | 40 |
| Northwestern Pac. R. Co.; Hansen v., App. | 209 | 63 |
| Oak Ridge Oil Co.; Griffith v., Sup. | 212 | 913 |
| O'Brien; Pavilion Ice Rink v., App. | 212 | 631 |
| O'Brien; Pavilion Ice Rink v., App. | 212 | 632 |
| Ocean Shore R. Co. v. Spring Valley Water Co., App. | 212 | 215 |
| Ogilvie v. Ætna Life Ins. Co. of Hartford, Conn., Sup. | 209 | 26 |
| Ohanesian v. Galente, App. | 211 | 238 |
| Old Homestead Bakery; Golden Eagle Milling Co. v., App. | 211 | 56 |
| Oliver v. Robnett, Sup. | 210 | 408 |
| Olsen; Reinders v., App. | 212 | 49 |
| O'Malley v. Carrick, App. | 212 | 45 |
| Orange County; Birch v., App. | 210 | 57 |
| O'Toole; Jones v., Sup. | 212 | 9 |
| Owens River Canal Co.; Watterson v., Sup. | 210 | 625 |
| Oxner; Clark v., Sup. | 212 | 13 |
| Pabst v. Finmand, Sup. | 211 | 11 |
| Pacific Acceptance Corporation v. Bank of Italy, Fresno Branch, App. | 209 | 1024 |
| Pacific Automobile Indemnity Exch.; Honey v., Sup. | 212 | 199 |
| Pacific Electric Ry. Co.; Bibby v., App. | 209 | 387 |
| Pacific Electric Ry. Co.; Griffey v., App. | 209 | 45 |
| Pacific Electric Ry. Co.; Simmons v., App. | 212 | 637 |
| Pacific Electric Ry. Co.; Simmons v., App. | 212 | 641 |
| Pacific Gas & Electric Co.; Gause v., App. | 212 | 922 |
| Pacific Gas & Electric Co.; Hamaker v., App. | 211 | 265 |
| Pacific Slope Securities Co. v. Lloyd, App. | 212 | 930 |
| Pacific Wharf & Storage Co.; Charles Nelson Co. v., App. | 209 | 51 |
| Palace Hotel Co. of San Francisco v. Board of Sup'rs of City and County of San Francisco, App. | 209 | 256 |
| Pallett v. Guenther, App. | 210 | 969 |
| Parish; People v., App. | 210 | 633 |
| Parker; Dickson v., App. | 212 | 42 |
| Passafiume; People v., App. | 210 | 544 |
| Patsy Frock & Romper Co.; Trans-Pacific Trading Co. v., Sup. | 209 | 357 |
| Pauli; People v., App. | 209 | 88 |
| Pavilion Ice Rink v. Bryant, App. | 209 | 76 |
| Pavilion Ice Rink v. O'Brien, App. | 212 | 631 |
| Pavilion Ice Rink v. O'Brien, App. | 212 | 632 |
| Payne v. Wright, App. | 209 | 218 |
| Pearson; People v., App. | 209 | 803 |
| Pellissier v. Whittier Water Co., App. | 209 | 593 |
| Pelton; Garin v., App. | 209 | 377 |
| Pelton; Garin v., App. | 209 | 378 |
| People v. Amort, App. | 212 | 50 |
| People v. Anderson, App. | 211 | 254 |
| People v. Bannon, App. | 209 | 1029 |

P.


| | Vol. | Page |
|---|---|---|
| People v. Casdorf, App. | 212 | 237 |
| People v. Cassella, App. | 209 | 40 |
| People v. Collins, App. | 212 | 701 |
| People v. Collins, App. | 212 | 705 |
| People v. Deases, App. | 212 | 407 |
| People v. Donnelly, Sup. | 210 | 523 |
| People v. Dunstan, App. | 211 | 813 |
| People v. Elkus, App. | 211 | 34 |
| People v. Farrell, App. | 212 | 932 |
| People v. Garcia, App. | 211 | 58 |
| People v. Graff, App. | 211 | 829 |
| People v. Hahn, App. | 209 | 268 |
| People v. Heiken, App. | 210 | 635 |
| People v. Herbert, App. | 210 | 276 |
| People v. Hunter, App. | 210 | 968 |
| People v. Jackson, Sup. | 212 | 4 |
| People v. Jo Fong, App. | 210 | 548 |
| People v. Lauman, App. | 210 | 421 |
| People v. Lee Yick, Sup. | 209 | 538 |
| People v. Lips, App. | 211 | 22 |
| People v. McMillan, App. | 212 | 38 |
| People v. Martinez, App. | 210 | 61 |
| People v. Marty, App. | 210 | 964 |
| People v. Marui, Sup. | 211 | 8 |
| People v. Mercado, App. | 209 | 1035 |
| People v. Merchants' Protective Corporation, Sup. | 209 | 363 |
| People v. Milk Producers' Ass'n of Central California, App. | 212 | 957 |
| People v. Mit Singh, App. | 209 | 1013 |
| People v. Navarro, App. | 212 | 403 |
| People v. Parish, App. | 210 | 633 |
| People v. Passafiume, App. | 210 | 544 |
| People v. Pauli, App. | 209 | 88 |
| People v. Pearson, App. | 209 | 803 |
| People v. Piazza, App. | 209 | 1017 |
| People v. Roe, App. | 209 | 381 |
| People v. Roe, Sup. | 209 | 560 |
| People v. Rogers, App. | 212 | 412 |
| People v. Ross, App. | 212 | 627 |
| People v. Ryan, App. | 212 | 35 |
| People v. Salisbury, App. | 210 | 642 |
| People v. Sander, App. | 209 | 1027 |
| People v. Savinovich, App. | 210 | 526 |
| People v. Sharp, App. | 209 | 266 |
| People v. Sherman, App. | 209 | 1023 |
| People v. Smith, App. | 209 | 248 |
| People v. Studer, App. | 211 | 233 |
| People v. Sullivan, App. | 211 | 467 |
| People v. Sutherland, App. | 210 | 965 |
| People v. Teixeira, App. | 211 | 470 |
| People v. Welton, Sup. | 211 | 802 |
| People v. Wismer, App. | 209 | 259 |
| People v. Wong Toy, Sup. | 209 | 543 |
| People v. Woods, App. | 212 | 41 |
| People v. Wren, App. | 210 | 60 |
| People's State Bank v. Bertaina, App. | 210 | 432 |
| People's State Bank v. Penello, App. | 210 | 432 |

P.


| | Vol. | Page |
|---|---|---|
| Peppers, Ex parte, Sup. | 209 | 896 |
| Phillips v. Byers, Sup. | 209 | 557 |
| Phillips v. Laguna Beach Co., Sup. | 211 | 225 |
| Phipps v. Western Pac. Development Co., App. | 212 | 407 |
| Penello; People's State Bank v., App. | 210 | 432 |
| Piazza; People v., App. | 209 | 1017 |
| Placer County v. Lake Tahoe Ry. & Transp. Co., App. | 209 | 900 |
| Pooshichian; Barberich v., App. | 211 | 236 |
| Press Pub. Co. v. Industrial Accident Commission of California, Sup. | 210 | 820 |
| Prewitt v. Sunnymead Orchard Co., Sup. | 209 | 995 |
| Provident Mut. Building-Loan Ass'n; Althouse v., App. | 209 | 1018 |
| Pruitt v. Industrial Accident Commission of California, Sup. | 209 | 31 |
| Pryor v. McGuire, App. | 210 | 532 |
| Pye; Kirkpatrick v., App. | 210 | 438 |
| Quinn; Leoni v., Sup. | 209 | 551 |
| Railroad Commission; Atchison, T. & S. F. Ry. Co. v., Sup. | 211 | 460 |
| Railroad Commission; Los Angeles & S. L. R. Co. v., Sup. | 211 | 460 |
| Railroad Commission; Southern Pac. Co. v., Sup. | 211 | 460 |
| Railroad Commission of California; Brewer v., Sup. | 210 | 511 |
| Railroad Commission of California; Brewer v., Sup. | 210 | 521 |
| Railroad Commission of California; King v., Sup. | 212 | 200 |
| Railroad Commission of California; McCullagh v., Sup. | 210 | 264 |
| Railroad Commission of California; Motor Transit Co. v., Sup. | 209 | 586 |
| Ramont; Biaggi v., Sup. | 209 | 892 |
| Ransome-Crummey Co. v. Thurber, App. | 212 | 928 |
| Rees v. Title Insurance & Trust Co., App. | 212 | 234 |
| Rees' Estate, In re, App. | 212 | 234 |
| Reger v. Southern Pac. Co., App. | 210 | 971 |
| Reinders v. Olsen, App. | 212 | 49 |
| Reuter v. Gaudreau, App. | 209 | 216 |
| Reynolds; Fawkes v., Sup. | 211 | 449 |
| Richardson v. Southern Pac. Co., App. | 212 | 959 |
| Robertson v. Melville, App. | 212 | 723 |
| Robison v. Southern Pac. Co., Sup. | 209 | 241 |
| Robnett; Oliver v., Sup. | 210 | 408 |
| Rodgerson v. Le Baron, App. | 209 | 216 |
| Roe; People v., App. | 209 | 381 |
| Roe; People v., Sup. | 209 | 560 |
| Rogers; People v., App. | 212 | 412 |
| Rogers Lamb Co. v. Coast Securities Co., App. | 209 | 246 |
| Rosenbloom v. Southern Pac. Co., App. | 210 | 53 |
| Ross; Burns v., Sup. | 212 | 17 |
| Ross; People v., App. | 212 | 627 |
| Rossi v. Caire, Sup. | 209 | 374 |
| Rowley; Carter v., App. | 211 | 267 |
| Russell's Estate, In re, Sup. | 210 | 249 |
| Ryan; People v., App. | 212 | 35 |
| Sage; Bell v., App. | 212 | 404 |
| Sainz; Garcia v., App. | 210 | 534 |
| Salisbury; People v., App. | 210 | 642 |
| Sander; People v., App. | 209 | 1027 |
| San Diego County; Forward v., Sup. | 209 | 993 |
| San Diego County; Forward v., Sup. | 211 | 458 |
| San Diego Sav. Bank; Southern Trust & Commerce Bank v., App. | 212 | 385 |
| Sanfilippo v. Lesser, App. | 210 | 44 |
| Sanford G. Lewald Co.; Western Fuel Co. v., Sup. | 210 | 419 |

| | Vol. | Page |
|---|---|---|
| San Francisco Wholesale Dairy Produce Exch.; Allen v., App. | 210 | 41 |
| San Joaquin Agr. Co.; Miller & Lux v., App. | 209 | 592 |
| San Joaquin Light & Power Corporation; Smith v., App. | 211 | 843 |
| Santa Clara Valley Land Co.; City of South San Francisco v., App. | 212 | 953 |
| Savinovich; People v., App. | 210 | 526 |
| Sayre v. Southern Pac. Co., Sup. | 209 | 241 |
| Schaefer; Fidelity Savings & Loan Ass'n v., App. | 210 | 47 |
| Schomig v. Keiser, Sup. | 209 | 550 |
| Schurman v. Look, Sup. | 210 | 816 |
| Scott v. Austin, App. | 209 | 251 |
| Sebrean; Zautz v., App. | 211 | 834 |
| Severini v. Sutter-Butte Canal Co., App. | 210 | 49 |
| Shafter Realty Co.; Flinn v., Sup. | 212 | 194 |
| Sharp v. Eagle Lake Lumber Co., App. | 212 | 933 |
| Sharp; People v., App. | 209 | 266 |
| Sherman; People v., App. | 209 | 1023 |
| Shimizu v. Nojiri, App. | 211 | 40 |
| Shockley; Evans v., App. | 209 | 42 |
| Shurtleff v. Marcus Land & Investment Co., App. | 211 | 241 |
| Siegman v. Fetters, App. | 210 | 49 |
| Silverthorne v. Simon, App. | 211 | 26 |
| Simmons v. Pacific Electric Ry. Co., App. | 212 | 637 |
| Simmons v. Pacific Electric Ry. Co., App. | 212 | 641 |
| Simon; Silverthorne v., App. | 211 | 26 |
| Singer v. Bruns, App. | 212 | 955 |
| Sisters of Mercy; Needham v., App. | 210 | 830 |
| Smith; People v., App. | 209 | 248 |
| Smith v. San Joaquin Light & Power Corporation, App. | 211 | 843 |
| Southern Pac. Co.; Billig v., Sup. | 209 | 241 |
| Southern Pac. Co.; Matoza v., App. | 211 | 252 |
| Southern Pac. Co. v. Railroad Commission, Sup. | 211 | 460 |
| Southern Pac. Co.; Reger v., App. | 210 | 971 |
| Southern Pac. Co.; Richardson v., App. | 212 | 959 |
| Southern Pac. Co.; Robison v., Sup. | 209 | 241 |
| Southern Pac. Co.; Rosenbloom v., App. | 210 | 53 |
| Southern Pac. Co.; Sayre v., Sup. | 209 | 241 |
| Southern Pac. Co.; Young v., Sup. | 210 | 259 |
| Southern Trust & Commerce Bank v. San Diego Sav. Bank, App. | 212 | 385 |
| Spagnoli, Ex parte, Sup. | 212 | 616 |
| Spencer; Franck v., Sup. | 210 | 417 |
| Spreckels Securities Co.; Ganz v., App. | 212 | 43 |
| Spring Valley Water Co.; Ocean Shore R. Co. v., App. | 212 | 215 |
| Stain; Knauf v., App. | 211 | 29 |
| Standard Lumber Co. v. Industrial Accident Commission of California, App. | 212 | 720 |
| Standard Oil Co.; Feeney v., App. | 209 | 85 |
| Starkey; Lane v., App. | 210 | 277 |
| State; Sullivan v., Sup. | 211 | 458 |
| Steel v. Thompson, App. | 210 | 430 |
| Steinfeld & Co. v. Broxholme, App. | 211 | 473 |
| Steinhofer; Georgeson v., Sup. | 210 | 817 |
| Stevens, In re, App. | 210 | 442 |
| Strupelle v. Strupelle, App. | 211 | 248 |
| Studer; People v., App. | 211 | 233 |
| Stull; McCallum v., App. | 211 | 466 |
| Sturzenberg; Jones v., App. | 210 | 835 |

P.


| | Vol. | Page |
|---|---|---|
| Sullivan; People v., App. | 211 | 467 |
| Sullivan v. State, Sup. | 211 | 458 |
| Sullivan's Estate, In re, Sup. | 211 | 458 |
| Sumida; Crain v., App. | 211 | 479 |
| Sunnymead Orchard Co.; Prewitt v., Sup. | 209 | 995 |
| Superior Court in and for Alameda County; Halpern v., Sup. | 212 | 916 |
| Superior Court in and for City and County of San Francisco; Harpold v., App. | 209 | 219 |
| Superior Court in and for Los Angeles County; Bishop v., App. | 209 | 1012 |
| Superior Court in and for Mariposa County; Castagnetto v., Sup. | 209 | 548 |
| Superior Court in and for Mariposa County; Castagnetto v., Sup. | 209 | 549 |
| Superior Court of California in and for City and County of San Francisco; Diamond v., Sup. | 210 | 36 |
| Superior Court of California in and for City and County of San Francisco; Industrial Loan & Investment Co. of San Francisco v., Sup. | 209 | 360 |
| Superior Court of California in and for Fresno County; Chrisman v., App. | 210 | 632 |
| Superior Court of California in and for Los Angeles County; Miller v., App. | 210 | 832 |
| Superior Court of California in and for Los Angeles County; Miller v., App. | 210 | 835 |
| Superior Court of City and County of San Francisco; Grinbaum v., Sup. | 209 | 1005 |
| Superior Court of Kern County; Francis v., App. | 209 | 80 |
| Superior Court of Orange County; Tannahill v., App. | 209 | 77 |
| Superior Court of Sacramento County; Monteverde v., App. | 212 | 690 |
| Sutherland; People v., App. | 210 | 965 |
| Sutter; Martin v., App. | 212 | 60 |
| Sutter-Butte Canal Co.; Severini v., App. | 210 | 49 |
| Tahoe Pines Co. v. Newman, App. | 210 | 445 |
| Tannahill v. Superior Court of Orange County, App. | 209 | 77 |
| Taylor v. Bernheim, App. | 209 | 55 |
| Teixeira; People v., App. | 211 | 470 |
| Tepper, Ex parte, App. | 212 | 220 |
| Thompson; Steel v., App. | 210 | 430 |
| Thurber; Ransome-Crummey Co. v., App. | 212 | 928 |
| Title Insurance & Trust Co.; Currie v., App. | 212 | 409 |
| Title Insurance & Trust Co.; Rees v., App. | 212 | 234 |
| Tobin; Cockerill v., App. | 209 | 1022 |
| Trans-Pacific Trading Co. v. Patsy Frock & Romper Co., Sup. | 209 | 357 |
| Tripp v. Tripp, Sup. | 211 | 225 |
| Tung Fong, Ex parte, App. | 211 | 32 |
| Underhill; Bryson v., Sup. | 211 | 801 |
| Underhill's Estate, In re, Sup. | 211 | 801 |
| Union Iron Works v. Industrial Accident Commission of California, Sup. | 210 | 410 |
| Union Trust Co. of San Francisco v. Coleman, Sup. | 209 | 571 |
| United Railroads of San Francisco; Cuneo v., App. | 210 | 1118 |
| United States Casualty Co.; H. Liebes & Co. v., App. | 211 | 842 |
| United States Fidelity & Guaranty Co.; Hutchinson v., App. | 209 | 249 |
| United States Fidelity & Guaranty Co.; Isaac Upham Co. v., App. | 211 | 809 |
| Upham Co. v. United States Fidelity & Guaranty Co., App. | 211 | 809 |
| Valentini v. Gobbi, App. | 212 | 718 |
| Vaughan, In re, Sup. | 209 | 353 |
| Vidovich; Key v., App. | 209 | 375 |
| Visscher; Whittier v., Sup. | 209 | 23 |
| Von Perhacs, Ex parte, Sup. | 212 | 689 |
| Walker; C. W. Clarke Co. v., Sup. | 211 | 1 |

| | Vol. | P. Page |
|---|---|---|
| Wallace; Anglo-California Trust Co. v., App. | 209 | 78 |
| Walling; McPherson v., App. | 209 | 209 |
| Walling; McPherson v., App. | 209 | 212 |
| Watt; McClung v., Sup. | 211 | 17 |
| Watterson v. Owens River Canal Co., Sup. | 210 | 625 |
| Weintraub; Applegarth v., App. | 212 | 36 |
| Wells Fargo Nevada Nat. Bank v. Haslett Warehouse Co., App. | 212 | 647 |
| Welton; People v., Sup. | 211 | 802 |
| Western Fuel Co. v. Sanford G. Lewald Co., Sup. | 210 | 419 |
| Western Pac. Development Co.; Phipps v., App. | 212 | 407 |
| White; Dunne v., App. | 210 | 839 |
| White v. Kirchmann, App. | 211 | 246 |
| Whitehead v. Davie, Sup. | 209 | 1008 |
| Whiteman v. Anderson-Cottonwood Irr. Dist., App. | 212 | 706 |
| Whittier v. Visscher, Sup. | 209 | 23 |
| Whittier Water Co.; Pellissier v., App. | 209 | 593 |
| Whitworth v. Jones, App. | 209 | 60 |
| Wilcox v. Hardisty, App. | 212 | 633 |
| Wild Goose Country Club v. Butte County, App. | 212 | 711 |
| Wilhelm; Dabney v., Sup. | 212 | 203 |
| Willett; Henry v., App. | 212 | 698 |
| Wilson; Los Angeles Inv. Co. v., App. | 212 | 211 |
| Wise & Co.; Meyercord v., App. | 210 | 829 |
| Wismer; People v., App. | 209 | 259 |
| Wolf; Hollman v., App. | 212 | 40 |
| Wolfer; Duncan v., App. | 212 | 390 |
| Wong Toy; People v., Sup. | 209 | 543 |
| Woods; People v., App. | 212 | 41 |
| Wren; People v., App. | 210 | 60 |
| Wright v. Board of Sup'rs of Sonoma County, Sup. | 212 | 921 |
| Wright; Payne v., App. | 209 | 218 |
| Wyseur v. Davis, App. | 209 | 213 |
| Yarbrough; Gray v., App. | 212 | 226 |
| Yosemite Lumber Co.; Gibbons v., Sup. | 211 | 4 |
| Young v. Southern Pac. Co., Sup. | 210 | 259 |
| Yraceburn v. Cape, App. | 212 | 938 |
| Yraceburn v. Cape, App. | 212 | 942 |
| Zautz v. Sebrean, App. | 211 | 834 |
| Zemansky; Garibaldi v., Sup. | 209 | 575 |
| Zemansky; Khan v., App. | 210 | 529 |
| Zurich General Accident & Liability Ins. Co. v. Industrial Accident Commission of California, App. | 210 | 51 |

# CALIFORNIA REPORTER

## 209 PACIFIC REPORTER

189 Cal. 450

**WHITTIER v. VISSCHER et al. (L. A. 7117.)**

(Supreme Court of California. Aug. 18, 1922.)

**1. Judgment ⊜714(1)—Conclusive in subsequent action involving same question, though different subject-matter.**

Though action by the makers of a nonnegotiable note against D., the payee, and W., assignee, thereof, to avoid it on the ground of fraud, was begun after W. had assigned the note to C., so that the judgment for defendants therein would not be available as res judicata of the issue of fraud in a subsequent action on the note by C. against the makers, yet, the original action having been also to re-establish W.'s liability as indorser on another note released as part of the same transaction and dependent on the same issue of fraud, W., subsequently taking a reassignment of the note given to D. and suing the makers thereon, could by reason of his own privity with the original judgment plead it as res judicata of the defense of fraud; a former judgment between the same parties being conclusive, not only as to the subject-matter in controversy in the action on which it is based, but also in other actions involving the same question.

**2. Parties ⊜59(2)—No abuse of discretion to allow subsequent assignee of note sued on to be substituted as plaintiff.**

Where, after action is begun on a note, it is assigned, it is not an abuse of discretion to allow the assignee to be substituted as plaintiff in the action.

**3. Corporations ⊜247—Stockholder's liability on corporate note held not affected by sale of her stock to payee.**

A stockholder's liability on a corporation's note was not affected by a sale of her stock to the payee, who as part consideration released her from liability as indorser, but did not otherwise release the corporation or its prior stockholders from liability thereon.

**4. Set-off and counterclaim ⊜34(1) — Stockholder's liability arises on contract.**

Relative to right of counterclaim under Code Civ. Proc. § 438, subd. 2, a stockholder's liability on account of note of the corporation is one arising on contract.

**5. Limitation of actions ⊜129 — Running against counterclaim stopped by commencement of main action.**

A counterclaim, not barred at commencement of the action in which it is interposed, is unaffected by subsequent running of the statute before it is pleaded.

**6. Set-off and counterclaim ⊜44(1)—Claim of either defendant proper subject of counterclaim in action on joint and several note.**

A valid claim of either defendant is proper subject of counterclaim in action on joint or several liability of makers of a note.

In Bank.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Henry F. Whittier against Mrs. W. E. Visscher and others. Judgment for plaintiff, and defendants, other than Mrs. E. M. Dixon, appeal. Reversed.

C. E. McDowell and Frederick Gros, both of Los Angeles, for appellants.

Bicksler, Smith & Parker and Arthur G. Baker, all of Los Angeles, for respondent.

SLOANE, J. This action was originally begun by one Eva B. Clark, as plaintiff, to recover on a promissory note. The note, conceded to be nonnegotiable, was for the sum of $4,750, and was executed by appellants and defendants Mrs. W. E. Visscher and Hugo Kraght Visscher to defendant Mrs. E. M. Dixon. Before suit was instituted, the note had been indorsed by the payee, Mrs. Dixon, to Henry F. Whittier, the present plaintiff and respondent, and by him indorsed without recourse to the original plaintiff, Eva B. Clark, who thereafter brought this action to recover from the Visschers, the makers of the note, and from Mrs. Dixon, the first indorser. Mrs. Dixon having failed to appear and answer, her default was regularly entered.

The Visschers answered, and by way of defense set up fraud, misrepresentation, and failure of consideration in the procurement of the note sued on. The undisputed facts show that the note was given as part of the consideration for 924 shares of the capital stock of a corporation existing under the name of Brinks Express Company. The defendant Mrs. E. M. Dixon owned 921 of the 924 shares, and the remaining 3 belonged to other directors of the corporation. The total corporate stock consisted of 1,392 shares. The corporation was at the time indebted to defendant Mrs. W. E. Visscher in the sum of $5,000, evidenced by a promissory note for that amount executed by the corporation, upon which note the respondent Whittier was liable as an indorser. The entire consideration for the 924 shares of stock received by the Visschers was the note sued on and the release of respondent Whittier from liability as indorser on the $5,000 note of the corporation. The liability upon the $5,000 note itself does not seem to have been released as to the corporation or any of its stockholders, other than the respondent.

The fraud alleged in the transaction need not be set out in detail. It is sufficient to

say that it consisted of alleged representations by the owners of the stock with regard to the value, character, and extent of the business of the corporation, which, if shown to be false and fraudulent, and if available to the appellant defendants under their answer, would constitute a sufficient defense to recovery in this action. The appellant defendants also set up by supplemental answer as a cross-demand their claim against Mrs. E. M. Dixon, the original payee of the note in suit, for her stockholder's liability on the indebtedness of the corporation evidenced by the $5,000 note held by Mrs. Visscher. These defenses were denied and excluded from the evidence by the trial court, and the judgment appealed from, for the full amount of the note sued on, was given for the respondent, who, pending the trial, had procured a reassignment of the note to himself, and was substituted as plaintiff in place of his former assignee, Eva B. Clark, the original plaintiff. It is upon the rulings of the trial court, defeating the special defense and the counterclaim of appellants, that the controversy arises on this appeal.

[1] The respondent plaintiff interposed as a plea in bar to the defense of fraud in procurement of the note a judgment in another action in which the same issue of fraud had been tried and determined adversely to the same averments contained in their answer in this action. It was stipulated between the parties on the trial that the plaintiffs in the former action were the same persons as the defendants prosecuting this appeal, and that the defendants in the former action were the respondent Whittier and the defendant Mrs. E. M. Dixon in this case. The cause of action was for rescission of the contract under which the corporate stock was obtained, and to cancel the note in suit, and re-establish the liability of the respondent as indorser of the corporation note. The allegations of fraud, misrepresentation, and failure of consideration were identical with the averments of the answer before us. Judgment was for the defendants, negativing the allegations of fraud, and upholding the validity of the note. On appeal the judgment was affirmed by the District Court of Appeal, and a rehearing in this court was denied. Visscher v. Whittier, 188 Pac. 1029.

It is the contention of appellants, however, that the bar of the judgment is defeated by reason of the fact, which is disclosed by the record here, that the action in which the judgment was obtained was begun some 10 days after the note sought to be avoided had been assigned to Eva B. Clark, and Eva B. Clark was never made a party to the action. The court at no time acquired jurisdiction of the real party in interest in the note, and was clearly without power to give a judgment which would affect the status of the note owned by a stranger to the record, who took the assignment before the commencement of the suit. Had Eva B. Clark remained the plaintiff in the present suit and the owner of the note, this earlier judgment could not be pleaded as an estoppel to a retrial of the issue of fraud as against her. Does the fact that respondent, Whittier, took a reassignment of the note and was substituted as plaintiff in this case pending trial, give any greater vitality to the earlier judgment than it would have had for or against his assignor?

Assuming that this might not be the case, if the only interest of the respondent in the former action had been in connection with the ownership of the note, it must be borne in mind that such action involved the rescission of the entire contract for the purchase and sale of the corporation stock, for which the note was only part of the consideration. The release of respondent from his liability as indorser of the $5,000 note of the corporation held by Mrs. Visscher was also one of the considerations for the shares of stock, and the action for rescission had for one of its purposes the restoration of respondent's liability as such indorser. He was therefore a proper and necessary party to the action for rescission for that reason, quite independently of any interest in the note sought to be cancelled, and the judgment was conclusive as to this defense of fraud upon respondent's liability as indorser of the corporation note.

Conceding, then, that respondent could not be brought into privity with the former judgment by a reassignment from Eva B. Clark, who was not a party to the first suit, we are of the opinion that, when his right to enforce payment on the reassigned note was questioned on the ground of this alleged fraud in its procurement, he could plead a former adjudication of that issue by virtue of his own relation to the suit in which the adjudication was made. The relief sought against respondent to re-establish his liability as indorser of the corporation note depended upon precisely the same state of facts as to the alleged fraud as would the cancellation of the note, the fraud in the transfer of the stock, which transfer was the consideration for both the note in suit and the release of respondent's liability on the other note. A former "judgment between the same parties is conclusive, not only as to the subject-matter in controversy in the action upon which it is based, but also in all other actions involving the same question." Bingham v. Kearney, 136 Cal. 177, 68 Pac. 597; Southern Pac. Co. v. Edmunds, 168 Cal. 418, 143 Pac. 597; Curtis v. Upton, 175 Cal. 331, 165 Pac. 935; Koehler v. Holt Manfg. Co., 146 Cal. 337, 80 Pac. 73; Kinderman v. Shipley (Cal. App.) 190 Pac. 472. It follows, then, that the operation of the judgment pleaded in

bar in favor of respondent does not rise upon any privity in such action, dependent upon the reassignment of the note. While such assignment may not invest respondent with any right to plead the former adjudication which Eva B. Clark, his assignor, did not possess, it did not deprive him of the right to rely upon his own privity with the judgment pleaded.

[2] We do not think there was any abuse of discretion in the permission of the court for a substitution of respondent as plaintiff in this action upon his becoming owner of the note in suit. When the substitution was made, there was some suggestion in the discussion between court and counsel to the effect that the change in parties plaintiff would not affect appellants' defenses; but this conversation seems to have been on the theory that respondent had no privity in the litigation pleaded, other than through ownership of the assigned note.

[3] We will consider next the cross-complaint set up in appellants' supplemental answer. As already pointed out, when appellants became the owners of the 924 shares of the stock of the corporation, there was no release or extinguishment of the liability of the corporation or of its prior stockholders on the indebtedness evidenced by the corporate note for $5,000 already held by Mrs. Visscher. We do not think that there is any merit in the contention of the respondent that the transactions under which the Visschers purchased this stock in any way affected liability under the $5,000 note, other than as to respondent's liability as an indorser. Mrs. Visscher, then, at the time of the commencement of this suit to recover against her and Hugo K. Visscher, had a valid cause of action against Mrs. Dixon, the original payee of this nonnegotiable note sued on, for her stockholder's liability on the corporation note upon which a separate judgment might have been obtained by her.

[4] Respondent further objects, however, that a stockholder's liability, which, as in this case, does not arise out of the transaction sued upon, is not a proper matter of cross-complaint or counterclaim; that it is not a cause of action "arising on contract" as specified in subdivision 2 of section 438 of the Code of Civil Precedure, but is purely a liability imposed by statute. While it is true that it is the authority of the statute which creates the general liability of the stockholder on the corporation indebtedness, in a case like this, it is the contract of the corporation which creates the indebtedness. In assuming the status of a stockholder, each owner of shares of stock in effect empowers the corporation by its act to bind him by its obligations. It is a separate independent liability, but it is created by and arises on the contract. There is nothing that we can discover in the creation of the stockholder's liability or in its enforcement, where it arises on a contract of the corporation, to differentiate it from a direct contract by the individual so far as concerns the remedy of the parties. The following decisions in situations analogous to that presented here have held the stockholder's liability to be contractual in its nature: Dennis v. Superior Court, 91 Cal. 548, 27 Pac. 1031; Kennedy v. Calif. Sav. Bank, 97 Cal. 93, 31 Pac. 846, 33 Am. St. Rep. 163; Royal Trust Co. v. MacBean, 168 Cal. 642, 144 Pac. 139; Lininger v. Botsford, 32 Cal. App. 386, 163 Pac. 63; Miller & Lux v. Katz, 10 Cal. App. 576, 102 Pac. 946; Platt v. Wilmot, 193 U. S. 603, 24 Sup. Ct. 542, 48 L. Ed. 809; Bank v. Farnum, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619; Whitman v. Oxford, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587. We are therefore of the opinion that such an existing liability of a plaintiff to the defendant may be pleaded by way of counterclaim.

[5] It is next contended that the claim in this case is barred by the statute of limitations. It is conceded that it was not so barred when the original action was begun, and the authorities in this state seem to be agreed that, if the right of action relied on was alive at the commencement of the suit, the statute does not run against it, when, as in this case, the full statutory period has expired thereafter during the pendency of the action and before the claim is pleaded as a cross-complaint. Lyon v. Petty, 65 Cal. 322, 4 Pac. 103; Perkins v. West Coast Lumber Co., 120 Cal. 27, 52 Pac. 118; McDougald v. Hulet, 132 Cal. 154, 64 Pac. 278; Bliss v. Sneath, 103 Cal. 43, 36 Pac. 1029; Id., 119 Cal. 526, 51 Pac. 848; Maryland Casualty Co. v. Shafer et al. (Cal. App.) 208 Pac. 197. The same rule is stated in 24 R. C. L. § 43, as declarative of the common law, as follows:

"If, however, a counterclaim or set-off is not barred at the commencement of the action in which it is pleaded, it does not become so barred afterward during the pendency of that action, and in pleading the statute of limitations to a counterclaim it must be shown that the bar of the statute had matured when the original action was commenced, and it is not sufficient to aver a bar when the counterclaim was filed."

[6] Respondents' remaining objection to this cross-complaint, that it cannot be maintained in this action because it only runs as a set-off in favor of one of the defendants is not tenable. This is an action on a joint and several liability of the makers of a promissory note. Payment by either would extinguish the right of action of the plaintiff against both. It naturally follows that the set-off of a valid claim of either may be interposed with the same result. Miller v. Murphy, 186 Cal. 344, 199 Pac. 525; Austin

v. Feland, 8 Mo. 309; Ruby v. Baker, 106 Kan. 859, 190 Pac. 6, 10 A. L. R. 1247.

By reason of error in the exclusion of evidence of appellants' counterclaim, the judgment is reversed.

We concur: SHAW, C. J.; LENNON, J.; WASTE, J.; RICHARDS, Justice pro tem.; MYERS, Justice pro tem.

---

189 Cal. 406

## OGILVIE v. ÆTNA LIFE INS. CO. OF HARTFORD, CONN. (L. A. 6502.)

(Supreme Court of California. Aug. 14, 1922. Rehearing Denied Sept. 11, 1922.)

**1. Evidence ⟸318(4), 333(1)—County surgeon's unsworn report of autopsy findings hearsay, and not admissible as a public record.**

In action by beneficiary on an insurance policy, an unsworn written report of autopsy findings, made by the county surgeon to the coroner on insured's death, was hearsay, and not receivable as a public record.

**2. Appeal and error ⟸1050(1)—Error in admitting unsworn report of autopsy findings held not cured by subsequent testimony.**

In an action on an insurance policy, error in admitting, for plaintiff, surgeon's unsworn written report of autopsy findings *held* not cured by his testifying as to the report at the instance of defendant, where plaintiff by another witness made use of the report to the detriment of defendant.

**3. Evidence ⟸220(1) — Lack of denial does not show an admission.**

Where persons not under duty to speak are merely shown to have made no denials, an admission is not thereby shown, especially where the authority of such persons to make admissions is doubtful.

**4. Insurance ⟸449—"Accidental death" and "death by accidental means" defined.**

Where death results from an act, but was not designed and not anticipated by deceased, though it be in consequence of some act voluntarily done by him, it is "accidental death"; where death is caused by some act of deceased not designed or intentionally done by him, it is "death by accidental means."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accident —Accidental.]

**5. Insurance ⟸669(11) —Instruction improper, under policy against death by accidental means, which failed to distinguish accidental result to insured and means producing result.**

In an action on a policy against "death by accidental means," as distinguished from "accidental death," an instruction was improper which told the jury that, if death of insured was due to a rupture caused by a strain, but was an unexpected result thereof, plaintiff could recover, since this fails to distinguish between the result to insured and the means by which that result was brought about.

**6. Insurance ⟸669(11) — Defendant insurer entitled, under policy against death by accidental means, to instruction on ordinary incidents of plowing, whereby deceased met accident.**

In such action, where there was evidence that insured's death was caused by lurching of a plow he was using in hard ground, insurer was entitled to an instruction that, if there was no more lurch to the plow than was ordinarily incident to the plowing which insured was doing, it was not an accident for which insured could recover.

**7. Trial ⟸235(2) — Instruction that theory cannot be established, where facts are consistent with contrary theory, properly refused.**

An instruction that a theory cannot be established in a civil case, where facts consistent with it are also consistent with a contrary theory, was properly refused, since the theory the jury deemed most probable would be established by a preponderance of evidence.

**8. Insurance ⟸646(6)—Trial ⟸296(7)—Error to instruct that defendant must prove that disease was proximate cause of death, in suit on policy against death by accidental means.**

In an action on a policy against death by accidental means, it was error to instruct that defendant must prove by a preponderance of evidence that disease was the proximate cause of death, and to refuse insurer's requested specific instructions to the contrary; nor was this error cured by conflicting instructions that plaintiff must prove that death resulted from injuries effected solely through external and accidental means.

**9. Insurance ⟸669(11) — Instruction as to disease being proximate cause of death, in action on policy insuring against death by accidental means, held error.**

In an action on a policy against death by accidental means, it was error to instruct that the presence of disease as a proximate contributing cause of insured's death would be immaterial, unless it was also found that the disease itself would have caused death at approximately the same time without the accident having occurred.

**10. Evidence ⟸20(1)—Court could judicially notice that plowing was not incident to occupation of real estate and investments.**

The court should judicially notice that plowing was not incident to the occupation of "real estate and investments," notwithstanding that men in this business have been known to plow.

**11. Insurance ⟸531 —Proviso reducing amount, if injury received while doing act pertaining to more hazardous occupation, covers isolated and casual acts, where occupation is not actually changed.**

Under a policy insuring against death by accidental means, which provides that the amount recoverable shall be reduced if insured is injured doing acts pertaining to an occupation more hazardous than that for which insured, it is not necessary, in order for the proviso

to become operative, to show that insured had actually changed his occupation; that is, that the act in which he was engaged when injured was "habitual," as distinguished from "casual."

**12. Insurance ⟸646(8) — Insurer has burden of proving accident occurred in more hazardous occupation than that for which insured.**

Where insurer seeks to reduce amount recoverable, because insured met accident in an occupation more hazardous than that against which insured, the burden is on insurer to show certain occupations are in fact more dangerous than others, and not merely that he so classifies them.

**13. Trial ⟸37—Omission to assume burden of proof waived by proceeding as if issues were properly presented.**

Right to object to omission to assume burden of proof may be waived by proceeding throughout trial as if the particular issue had been properly presented.

In Bank.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Hattie L. Ogilvie against the Ætna Life Insurance Company of Hartford, Conn. From a judgment for plaintiff, defendant appeals. Reversed.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles (Henry F. Prince, of Los Angeles, of counsel), for appellant.

Meserve & Meserve, of Los Angeles, for respondent.

MYERS, Justice pro tem. Plaintiff brought this action as beneficiary under a policy issued by the defendant insuring plaintiff's husband "against disability or death resulting directly and independently of all other causes from bodily injuries effected solely through external, violent, and accidental means." Defendant appeals from the judgment on verdict in favor of the plaintiff for the full amount of the policy. It is conceded that the evidence is legally sufficient to support the verdict, and the appeal is predicated solely upon claimed errors of law in the admission and rejection of evidence and the giving and refusal of instructions.

The allegation of the complaint was to the effect that the assured, while assisting a Japanese in doing some plowing, met with an accident, "in substance, that the said plow which the said James G. Ogilvie was using at said time, came in contact with a root or other obstruction unforeseen, causing said plow and its plow handle to be given a severe wrench, thereby causing the said James G. Ogilvie to be given a severe wrench and strain," as a result of which his heart was ruptured, and he died therefrom five days later. Defendant denied that assured sustained any injury from accidental means, and alleged that his death was caused and was contributed to by disease.

The issues, so far as the right of recovery is concerned, may be stated as follows: (1) Did Mr. Ogilvie sustain an injury through accidental means? (2) If so, did such injury solely cause his death, or was his death contributed to by a pre-existing condition of disease? The evidence was amply sufficient to support a finding in favor of the defendant upon each of these issues, and as such a finding, upon either issue, would have precluded recovery, it becomes important to consider the claimed errors.

[1] Upon the trial the plaintiff offered in evidence the written report of his findings made by Dr. Wagner, the county autopsy surgeon, to the coroner, and filed with the county clerk. It was received in evidence over the objection of the defendant on the ground that it was hearsay and incompetent, and that Dr. Wagner was then present in court and available as a witness. Counsel for defendant stipulated that Dr. Wagner was the duly qualified and acting autopsy surgeon, and that the examination and the report were regularly made by him in the performance of his official duties. This is the only basis suggested to us for its admissibility in evidence, and it should have been excluded as hearsay. It was an unsworn statement, not subject to cross-examination, made by a stranger to this action, and made in the course of a proceeding to which this defendant was neither party nor privy. Various sorts of public records are made receivable as prima facie evidence by virtue of express provision of statute, but we have been cited to no such statute as applicable to this report.

[2] It is claimed that this error was rendered harmless by the fact that the defendant afterward called Dr. Wagner as its witness, and proved by him the same facts embodied in his report, as to the physical findings. We would be inclined to adopt this view, if the use made by the plaintiff of this report had gone no further. But the plaintiff then called Dr. Pallette as her witness, and, after defining and explaining to the jury the meaning of certain technical words found in the report, he testified that the expression, "moderate degree of senile changes," as used in the report, had no definite and fixed meaning in the medical profession. He was then asked "whether or not that report shows any disease or diseased condition of the heart"? This question was objected to upon the grounds, among others, "that the statement itself is not admissible"; "that it is not permissible for this witness to explain what is meant by another surgeon in making the report"; and that "it is not shown that this witness was present at the examination, or has any knowledge or means of knowing

what the autopsy surgeon meant." The objection was overruled, and the witness answered, "No."

Plaintiff's counsel do not attempt to justify this ruling, but assert that it was harmless. We cannot agree. The question of a diseased condition of the heart was one of the vital issues in the case. Defendant produced much evidence tending to establish such diseased condition. In the words of its counsel:

"Since respondent could not establish an undiseased condition of the heart by the testimony of the coroner's physician, she introduced his written report, and was permitted to have another doctor interpret that report as not showing a diseased condition, although the terms used admittedly had no definite meaning in medical parlance."

But it is said that this error was "cured" by the fact that the defendant afterward called Dr. Wagner as a witness, who testified that he did find a diseased condition of the heart. We fail to see how this cured the error. It still left in the case the incompetent testimony on the side of the plaintiff, to which it is to be added that Dr. Wagner, as a witness, was apparently impeached in the eyes of the jury by his own report as interpreted by Dr. Pallette.

The report as first admitted was limited to the portion thereof which stated the physical and pathological findings. Dr. Wagner, in his direct examination by defendant, mentioned that "there was a history of plowing that I had to embody in the notes." He was then asked upon cross-examination if that history formed a material part in his examination and opinion. He replied, "I had to take it into consideration." Plaintiff thereupon offered in evidence the entire report, containing the following recital: "There was a history of a severe strain while plowing and striking a large root." The court overruled defendant's objection that it was hearsay, and admitted it in evidence. It was hearsay "twice removed," and should have been excluded. It was not admissible for the purpose of impeaching the witness, because it did not tend to contradict or modify what he had testified to.

[3] It was shown at the trial that after the autopsy an examination of the body was made by two physicians in behalf of the plaintiff and two others in behalf of the defendant by stipulation "under the terms of the policy." As part of her case in chief, and before any witness had testified for defendant, plaintiff was permitted to show by her said two physicians that neither of defendant's physicians, at the time of the examination, made any statement to the effect that there was a diseased condition of the heart. This was over defendant's objection, and without showing that any conversation whatever took place at said time between any of said physicians. There was nothing, other than is here stated, to indicate that either of the physicians had any authority to make any admission binding upon the defendant. There was a provision in the policy giving the defendant the right to examine the person of the assured at any time after injury. If this be regarded as indicating that the physicians had authority to make admissions in behalf of the defendant, nevertheless it was not shown that they had made admissions. It was merely shown that they made no denials, without showing any condition or circumstance which called upon them to say anything.

[4] In considering the instructions given and refused, it is necessary to keep in mind the fact that the policy here sued upon did not insure against accidental death. It insured only against death as the result of accidental means. The distinction is well recognized in this state.

"Where the death is the result of some act, but was not designed, and not anticipated by the deceased, though it be in consequence of some act voluntarily done by him, it is accidental death; but where death is caused by some act of the deceased, not designed by him, or not intentionally done by him, it is death by accidental means." Olinsky v. Railway Mail Ass'n, 182 Cal. 669, 189 Pac. 835, 14 A. L. R. 784.

[5] The trial court instructed the jury that:

"The term 'accident,' as used in the policy here in question and in these instructions, denotes an event that takes place without one's foresight or expectation, * * * or is an unusual effect of a known cause, and therefore not expected. * * * It is an event happening unexpectedly or undesignedly."

This instruction, together with plaintiff's instruction No. V, which followed it, tells the jury in effect that, if the death of the assured was due to a rupture caused by a strain naturally incident to the exertion of plowing, but was an unexpected result thereof, the plaintiff could recover. It should not have been given, because—

"It fails to give effect to the plain language of the policy, in that it does not distinguish between the result to the insured and the means by which that result was brought about. As we have already pointed out, the insurance is not against accidental injury or death, but is against death resulting from injuries effected by accidental means." Rock v. Travelers' Insurance Co., 172 Cal. 462, 467, 156 Pac. 1029, 1031 (L. R. A. 1916E, 1196).

[6] The court refused the defendant's request to instruct the jury to the effect that if the assured received a strain or wrench as a result of the sway or swinging of the plow, and there was no more lurch or sway or swing to the plow than is usual and ordinarily incident to the character of plowing

that the assured was doing, it was not an accident for which recovery could be had under the terms of the policy. One of plaintiff's witnesses had testified that the ground where the assured was plowing had not been plowed for at least five years, and "was so hard you could not keep the plow in the ground"; that "the plow was jumping in and out of the ground." Under such circumstances we think the defendant was clearly entitled to have this instruction, or the substance thereof, given to the jury. For like reasons, defendant's requested instruction No. XIX, or the equivalent thereof, should have been given.

[7] Complaint is made of the court's refusal to give either of several instructions requested by defendant to the effect that:

"A theory cannot be said to be established in a civil case, where the facts and circumstances from which it is sought to establish such theory are consistent with it, and are also consistent with a contrary theory."

It is true that a verdict may not lawfully be predicated upon mere conjecture or speculation, and that, when two opposite conclusions appear equally probable from all of the evidence, neither of them can be said to be proven; but, from the mere fact that both conclusions or theories are consistent with the facts proven, it does not necessarily follow that both are equally probable. If to the minds of the jury, under such circumstances, the one fairly appears more probable than the other, it is established by preponderance of the evidence. These instructions were properly refused.

[8] The trial court erroneously instructed the jury to the effect that the burden rested upon the defendant to prove by a preponderance of the evidence that disease was a proximate cause of the death of the assured (Kellner v. Travelers' Ins. Co., 180 Cal. 326, 181 Pac. 61, 63), and refused the specific instructions to the contrary which were requested by the defendant. This error was not cured by the giving of a conflicting general instruction to the effect that the burden was upon the plaintiff to prove by a preponderance of the evidence that the death resulted "from bodily injuries effected solely through external, violent, and accidental means." Rathbun v. White, 157 Cal. 248, 253, 107 Pac. 309, 311.

[9] The court further instructed the jury, in effect, that the presence of disease as a proximate contributing cause of the death of the assured would be immaterial, unless they also found that the disease itself would have caused the death of the assured at approximately the same time without the accident having occurred. This was in plain disregard of the terms of the policy, and substantially identical with an instruction which was expressly disapproved by this court in Kellner v. Travelers' Ins. Co., supra. See, also, Clarke v. New Amsterdam Casualty Co., 180 Cal. 76, 179 Pac. 195.

Enough has been shown, we think, to make it apparent that this verdict was predicated upon an erroneous conception of the law, and to necessitate a reversal, even if we could assume that the verdict was not influenced by the admission of the incompetent testimony to which we have referred.

Inasmuch as this case must be sent back for retrial it is proper that we consider the assignments of error relating to the amount recoverable under the policy. In the schedule of warranties attached to and a part of the policy, the assured stated his occupation as "Real estate and investments," with the duties "usual thereto." He further stated therein:

"I understand that risks are classified according to occupation, and that my occupation above described is classified preferred."

Section 20 of the policy provided:

"If the insured is injured after having changed his occupation to one classified by this company as more hazardous than that herein stated, *or is injured while doing any act or thing pertaining to any more hazardous occupation*," the amount recoverable should be reduced in inverse proportion to the premiums charged for the respective risks. (Italics ours.)

The defendant conceded at the trial that the assured had not changed his occupation, but its contention was that the manual labor of plowing is not incident to the occupation of "real estate and investments," but is an act incident to the occupation of "farmer," "farm laborer," and "common laborer," each of which was classified by it as "hazardous," and required a premium 2½ times larger than was paid by the assured, and that the amount recoverable under the policy was thereby reduced from $7,500 to $3,000.

[10] Defendant contended at the trial that the court should take judicial cognizance of the fact that plowing is not incident to the occupation of real estate and investments, but is incident to the other occupations above named, and should have so informed the jury. The learned trial judge might well have done so. Courts have taken judicial notice of the general character of business of a crematory, of building and loan associations, of the lumber industry, of a barber shop and shoe-shining parlor, of a mercantile agency, and of professions generally.

"The judicial notice which courts take of matters of fact embraces those facts which are within the common knowledge of all, or are of such general notoriety as to need no evidence in their support." People v. Mayes, 113 Cal. 618, 625, 45 Pac. 860, 862; Edson v. Southern Pacific R. Co., 144 Cal. 182, 189, 77 Pac. 894.

It must be conceded to be a matter of common knowledge that the manual labor of

plowing is not ordinarily incident to the occupation of real estate and investments in large cities, but is an act incident to at least the occupations of farmer and farm laborer; and this is no less a fact because of the circumstance that men in the real estate business have been known to plow.

[11] The question of the legal effect of the italicized words above quoted from the policy has not been adjudicated by the courts of this state. Some reliance is placed by plaintiff upon the line of decisions of which the case of Berliner v. Travelers' Ins. Co., 121 Cal. 458, 53 Pac. 918, 41 L. R. A. 467, 66 Am. St. Rep. 49, is an example, holding that the assured must have actually changed his occupation in order that such a proviso should become operative. But the language here relied upon by the defendant was not in the policy which was before this court in the Berliner Case. It is in fact asserted with apparent reason that the language here relied upon was embodied in defendant's policies in response to the suggestion found in the opinion in the Berliner Case of a means by which the insurer might have avoided the result which there followed. That suggestion was in the following language:

"If the company intended to say to the assured that if he did any act which did not strictly belong to his own occupation, but was embraced more properly in some other business, and if thereby any harm to him accidentally resulted, that in such event he could claim nothing under his policy, it was easy for them to do so in plain language."

"That," says the defendant, "is precisely what we have done, except that we have provided for a reduction of the amount, instead of a forfeiture of the policy."

The United States Circuit Court of Appeals, Sixth Circuit, having before it a policy containing a provision identical with that here under consideration, as applied to a situation substantially analogous, held that the proviso would be inoperative unless the act in which the assured was engaged at the time of injury was "habitual," as distinguished from "casual," and that the case should have been submitted to the jury to determine which of these it was. Inasmuch as the court said in its opinion, "It does not appear that Reading [the assured] ever ran the elevator before," we are left in some doubt as to just what question it deemed should have been submitted to the jury. Gotfredson v. German Commercial Accident Co., 218 Fed. 582, 134 C. C. A. 310, L. R. A. 1915D, 312. The Supreme Court of Iowa, in the case of Holiday v. American Mut. Acc. Ass'n, 103 Iowa, 178, 72 N. W. 448, 64 Am. St. Rep. 170, held an identical policy provision to be inoperative as applied to the case of an assured who was injured by the accidental discharge of his gun while hunting. The Texas court, in a case presenting an exactly similar situation, refused to follow the Holiday Case, saying:

"The decision is in the very teeth of language that is plain and simple, and had the effect of destroying the contract made by the parties and of substituting therefor one made by the court." Lane v. General Accident Ins. Co. (Tex. Civ. App.) 113 S. W. 324.

The Washington court, in a similar case, disapproved and refused to follow the Holiday Case, saying:

"It seems to us that the holding in the Iowa case practically reads out of the contract that clause" (the one here under consideration). Green v. National Casualty Co., 87 Wash. 237, 151 Pac. 509.

To the same effect are Montgomery v. Continental Casualty Co., 131 La. 475, 59 South. 907; Loesch v. Union Casualty & Surety Co., 176 Mo. 654, 75 S. W. 621, and Ridgely v. Ætna Life Ins. Co., 160 App. Div. 719, 145 N. Y. Supp. 1075 (affirmed in 217 N. Y. 720, 112 N. E. 1073). We are of the opinion that the better reason, as well as the weight of authority, is in support of that rule which gives effect to the plain intent of the language used by the parties in their contract.

[12, 13] In view of what we have said above, it is unnecessary to review the numerous errors claimed to have been committed in the trial of this branch of the case. It should be pointed out, however, that the burden rests upon the defendant, in order to make good its claim in this behalf, to allege and prove that the occupation of "farmer," or "farm laborer," or "common laborer," as the case may be, was in fact more dangerous than that of "real estate and investments," not merely that it was so classified. Such is the plain intendment of the language used, construing it strictly, as we must, against the insurer. This the defendant did not do in the trial below, but the plaintiff waived this omission (so far as that trial was concerned) by proceeding throughout the trial as if the issue had been properly presented.

The judgment is reversed.

We concur: SHAW, C. J.; WASTE, J.; LAWLOR, J.; LENNON, J.; RICHARDS, Justice pro tem.

189 Cal. 459

## PRUITT v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.
(L. A. 7298.)

(Supreme Court of California. Aug. 30, 1922.)

**1. Master and servant ⟹414—Service of application for compensation before hearing held waived.**

Where one made a party to a workmen's compensation proceeding at the hearing had actual knowledge of filing of application, was present at the hearing, and when made a party immediately became an actor therein by personally recalling and cross-examining witnesses and submitting the matter for decision, and in all subsequent proceedings was represented by counsel, his conduct amounted to a waiver of the requirement of Workmen's Compensation Act, § 17a, for the service of a copy of the application for compensation, with notice of the time and place of hearing.

**2. Master and servant ⟹417(1)—Person aggrieved by want of service in compensation proceeding must apply to commission for relief.**

A party to a workmen's compensation proceeding, contending that no service was made on him, or claiming to be aggrieved by want of notice of pendency of proceeding, should, under Workmen's Compensation Act, § 18b, apply to the Industrial Accident Commission for relief substantially in accordance with Code Civ. Proc. § 473, relative to relief against judgments, etc., taken through mistake, inadvertence, etc.

**3. Master and servant ⟹414—Rehearing in compensation proceedings may be limited to hearing of additional testimony.**

Where one applying for rehearing in workmen's compensation proceeding, though made a party during the first hearing, was present at the hearing, heard all of the testimony, cross-examined all of the witnesses, testified himself, and was fully apprised of the claim for compensation, the commission had power, in view of the broad powers conferred by Workmen's Compensation Act, § 64e, to limit the rehearing to the hearing of additional evidence introduced by such party, without again hearing any evidence to establish the claim.

**4. Master and servant ⟹361 — One hiring truck and driver to another not liable for compensation, if exercising no control over the driver.**

Where owner of truck hired driver, under agreement that he should receive 25 per cent. of the earnings of the truck and nothing when idle, and hired the truck and driver to a third person, the theory of general and special employment did not apply, and an award of compensation against him was unauthorized, unless he exerted some degree of control over the driver in connection with his employment in the service of the third person.

**5. Master and servant ⟹417(7) — Commission's findings in compensation proceeding binding on reviewing court, if supported by evidence.**

Findings of the Industrial Accident Commission in a workmen's compensation proceeding stand on the same footing as the finding of a judge or verdict of a jury, and are not to be set aside if there is any substantial evidence on which they can rest; but a review may be had on the theory that the commission had no jurisdiction to make a finding, where there was no evidence to support it.

In Bank.

Proceeding under the Workmen's Compensation Act by Luceille Conklin and another for compensation for the death of Paul R. Conklin, opposed by W. L. Pruitt and others. Compensation was awarded, and Pruitt brings a writ of review. Affirmed in part, and annulled and set aside in part.

Clock, McWhinney & Clock, of Long Beach, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

WASTE, J. Petitioner, W. L. Pruitt, seeks in this proceeding, on a writ of review, to have set aside and annulled an award of the Industrial Accident Commission, upon the ground that, as to him, the commission acted in excess of its powers and was without jurisdiction in the matter. Two questions are presented for consideration. The first concerns the procedure followed in the hearing on the original application out of which the award arose. The second relates to the sufficiency of the evidence to support the finding of the commission, in so far as it imposes a liability upon petitioner.

It appears from the record returned by the respondent that Luceille Conklin and Eunice G. Conklin, a minor, by her guardian ad litem, instituted a proceeding before the Industrial Accident Commission against Graham Bros., a copartnership, and its insurance carrier, the United States Fidelity & Guaranty Company, for compensation for the death of Paul R. Conklin. Petitioner was not made a party defendant in such application. When the matter came on for hearing before the referee of the commission, Pruitt was present as a witness. When considerable testimony had been taken, it appeared to the referee that, by reason of his interest in the proceeding and his apparent relationship to the deceased employee, Conklin, Pruitt should be joined as a defendant in the proceeding, subject to the right of said Pruitt to request and have granted a further hearing, and an order to that effect was made. The referee thereupon inquired of Pruitt if he wished to have the hearing continued to a future date, in order that he might make any preparation for further hearing. Pruitt stated that he was willing to proceed forthwith. He further stated that, having been present and having heard all of the testimony and proceedings thus far had, he would like to question the witnesses. The witnesses were thereupon recalled and were cross-examined

by him. He also took the stand and testified. At the conclusion of the testimony, in answer to a question of the referee, Pruitt stated he was willing to submit the matter, which was done.

The commission thereafter made its findings and award, holding Pruitt liable for compensation as a joint employer with Graham Bros., and awarded the applicants compensation in the sum of $5,000. In due time Pruitt applied for a rehearing before the commission, and subsequently filed a supplemental petition, in which he set forth an outline of certain evidence which he desired to present in his own behalf. Upon this petition the commission granted a rehearing. When the matter came on again, Pruitt was present in person and was represented by an attorney. The record does not disclose that any objection was made by any of the parties to the proceeding. Although the petitioner now contends that he demanded that he be furnished with a copy of the testimony taken at the previous hearing, the record does not bear him out in that behalf. Pruitt appears to have been permitted to present any and all the testimony he desired in support of his defense. A number of witnesses were called and examined by him. The matter was thereupon submitted without objection or protest from him. The commission made its decision after such rehearing, finding that the testimony produced thereon was not sufficient to change or modify the facts set forth in the findings made upon the first hearing. It accordingly affirmed the findings and award theretofore made.

[1, 2] In seeking to have such award annulled, the petitioner contends that the Industrial Accident Commission was without jurisdiction to make any award against him, for the reason, first, that no copy of the original application for compensation, with the notice, of the time and place of the hearing thereof, was served upon him at the time he was joined as a defendant before the commission, or at any time. There is nothing in this contention. Petitioner had actual knowledge of the filing of the application, and was present at the original hearing. When made a party to the proceeding, he immediately became an actor therein by personally recalling and cross-examining the witnesses who had testified in his presence and hearing, and submitting the matter for decision. In all subsequent proceedings he was represented by counsel. His conduct in the matter amounted to a waiver of the requirements of the act (St. 1917, p. 846, § 17a) as to service and notice. It was substantially the same as that of one who appears in court proceedings under similar circumstances, and must be held to have had like effect. Massachusetts, etc., Co. v. Industrial Acc. Comm., 176 Cal. 491, 492, 168 Pac. 1050. Furthermore, a party subsequently contending that no service was made upon him, or claiming to be aggrieved by want of notice of the pendency of the proceeding, should apply to the commission for relief substantially in accordance with the provisions of section 473 of the Code of Civil Procedure. Workmen's Compensation Act, § 18b.

[3] Petitioner next complains that no evidence, testimony, or stipulations of any kind were introduced by or on behalf of the applicants for compensation upon the rehearing; that the attorneys for petitioner objected to such procedure, but the referee proceeded to hear only the evidence introduced by the defendant Pruitt; that there was not at that time any evidence introduced establishing the applicants' claim against Pruitt, the contention being that Pruitt never at any time has had an opportunity to object to the stipulations which were previously offered in evidence, to cross-examine the witnesses on behalf of the applicants, nor to object to the testimony introduced against him, and that the final proceedings did not actually amount to a rehearing; that all that was done was to open the case as it stood in the first instance and allow Pruitt to offer additional matters that he had by way of defense. There is no merit in this contention. Pruitt, having been present at the first hearing, at which he was made a party defendant, having heard all of the testimony, having in person cross-examined all the witnesses who were called at that time, and having himself testified, was fully apprised of the claim of the applicants for compensation. Upon the rehearing he proceeded without objection, was accorded every opportunity to offer such testimony as he desired, and to seek such stipulations as he or his counsel might feel would be material in presenting his defense. In seeking such rehearing he had set forth an outline of the new evidence he desired to present in his behalf.

Under subdivision (e) of section 64 of the Workmen's Compensation Act the commission has very broad powers in the matter of rehearings. If it considers that the issues raised by an application for a rehearing have theretofore been adequately considered, it may determine the matter by confirming, without a rehearing, its previous findings. If a rehearing is deemed necessary to determine the issues raised, or any one or more of such issues, it may order a rehearing thereon and consider the matters raised by such application. If at the time of granting such rehearing it shall appear that no sufficient reason exists for taking further testimony, the commission may reconsider and redetermine the original cause, without even setting a time and place for such further hearing. The case of Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218, so urgently relied upon by the petitioner in support of his contention, is not in point. All the evidence in

that case tending to show that Carstens was in any way related to the matter in hand was taken before he had received any notice of the application. It was not repeated after he had received such notice, and no evidence indicating any relation whatever between him and the other parties to the proceeding, or to the applicant, was introduced after the notice was served upon him. Carstens never appeared, was never represented, and took no part in the proceedings. In the present case the petitioner was accorded ample opportunity to present his defense in opposition to the claim of the applicants.

The commission found that the decedent, Conklin, was at the time of his injury in the joint employment of both the defendants, Pruitt and Graham Bros., that both of the employers and employee were subject to the provisions of the Workmen's Compensation, Insurance and Safety Act, and that the defendant United States Fidelity & Guaranty Company was the insurance carrier for the defendant Graham Bros. It accordingly made its award in favor of the applicants and against this petitioner, Pruitt, and the United States Fidelity & Guaranty Company, and each and either of them, in the total sum of $5,000, and medical expenses in the sum of $174.95. It ordered that Graham Bros. be released from all liability in the premises.

[4] The finding and award of the commission, which can only be predicated upon an application of the theory of a general and a special employment of Conklin, is not controverted by the respondent insurance carrier of Graham Bros. It does not dispute the liability of the partnership in the premises. The petitioner, Pruitt, is here alone contending that there was a want of sufficient evidence to sustain the finding that he was liable, and that therefore the award is, as to him, without support. This contention must be sustained. While it has been held that in some cases where, at the time of the accident, both the general and special employer exerted some measure of control over the injured employee, both should be held liable, and that under such circumstances an employee may look either to the general employer or to the special employer, or to both, for compensation for injuries due to occupational hazards (Employers' Liability Assurance Corp. v. Industrial Acc. Comm., 179 Cal. 432, 438, 439, 177 Pac. 273), the facts here under review do not bring the case within the application of the rule.

That Conklin's death was the result of injuries he received when the truck he was driving was struck by a train, while he was in the discharge of his duties and while acting within the scope of his employment, is not disputed. Graham Bros., copartnership, was engaged in the general contracting business. For the purpose of hauling broken rock, gravel, and sand the firm used a great many motor trucks which the partnership did not own. It was its custom to hire these trucks promiscuously, without being concerned as to who the owners might be, paying at the rate of $3 per hour for their use, including the services of the driver. Robert Graham, a member of the copartnership, had general control of the operation of these trucks during working hours through a foreman, who gave orders as to when, where, and how the materials were to be hauled and the trucks otherwise used. For some time Conklin, who appears to have had an interest in a truck, was employed by Graham Bros. at the rate of $3 per hour for his own services and the use of the truck. About two weeks before the accident this arrangement was changed. Pruitt, who already had two trucks in the service of Graham Bros., bought the truck Conklin was using, and thereupon notified Graham Bros. that Conklin was working for him. He arranged with Conklin, however, that Conklin should continue to use the truck in the service of Graham Bros. as before, and on the same terms. He agreed with Conklin "to give him 25 per cent. of his wages—what he earned from Graham Bros." If for any reason the truck was laid off, Conklin received nothing for the time he was idle. He was charged with the care of the truck, which he kept at his own home when it was not in use. Pruitt paid the bills for its upkeep, and for the oil and gasoline used in its operation. He agreed to pay Conklin the usual wages of a mechanic for his time when he made any repairs to the truck. Having made these agreements with Graham Bros. and Conklin, Pruitt did not thereafter give any orders, or directions, to either, and exerted no measure of control over the truck or its driver. On this evidence the commission correctly found that at the time of the injury Conklin was operating the truck "in the service of Graham Bros." under the above arrangement, and that "during all of said time said Paul R. Conklin was subject to the control and direction of said defendant Graham Bros. in the operation and movement of the truck." These findings support the claim for compensation against Graham Bros., and justify the award against the United States Fidelity & Guaranty Company, its insurance carrier, but utterly fail to establish any liability on the part of Pruitt.

[5] There is neither evidence nor finding to show that petitioner ever exerted, or had the right to exert, the slightest degree of control over Conklin in connection with his employment in the service of Graham Bros. Yet to uphold an award against him it must so appear. Employers' Liability Assurance Corp. v. Industrial Acc. Comm., supra; De Noyer v. Cavanaugh, 221 N. Y. 273, 275, 116 N. E. 992. If it be contended that a further finding of the commission, that "at the time of said injury the said Paul R. Conklin was

in the joint employment of both the defendants W. L. Pruitt and Graham Bros." should be construed to have that effect, there is no evidence in the record to support it. Ordinarily, in cases such as this, the reviewing court is bound by the decision of the triers of fact. The finding of the commission in such matters stands upon the same footing as the finding of a judge, or the verdict of a jury, and is not to be set aside if there is any substantial evidence upon which it can rest. Pigeon's Case, 216 Mass. 51, 52, 102 N. E. 932, Ann. Cas. 1915A, 737; Massachusetts, etc., Co. v. Industrial Acc. Comm., supra. A review of the findings in such cases may be had, however, on the theory that the commission has no jurisdiction to make a finding where there is no evidence to support it. Dearborn v. Industrial Accident Commission (Cal. Sup.) 203 Pac. 112; Southern Pacific Co. v. Industrial Accident Commission, 177 Cal. 378, 380, 170 Pac. 822. The last-mentioned finding falls squarely within this category and may be disregarded.

The finding of facts made in this proceeding fails to support the award as to the petitioner, W. L. Pruitt. The award against the United States Fidelity & Guaranty Company is affirmed, and the award against W. L. Pruitt is annulled and set aside.

We concur: SHAW, C. J.; LENNON, J.; MYERS, Justice pro tem.; RICHARDS, Justice pro tem.

---

189 Cal. 446

## AGNEW v. DAUGHERTY, State Commissioner of Corporations. (S. F. 10355.)

(Supreme Court of California. Aug. 18, 1922.)

**1. Licenses ⟸18½, New, vol. 12A Key-No. Series—Interests in trust and mining options held "securities," which could not be sold without permit from commissioner of corporations.**

Where one having a lease and option on mining property was selling interests therein, and in a trust under which it was to be operated, evidenced by certificates and each representing 1/3000 part of the property and assets of the trust, such interests were "securities," within Corporate Securities Act, especially in view of section 2, providing that the singular includes the plural, etc., and a permit from the commissioner of corporations for their sale was necessary.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Security.]

**2. Licenses ⟸18½, New, vol. 12A Key-No. Series—Commissioner can impose only such conditions on sale of securities as are necessary to safety and security.**

The Corporate Securities Act, providing that, if the commissioner of corporations finds that a proposed plan of business is not unfair, unjust, or inequitable, etc., he shall issue a permit for the sale of securities on such terms and conditions as he may provide, attacked as violating Const. U. S. Amend. 14, and Const. Cal. art. 1, § 11, authorizes the commissioner to impose only such conditions as are necessary to secure safety and security, and it cannot be assumed in advance that he will impose any other conditions.

In Bank.

Original petition by Francis E. Agnew for a writ of prohibition, directed to Edwin M. Daugherty, Commissioner of Corporations of the State of California. Petition denied.

Westervelt & Ball, of Los Angeles, for petitioner.

SHAW, C. J. The applicant has filed a petition for a writ of prohibition, directed to Edwin M. Daugherty, commissioner of corporations of the state of California, to prohibit and enjoin him from proceeding in the matter of the trust described in the petition, and to require the petitioner to discontinue the sale or negotiation of the trust certificates and other securities mentioned in the trust set forth in the petition, until he has received a certificate of the corporation commissioner authorizing him to do so. The petition sets forth that he has acquired a lease and option of certain mining property, and that he has conveyed the same to certain persons as trustees under a contract in writing with them defining the trust.

The terms of the trust are not set forth, as such, but in his declaration, which is made a part of his petition, he states that he has created a trust, designating it as the "La Plata Smelting Company," has appointed William H. Test, H. E. Williams, and W. C. Randall as trustees thereof, and has empowered them as such trustees to receive all payments that may be due to him for interests in the lease, and to hold the same and all funds received from the sale of the product or the operation of said lease, as a trust fund for the holders of the several interest certificates, and disburse, use, and manage the same as such trustees. When they have received a sufficient amount from the sale of interests they shall start operations, including the work and development of the mines on the property. The "interests" are 3,000 in number. When 1,500, or so many of that number as may be necessary, are sold, he is to execute to the said trustees a proper assignment of said lease. The remaining 1,500 of the "interests" are to be retained, and petitioner reserves the right to hold them for himself and his associates as a consideration for the transfer of the property to be conveyed in trust, namely, of the lease and option aforesaid. Share certificates, conveying to the holder thereof 1/3000 part of the said

property and assets of said trust, are to be issued by the petitioner to each purchaser of an "interest," and they shall have equal rights to the profits of the enterprise, and are to be entitled to equal benefits therein. Certificates may be transferred only upon the books of the said Agnew until enough of the "interests" are sold to justify him in conveying to said trustees the lease and options and the proper license to operate under certain letters patent in connection with said lease. Thereafter the trustees agree to keep such transfer books.

All this is set forth in his declaration. He proposes to begin the sale of such "interests" at once, and a form is set forth of the terms of the sale proposed to be made, embodying all the preceding provisions of the trust. The commissioner of corporations, it is alleged, is interfering with his business, and has informed him that the certificates of interest issued by him are "securities," as that term is defined in the Corporate Securities Act (Stats. 1917, p. 673, and amendments thereto [St. 1919, p. 231; St. 1921, p. 1114]), that a sale or issuance thereof without having a permit to do so, as provided in the act, is a public offense punishable by fine and imprisonment, and has demanded that he apply for such permit before proceeding further.

[1, 2] It will be seen from the foregoing that the commissioner of corporations is right in his contention. The certificates of interest which he proposes to issue under his trust scheme are "securities" within the meaning of the Corporate Securities Act. "The singular number includes the plural, and the plural the singular," according to the opening clause of section 2 of the act, and so the fact that the assignor, so called, namely, Mr. Agnew, is the person who alone is to issue and sell the "interests," is of no moment. Their effect is the same as if they were issued and sold by trustees, consisting of two or more. The terms of the trust are to govern the rights of the holder in all cases. They are much the same as the "unit shares" or "unit interests" that were to be sold under the scheme set forth in the case of In re Girard, 186 Cal. 722, 200 Pac. 593, which were held to be subject to the same law. All the objections to the validity of the law urged by the petitioner here were considered and determined in that case to be without merit, except the following, namely, that said act allows the commissioner to issue a permit by the following clause:

"If he finds that the proposed plan of business of the applicant is not unfair, unjust or inequitable, that it intends to fairly and honestly transact its business, and that the securities that it proposes to issue and the methods to be used by it in issuing or disposing of them are not such as, in his opinion, will work a fraud upon the purchaser thereof, the commissioner shall issue to the applicant a permit authorizing it to issue and dispose of securities, as therein provided, in this state, in such amounts and for such considerations and upon such terms and conditions as the commissioner may in said permit provide. Otherwise he shall deny the application and refuse such permit and notify the applicant in writing of his decision."

He claims that this gives power to the commissioner to act arbitrarily and authorizes him to deny the applicant the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States and to section 11, article 1, of our Constitution, requiring that "all laws of a general nature shall have a uniform operation." The passage in the above quotation from the statute which allows the commissioner to issue a permit authorizing the applicant to sell his securities "upon such terms and conditions as the commissioner may in said permit provide" must be read in connection with the context, which provides that the commissioner must inquire into the method of doing business, and shall ascertain if the same is fair, just, and equitable, and that the methods used in disposing of them would not work a fraud upon the purchasers thereof. The terms and conditions to be prescribed in the permit must not be such as would make a greater burden than is consistent with safety and security. The condition imposed must be such as could fairly be said to be necessary to accomplish that purpose. If the commissioner should refuse to issue a permit, except upon conditions which would be unjust, unfair, or inequitable to the applicant, doubtless he would have the right to have such permit revised and reformed so as to make it equitable and fair, but we cannot assume that he will impose such conditions in advance of his action. He is proposing now to proceed in accordance with the law, and until he has exceeded his powers it is not proper for this court to interfere with him in performing them. The law is designed to secure fair dealing on the part of those who propose to sell corporate securities, and it should be observed by all who come within its terms. We think the petitioner is one of those who are to be controlled by the provision of the act.

The petition is denied.

We concur: WASTE, J.; LENNON, J.; MYERS, Justice pro tem.; RICHARDS, Justice pro tem.

189 Cal. 467

## DOMENIGONI v. IMPERIAL LIVE STOCK & MORTGAGE CO. (L. A. 7095.)

(Supreme Court of California. Sept. 1, 1922. Rehearing Denied Sept. 28, 1922.)

**1. Licenses ⟸18½, New, vol. 12A Key-No. Series—Subscriptions to stock held not to comply with permit of corporation commissioner under Blue Sky Law.**

Under the Blue Sky Law and Civ. Code, §§ 1550, 1668, a permit issued by the corporation commissioner, authorizing the licensee to sell shares of its capital stock at par "upon subscription agreements providing for the payment of 25 per cent. of the subscription price in cash, and the execution of promissory notes bearing interest at 6 per cent. by the subscriber for the balance," was not complied with where the licensee's agent took a note to the corporation for 75 per cent. of a subscription, and another note for 25 per cent. thereof due in six months, payable to "myself" and indorsed by the purchaser, though the agent immediately thereafter converted the smaller note into cash by discounting it at a bank, the evidence being insufficient to show that the purchaser authorized the selling agent to make the discount as the agent of the purchaser, and the fact that the subscription contract recited that 25 per cent. of the price was paid in "cash," was immaterial.

**2. Licenses ⟸39 — Neither party to illegal transaction in violation of Blue Sky Law entitled to relief.**

Where a permit under the Blue Sky Law and Civ. Code, §§ 1550, 1668, authorized the sale of stock by the licensee "upon subscription agreements providing for the payment of 25 per cent. of the subscription price in cash," a transaction by which a purchaser of stock gave his note to the corporation for 75 per cent. of the subscription price and a smaller note for the balance to the sales agent, payable in six months to "myself," and indorsed by the purchaser to the agent, who immediately discounted the note at a bank, was merely a device to evade the law, and neither of the parties was entitled to relief in a court of equity, and the purchaser of the stock could not maintain an action to cancel the notes, though defendant did not interpose the defense of illegality.

In Bank.

Appeal from Superior Court, Riverside County; W. D. Dehy, Judge.

Action by Angelo Domenigoni against the Imperial Live Stock & Mortgage Company. From a judgment for defendant, plaintiff appeals. Reversed.

Thomas T. Porteous, of Riverside, for appellant.

Marshall Stimson and Noel C. Edwards, both of Los Angeles, for respondent.

SHAW, C. J. This is an action to cancel and have delivered up to the plaintiff certain promissory notes delivered by plaintiff to the defendant, and also certain agreements by plaintiff with defendant for the purchase of stock of said defendant. The right of the plaintiff depends upon the provisions of the law for the regulation of corporations, approved May 18, 1917 (Stats. 1917, p. 673), usually known as the "Blue Sky Law." His contention is that the notes and agreements were made in violation thereof, and that therefore they are against the policy of the law (Civ. Code, §§ 1550, 1668) and void.

This statute provides that no corporation shall sell its capital stock, except for a delinquent assessment, until it has secured from the commissioner of corporations a permit authorizing it to do so (section 3), and that the permit, when issued, shall authorize the corporation to issue and sell its "securities * * * in such amounts and for such considerations and upon such terms and conditions as the commissioner may in said permit provide" (section 4). The word "security," as defined in section 2, includes shares of the capital stock of the corporation which makes such sale. The act also provides that every corporation "which shall directly or indirectly issue or cause to be issued any security contrary to the provisions of this act, * * * or in nonconformity with a permit of the commissioner authorizing the same," is punishable by a fine not exceeding $10,000 (section 13); also that any agent of such company who does the like is guilty of a felony (section 14).

In pursuance of this act the corporation commissioner on December 30, 1919, issued to the defendant a permit granting it the right to sell 190,000 shares of its capital stock, at par, "upon subscription agreements providing for the payment of 25 per cent. of the subscription price in cash, and the execution of promissory notes bearing interest at 6 per cent., by the subscriber, for the balance," at the price of $10 per share; that being its par value. Under this permit the defendant sold to the plaintiff 2,000 shares of its stock at the price of $10 per share, by four separate sales; the first being a sale of 250 shares on June 10, 1920, the second for 250 shares on July 10, 1920, the third for 500 shares on October 19, 1920, and the fourth for 1,000 shares on November 17, 1920.

The plaintiff claims that each of these sales were made in consideration of his note for one-fourth of the price, made payable to himself, indorsed by him, and delivered by him to the agent of the defendant, and another note for three-fourths of the price payable directly to the defendant, and that in neither instance did he pay the one-fourth of the price in cash. The defendant, on the other hand, claims that on each occasion the plaintiff agreed to pay one-fourth of the price in cash, executed his note for a sum equal to such one-fourth, payable to himself, and indorsed and delivered the same to one

W. B. Lawrence; that he thereupon authorized Lawrence, in his behalf and as his agent, to sell said note at a bank for cash to raise the money necessary to make the cash payment by Domenigoni, and for him to apply such cash in payment of the one-fourth part of the purchase price of the stock then sold, and that Lawrence, in accordance therewith, made the sale and paid the money to the defendant in satisfaction of that part of the purchase price. The court made findings in favor of the defendant on this proposition, stating specifically therein with respect to each sale that:

"The plaintiff made the said W. B. Lawrence his agent and authorized him to cash the said note, * * * for the purpose of paying the first installment of the subscription agreement of even date with said note, which plaintiff executed at said time."

The judgment went for the defendant, and the plaintiff appeals.

[1] The only question arising upon the appeal is the sufficiency of the evidence to sustain the finding of the court just quoted. The issuance and sale by the defendant of its capital stock, or an agreement for such sale, in a manner not in conformity with the permit issued to it by the commissioner of corporations, would be illegal and void. The permit so issued required that the agreement of sale of the stock should provide "for the payment of 25 per cent. of the subscription price in cash" and for the execution of notes by the purchaser for the balance. A sale made in consideration of a price, all of which was represented by notes given by the purchaser to the defendant or its agents, would be contrary to the permit. The sufficiency of the evidence to support this finding depends upon its sufficiency to show that the note for one-fourth of the price of each sale, given at the time thereof, was a note given to an agent of the defendant corporation in consummation of the sale, or a note executed by the plaintiff to his own agent, authorized to sell the note for its face value and apply the proceeds upon the cash payment by transmitting the same for plaintiff to the defendant.

The facts bearing on this question are in the main not contradicted. One C. H. McPhail was employed by the defendant as its exclusive agent to sell the 190,000 shares of stock above mentioned. The agreement provided that the defendant was to furnish McPhail with all statements and literature for any advertising campaign that McPhail should undertake in selling said stock, and that McPhail should use and make no statements or representations to any prospective purchaser, other than those contained in the literature so furnished. C. W. Francis was the manager for McPhail in selling said stock. Three agents appointed by McPhail or Francis were instrumental in negotiating the sales to the plaintiff, namely, W. B. Lawrence, Charles O. Harding, and James W. Lynch. Lawrence was present at the time each of the sales was made, Harding at the first two, and Lynch at the third and fourth. Harding and Lawrence first saw the plaintiff some time in April, 1920, and suggested to him the purchase of this stock. The plaintiff then expected to sell his farm for a considerable sum of money and expressed his desire to make an investment in case he sold it. The transactions with respect to each sale, as the evidence discloses, were precisely similar in all essential particulars, and the relation of one will suffice for all. On June 10, 1920, Lawrence and Harding visited the plaintiff at his residence. They had been furnished by McPhail with a supply of forms for the transaction then entered into. These included notes payable to "myself," payable in six months, other notes payable to the defendant by name and forms of authorization as hereinafter shown. They also included a form of subscription agreement providing for the payment of the price "not less than one-fourth cash accompanying this application, and the balance thereof as evidenced by promissory note of even date herewith, bearing interest at the rate of 6 per cent. per annum," and a form of receipt to the purchaser as hereinafter given.

On that occasion they obtained from the plaintiff his signature to an agreement in the form above stated for the purchase of 250 shares of stock and his note payable to the defendant for $1,875; also his note payable in six months to himself on one of the "myself" forms and his indorsement thereon, which note he then delivered to said Lawrence; also his signature to one of the authorization agreements aforesaid in the following words:

"June 10, 1920.

"To Any Bank or Banker:

"You are at liberty to purchase my note of this date for $625, given to W. B. Lawrence, if you desire.

"There are no offsets or conditions against this note. Angelo Domenigoni."

They also executed to him a receipt as follows:

"Receipt to be Given Subscriber.

"June 10, 1920.

"Received of Angelo Domenigoni, of Winchester, Calif., the sum of twenty-five hundred dollars. Cash, $625; notes $1875.

"Payable to Imperial Live Stock & Mortgage Company as payment for two hundred and fifty (250) shares of the capital stock of the Imperial Live Stock & Mortgage Company, as set forth in this subscription contract, numbered the same as the receipt and bearing even date herewith.

"(Not valid unless signed.)

"Imperial Live Stock & Mortgage Company,
"Harding & Lawrence, Special Agents."

The only evidence in regard to the proposition that the plaintiff then appointed Lawrence as his own agent to obtain the money for him on the "myself" note and make payment of one-fourth of the price therewith is the testimony of Lawrence, Harding, and Lynch, together with the contents of the documents aforesaid. Lawrence testified that the plaintiff read the agreement of subscription and the two notes, that he then explained to the plaintiff that it would be necessary for him to pay one-fourth cash, that the balance could be taken in notes, which could be carried by the company as long as he desired, provided he paid the interest, and that he (Lawrence) would "renew his original first payment note, if he so desired," referring to the "myself" note for one-fourth, of the price. His testimony as to his authorization to act as agent for plaintiff consisted of the following questions and answers:

"Q. Did you tell him by what method you expected to raise the money on his 'myself' notes? A. I told him, in lieu of cash, it was necessary for us to discount all notes.

"Q. Did you tell him that you would have to act for him in cashing that note? A. I told him I would discount these notes."

Harding testified on this subject that all the details were explained to the plaintiff, and that he was told that if he wanted this stock:

"We could arrange it so that he would make a cash payment, and that would be upon making this 'myself' note, which was different entirely from the note which was part of the application. Then his 'myself' note was supposed to cover the first payment, and be converted into cash through discount at a bank by Mr. Lawrence and myself.

"Q. Acting for whom? A. Acting for ourselves or for him. It was simply a case of getting him the money to make the first payment."

The plaintiff testified that he gave the two notes for the entire purchase price of the stock, and that he paid nothing in cash at the time of either purchase. Immediately after the purchase on each occasion the two agents departed with all the papers, except the receipt. The "myself" notes of June 10 and July 10 were both sold on July 12, 1920, for their face values to the First National Bank at Hemet by Lawrence, and he thereafter in due course transmitted the money to McPhail, together with the subsequent agreements and the other notes for the remainder of the price. The money obtained from the bank in Hemet was reported to the defendant's main office by McPhail or Lawrence, or both, as cash paid on the price of the stock sold on each occasion.

From the foregoing statement of the facts proven, it is plain that the transactions in question were planned and executed in the endeavor to circumvent the statute and evade the requirements of the permit allowing the defendant to sell this stock. McPhail was the exclusive and general agent of the defendant. It had agreed to make no sales thereof save through his agency. In carrying out his duties as agent it was necessary for him to have solicitors and salesmen to procure purchasers and make sales. He had appointed Lawrence, Harding, and Lynch as such salesmen, and had furnished them with a supply of the forms aforesaid, to enable them to carry out the plan in the manner here exhibited. He must be deemed to have intended they should do so, and to have authorized them to carry out the plan. These salesmen were the agents of the defendants for that purpose. The legal results are, therefore, the same as if the transaction had been carried out directly between Domenigoni on the one side and the managing agent of the defendant on the other, which was the same in effect as if it had been done by the defendant through the board of directors.

The permit authorized agreements of sale of the stock only upon the condition that one-fourth of the price was paid in cash at the time of its execution. The written agreements made in this case did, in form, declare that one-fourth should be paid in cash, but this provision was not fulfilled nor intended to be fulfilled. The cash was not paid. Instead, the plaintiff executed a note payable six months afterward to himself, indorsed it in blank, and delivered it to Lawrence, one of the defendant's agents engaged in negotiating the sale. The first payment, so far as Domenigoni, the payor, was concerned, was not made in cash, and would not be made by him until the six months expired. The permit did not specify that the defendant could accept a note, instead of the cash payment, or that it would be allowed to do so, provided it could negotiate the note and procure the cash by that means. Yet the latter is precisely what was done. Domenigoni's note was accepted by defendant's agents, and it was not until a month later that the cash was obtained on it.

To say that Lawrence was appointed by Domenigoni as his own agent to take his note to some bank and there obtain the cash, if he could, and then use it, for Domenigoni to pay for him the cash necessary to complete the transaction, would sanction a mere pretense of conformity to the statute and the permit. The transaction with Domenigoni was complete when the agents, after giving him a receipt for "cash $625," departed with his note for that sum due in six months, and no cash. There is no substantial evidence that he authorized Lawrence to cash the note for him, or that he ever supposed that to be the relation between them, even if so plain an evasion could be tolerated by the courts. The agreement of sale and the receipt each bears the signature "Harding & Lawrence, Special Agents," subscribed thereto. They were the active agents for the defendant, the

seller, in the matter. Neither of these agents was willing to testify that he undertook to act also as the agent of the buyer, or that any suggestion to that effect was made to the buyer. When Lawrence was asked if he told Domenigoni that he would "have to act for him in cashing that note," his answer was: "I told him I would discount these notes." This was a plain evasion of the question, and it shows that the statement embraced in the question was not made. The statement that he would "discount the notes" does not imply that he said he would do so for Domenigoni, but, especially when made in answer to such a question, clearly implies that he made no such statement. Harding's testimony does not go as far as that of Lawrence. His testimony that, in converting the "myself" note into cash to cover the first payment, he and Lawrence would be "acting for ourselves or for him," is entirely noncommittal, and scarcely rises to the dignity of a conclusion, much less a statement of fact.

The plain facts were that in each case Domenigoni made an agreement to subscribe for stock which upon its face stated that one-fourth of the price was to be paid in cash, but in fact he gave his note, due six months thereafter, for the one-fourth, and another note for the balance, payable in installments at later dates, and the agents of the defendant thereafter sold the six-months notes and thereby obtained the cash wherewith and whereby the transaction might appear on the books of the defendant as a sale for one-fourth cash. The agents accepted the six-months note on behalf of themselves as agents for the defendant, and the subsequent sale thereof by them was in legal effect a sale by defendant, whether its directors and managing officers were aware of the details of the transaction or not. Its general agent, McPhail, is charged with full knowledge of it, for he prepared the papers required for its execution. If such subterfuges were permitted, the statute would soon become a dead letter, and the object it was designed to accomplish would be frustrated by the very persons against whose practices it is directed.

Therefore the court below erred in its findings. As to each case the court found that the plaintiff delivered the "myself" note to W. B. Lawrence as his agent, that defendant received from Lawrence the amount of said "myself" note in cash at the time said note was so delivered to Lawrence, that the defendant did not agree with plaintiff that if plaintiff would purchase the stock he could give notes for the full amount of the purchase price thereof, that it is not true that the whole purchase price of said stock was paid in promissory notes of the plaintiff, and that plaintiff made said Lawrence his agent, and authorized him, as such, to cash the said "myself" notes for the purpose of paying the first installment of the subscription agreement of the same date, and that defendant received the sum of 25 per cent. of each installment of such stock sold to plaintiff in cash. The court should have found that when each stock sale was made the plaintiff agreed to execute notes for the full price, three-fourths of the purchase price by the notes payable to defendant and the other one-fourth by the "myself" notes, and that said last-mentioned notes, though made to himself and indorsed in blank by him, were also delivered to plaintiff through the medium of Mr. Lawrence, who was the defendant's agent to receive them, and obtain the money on them, and not the agent of the plaintiff.

[2] But it does not follow that the plaintiff was entitled to any relief. The entire transaction was an attempt to circumvent the law. The notes and agreements were each of them made in violation thereof, and are therefore against the policy of the law, as he claims, and void. He was a party to them and is equally guilty with the defendant. In such a case the court will give no relief even if the point is not raised by either party. In Kreamer v. Earl, 91 Cal. at page 118, 27 Pac. at page 737, the court said:

"It may be suggested that the appellant has never questioned the legality of the contract, and that we ought not to make the point for him. * * * A court of equity will not allow itself to become a handmaid of iniquity of any kind. It intervenes, not for the sake of the party who is benefited by the intervention, but for the sake of the law itself. It matters not that no objection is made by either party; when the court discovers a fact which indicates that the contract is illegal and ought not to be enforced, it will, of its own motion, instigate an inquiry in relation thereto."

To the same effect, see Valentine v. Stewart, 15 Cal. 404; Abbe v. Marr, 14 Cal. 211; Davis v. Mitchell, 34 Cal. 89–90; Prost v. More, 40 Cal. 348; Bulson v. Moffat, 173 Cal. 686, 161 Pac. 259; Colby v. Title, etc., Co., 160 Cal. 640, 117 Pac. 913, 35 L. R. A. (N. S.) 813, Ann. Cas. 1913A, 515; Ripperdan v. Weldy, 149 Cal. 676, 87 Pac. 276; Los Angeles v. City Bank, 100 Cal. 24, 34 Pac. 510; McGregor v. Donnelly, 67 Cal. 149, 7 Pac. 422; 14 Cor. Jur. p. 492.

It follows that the court erred in its findings, and the judgment must be reversed, in order that proper findings may be entered; and the judgment should not carry costs in favor of the defendant. Each party should be left to pay his own costs.

The judgment is reversed.

We concur: WASTE, J.; LENNON, J.; RICHARDS, Justice pro tem.; MYERS, Justice pro tem.

(58 Cal. App. 547)

## PEOPLE v. CASSELLA. (Cr. 632.)

(District Court of Appeal, Third District, California. July 18, 1922. Hearing Denied by Supreme Court Sept. 14, 1922.)

**1. Intoxicating liquors ⟹236(13)—Evidence held to show that wine contained more than permitted percentage of alcohol.**

Evidence that witness bought wine from defendant which had a kick to it *held* sufficient to show that the liquid sold contained more than 1 per cent. of alcohol, in violation of the Wyllie Law.

**2. Criminal law ⟹1175—Failure to state in verdict each offense on which defendant was convicted held not prejudicial.**

Where defendant was prosecuted under three counts, and the court instructed the jury that, if they found defendant guilty under all three counts, to return a verdict of guilty as charged, and they returned such a verdict, defendant was not prejudiced by a failure to literally comply with Pen. Code, § 954, providing that each offense on which defendant is convicted must be stated in the verdict.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Louis Cassella was convicted of violating the Wyllie Local Option Law, and he appeals. Affirmed.

M. H. Iversen, of Ukiah, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted on two counts of selling alcoholic liquor and on one count of conducting a place where alcoholic liquor was sold, served, and distributed, and kept for the purpose of sale and distribution, all contrary to the provisions of the Wyllie Law (St. 1911, p. 599). He was sentenced to imprisonment for three months on each of counts 1 and 2, to run concurrently, and to pay a fine of $300 on the third count. The defendant appealed from the judgment, and from the order denying his motion for a new trial.

A reversal is asked on two grounds: (1) That the evidence is insufficient to show that the liquor sold or kept for sale contained one per cent. or more of alcohol; (2) that the verdict is void for uncertainty.

[1] A witness for the prosecution testified, in support of the first count, that he purchased from the defendant "so-called wine" at 20 cents a glass and "so-called jackass" at 35 cents a glass; that the liquor had a kick to it; that he could feel it; that "they called it wine"—referring to the "so-called wine." In support of the second count the witness testified that he purchased from the defendant two glasses of wine at 20 cents a glass. The testimony produced in support of the third count is conclusive against the defendant. In People v. Mueller, 168 Cal. 521, 528, 143 Pac. 750, 751 (L. R. A. 1915B, 282) the court said:

"Wine is a well-known form of vinous liquor, and it is common knowledge that it contains alcohol. * * * Its character is so well known that the court takes judicial notice of these qualities, and also that it contains considerably more than 1 per cent. by volume of alcohol, that it is intoxicating when taken into the stomach and that it may be used as a beverage. Black on Intoxicating Liquors, § 5; 23 Cyc. 61. We are not aware of any case holding specifically that judicial notice will be taken of the fact that ordinary wine contains more than 1 per cent. of alcohol, but we do not doubt that it will."

[2] The verdict of the jury is as follows: "We the jury find the said defendant guilty as charged in the indictment." Section 954 of the Penal Code provides that "each offense upon which the defendant is convicted must be stated in the verdict." It is contended that "the jury in casting their votes could have reached the verdict as rendered with a portion of the jury voting on count 1, while another portion had in mind count 2 and still another portion of the members had in mind count 3," in other words, that the jurors may not all have agreed as to the defendant's guilt on any one count. The court gave the jury eight forms of verdict, among them the one rendered. The court instructed the jury as follows:

"The court has had prepared forms of verdicts one of which you will endeavor to find. * * * One verdict will read, 'We, the jury, find the defendant not guilty.' If you find * * * he is not guilty of either or any of the three counts, your foreman will sign that verdict and return into court. The next verdict, * * * 'We, the jury, find the defendant guilty as charged in the indictment.' If you find the defendant guilty of all three counts, your foreman will sign that one and return into court. Another one reads, 'We, the jury, find the said defendant guilty as charged in count 1 of the indictment and not guilty as charged in counts 2 and 3.' Now in case you find the defendant guilty of the first count of the indictment, and not guilty in the last two counts, you will return that verdict."

In a similar manner the court instructed as to other possible verdicts. If the jurors followed the plain instructions of the court, and it must be presumed that they did, then the verdict is not uncertain. It is not in literal compliance with the provisions of section 954 of the Penal Code, but under the circumstances disclosed the defendant could have suffered no prejudice therefrom. Had the jury expressly found the defendant "guilty on all counts as charged in the indictment," it would hardly be contended that the verdict was uncertain, and, in effect, this

is what the jury did. In Ballew v. United States, 160 U. S. 187, 16 Sup. Ct. 263, 40 L. Ed. 388, in considering a similar question, where the trial court had instructed the jury, "that, if they considered the defendant guilty on one count and innocent on the other, they should so find, and, if they found him guilty on both counts, that they should return a general verdict," and the jury had returned a general verdict of guilty, the court said:

"The verdict was a general verdict. That in a case such as this a general verdict is proper, and imports of necessity a conviction as to both crimes, is settled."

In view of the uncertainty apparently existing as to the correct form of verdict in such cases, it is deemed not improper to suggest that, where two or more offenses are charged, it would be a full compliance with the statute to furnish the jury a single form of verdict. In this case the following form would have been sufficient, with instructions to insert the words "guilty" or "not guilty" in the blank spaces in accordance with the finding of the jury on each count:

"We, the jury, find the defendant ——— as charged in the first count of the indictment; we find him ——— as charged in the second count; and we find him ——— as charged in the third count."

See State v. Blunt, 110 Mo. 322, 339, 19 S. W. 650.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

---

(58 Cal. App. 537)

## FAHEY v. MADDEN et al. (Civ. 2472.)

(District Court of Appeal, Third District, California. July 17, 1922.)

**1. Highways ⇐184(3)—Pedestrian, walking on left side of road and turning to left, held not guilty of contributory negligence as matter of law.**

A pedestrian, walking on the left side of a highway and turning to the left in trying to avoid an automobile, which struck him, *held* not guilty of contributory negligence as a matter of law.

**2. Highways ⇐175(1)—Rule of care as between pedestrian and automobilist stated.**

An automobilist and a pedestrian must make reasonable use of all of their senses for the prevention of accidents, and exercise such reasonable caution as ordinarily careful and prudent persons would exercise under like circumstances.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by T. H. Fahey against Winfield Madden, Robert Boen, and others. Judgment for plaintiff, and defendant Robert Boen appeals. Affirmed.

See, also, 206 Pac. 128.

Elmer W. Armfield and Arthur B. Eddy, both of Woodland, for appellant.

W. H. Morrissey, of San Francisco, and P. B. Lynch, of Vallejo, for respondent.

BURNETT, J. This is an appeal by Robert Boen from a judgment in favor of plaintiff, based upon the verdict of a jury for $8,000 against both defendants, allowed as damages for personal injuries. It was alleged in the complaint that Madden was the owner of a certain automobile and—

"that the said defendant Boen at the time of the accident herein complained of was driving said motor vehicle with the permission, consent, and approval of said defendant, Madden, and while so driving said motor vehicle on the 14th day of December, 1917, negligently and carelessly drove the said motor vehicle into and over the plaintiff, knocking him to the ground with great force and violence, breaking his leg, and bruising and injuring him to such an extent that it was necessary to amputate his right leg just above the knee, and plaintiff's leg was in fact by reason of said negligence and carelessness amputated just above the knee."

[1] The only contention of appellant is that his motion for nonsuit should have been granted, for the reason that the only rational conclusion that could be drawn from the testimony for plaintiff is that he was chargeable with contributory negligence. As we view the record, the position is utterly untenable. The testimony of plaintiff is to the effect that, when the accident occurred, about 7 o'clock in the evening, he was walking in an easterly direction along the state highway just east of Fairfield, in Solano county. He was returning from Suisun to his work at Cement, and was traveling on the left-hand side of the road, about the width of an automobile off of the concrete pavement. When he first saw the automobile, it was traveling on said highway in a southerly direction, and was then about a mile away. The highway makes a right angle turn from the northerly and southerly direction to the easterly and westerly direction just before the point where the accident occurred, according to the testimony of Fahey, and the automobile had rounded this turn and had traveled about 25 or 30 feet, when it swerved to the north of the concrete part of the highway and collided with plaintiff, inflicting the very serious injuries that are described in the complaint. When plaintiff saw the imminence of the danger, in his own language, he "made an effort to get over there to the left, to get out of the way of

the machine; it caught me before I could get out of the way."

Appellant would have the court hold that contributory negligence should be imputed to plaintiff by reason of each of the two circumstances, that he was walking on the left-hand side of the road, instead of the right, and that he turned to the left, rather than the other direction, when he tried to avoid the machine. As to the former, there is no law and no established criterion of conduct that attributes negligence to one who walks on the left side of a highway. In Raymond v. Hill, 168 Cal. 482, 143 Pac. 747, it is said:

"As to foot passengers, the old common-law freedom of use of the king's highway has not been modified in this state by any positive enactment; so that it still remains the law that foot passengers have the right to use and traverse the highway at all its points, being chargeable only for the exercise of a due amount of care, which due amount of care, in its quantum, is governed by the circumstances attending the use which the pedestrian actually makes. Thus in this state, even in populous streets of cities, pedestrians are not restricted to the crossings in traversing a street, but may cross it at any point. And the same is true of their right to walk along the road bed of a highway."

[2] Of course, the general rule applies that the person having the management of the automobile and the traveler on foot are both required to use such reasonable care, circumspection, prudence, and discretion as the circumstances require, an increase of care being required where there is an increase of danger; "and both are bound to the reasonable use of all their senses for the prevention of accident, and the exercise of all such reasonable caution as ordinarily careful and prudent persons would exercise under like circumstances." 2 Elliott on Roads and Streets (2d Ed.) p. 667. But it cannot be said that plaintiff by traveling as he did failed to meet this requirement. Indeed, there is room for the opinion that "it is safer," in the language of respondent, "to walk along the highway on the side of the road facing the oncoming traffic rather than take the chance of walking on the opposite side and of being struck by unseen automobile from behind." It is further declared that the soldiers of the United States army, when not marching in formation, are required to walk on the side of the road facing the oncoming traffic. At any rate, for a pedestrian to walk on that side cannot be said as a matter of law to constitute negligence. Moreover, it is to be remembered that plaintiff testified that he was walking a machine's width from the paved highway. Assuredly, that could not be considered a place of danger, and he would not be chargeable with negligence in anticipating that an oncoming machine would not leave the pavement, which was constructed for automobile traffic, and to which the operation of machines is ordinarily confined.

Neither can it be said that in turning to the left he was necessarily guilty of contributory negligence. In considering his conduct the excitement and confusion of the moment must be accorded due weight, and under such circumstances, if he made a mistake, the law would hardly hold it against him. Moreover, since he was walking away from the pavement, and might reasonably expect that the driver would attempt to keep his machine thereon, what more natural thing than for the pedestrian to try to get still further away when he found that the machine was bearing down upon him? Manifestly his position upon the highway must be regarded in determining what movement reasonable care would require of him when it appeared to him that he was in danger of being run over. If he had been on the paved portion of the highway a different situation might have presented itself, but, under the circumstances, we think no court could hold that the only rational conclusion is that he acted without due caution and circumspection.

We think the trial court was clearly right in denying the motion for a nonsuit, and the judgment is therefore affirmed.

We concur: FINCH, P. J.; HART, J.

---

58 Cal. App. 427

## EVANS et al. v. SHOCKLEY.
## (Civ. 4137; S. F. 10001.)

(District Court of Appeal, First District, Division 1, California. July 3, 1922. Rehearing Denied Aug. 2, 1922. Hearing Denied by Supreme Court Aug. 31, 1922.)

**1. Trade-marks and trade-names and unfair competition ⟸23—Use of trade-name by one not true owner may be restrained.**

Under Pol. Code, § 3197, providing for the recording of a trade-name with secretary of state, and section 3199, providing that the one who has first adopted and used a trade-name, whether within or without the state, is its original owner, the rights thus acquired are property rights, and may be protected from invasion by an injunction.

**2. Trade-marks and trade-names and unfair competition ⟸33—Trade-name may be transferred separately from the business.**

Under Pol. Code, § 3199, providing for the transfer of trade-names, a trade-name may be lawfully transferred, so as to separate it from the business or commodity to which it pertains.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Suit for injunction by Fanny Riegel Evans and others against Laura M. Shockley. From an order granting an injunction pendente lite, defendant appeals. Affirmed in District Court of Appeal, and hearing denied in Supreme Court.

Charles C. Boynton, of San Francisco, for appellant.

Grove L. Johnson, of Sacramento, and Hiram W. Johnson, Jr., of San Francisco, for respondents.

KNIGHT, Justice pro tem. This is an appeal by defendant, Laura M. Shockley, from an order awarding plaintiffs an injunction pendente lite restraining defendant from using upon any place of business conducted by her, or in which she might be interested, and in any advertising, or printed, written, or painted matter, or in any linen, table coverings, napkins, or silverware, the name "Mary Elizabeth," or "Mary Elizabeth's," or "Mary Elizabeth of San Francisco," or any colorable simulation thereof. The application for said injunction was heard and determined upon the allegations of the verified complaint and upon certain affidavits filed on behalf of the respective parties.

From the record presented on said application the following facts appear: About the year 1897, in the city of Syracuse, state of New York, one of the plaintiffs, Mary Elizabeth E. Sharpe (formerly Mary Elizabeth Evans), who was then 13 years of age, began making and selling candies to her friends, which soon became known about that city as "Mary Elizabeth's" candies. Because of its good quality the candy soon came into much demand, and in the year 1900 a copartnership was formed between the maker of said candies and the other plaintiffs herein, and a place of business was opened in said city of Syracuse. The business rapidly developed, and during the next few years tea rooms were opened and operated under the name "Mary Elizabeth's" in New York City, Boston, Syracuse, Newport, R. I., and in the city of Hamilton, island of Bermuda, all of which, except the one in Bermuda, were going concerns at the time of the commencement of this action. As a part of that business, confections and pastries of different kinds were made and sold under the name "Mary Elizabeth's," shipments of said products were made to various parts of the country, including California, and plaintiffs claim that said tea rooms and products have acquired a wide reputation in this country and abroad, and that resulting therefrom a business of great value, alleged by plaintiffs to be worth $500,000, has been established under the name "Mary Elizabeth's." Under the terms of the lease, plaintiffs allege that they pay a rental of $40,000 per year for the New York tea room.

In 1914 plaintiffs trade-marked the name "Mary Elizabeth's" in the United States Patent Office, Washington, D. C., for candies, chocolates, jellies, marmalades, preserves, etc.; the same being affixed to these goods with printed labels, etc. In the year 1917 one William E. Harris and wife opened a tea room in Los Angeles under the trade-name "Mary Elizabeth Tea Room," and filed with the secretary of state of this state, in accordance with section 3197 of the Political Code, their trade-name "The Mary Elizabeth Tea Room." Thereafter, upon the objection of these plaintiffs to the use of said name by said Harris and wife, the latter ceased doing business under said trade-name, and assigned said trade-name and the right to exclusive use thereof to the plaintiffs. On May 9, 1921, the defendant, Laura M. Shockley, and a partner (who retired from the firm prior to the commencement of this action) opened a tea room at No. 445 Powell street, San Francisco, near the St. Francis Hotel, under the name of "Mary Elizabeth of San Francisco," and all of the linen used therein was marked and the silver was engraved "Mary Elizabeth." All advertising matter also bore said trade-name.

It appears from the evidence offered that, because of the use of said trade-name, customers, particularly tourists, would occasionally, from day to day, call at said tea room so conducted by defendant, and make inquiries as to whether defendant had on sale the products of the plaintiffs, and that, when reply was made in the negative, several inquirers highly praised plaintiffs' products and advised defendant to secure the agency, which she endeavored to do, but received no reply to her letter. According to plaintiffs' evidence, as soon as plaintiffs learned of the defendant's appropriation of said trade-name they protested, because, it was claimed, the use thereof was a source of confusion to the public and an injury to plaintiffs' business. On June 28, 1921, defendant filed with the county clerk of the city and county of San Francisco, and thereafter published in a newspaper, a certificate announcing that defendant was doing business under the fictitious name of "Mary Elizabeth of San Francisco" at No. 445 Powell street.

There is a dispute as to the reason why defendant adopted said trade-name, but in this respect defendant admits that she had visited plaintiffs' place of business in New York City and "was agreeably impressed therewith." After plaintiffs had objected to the use of such trade-name by defendant, negotiations were had between the parties for a settlement of their dispute, and defendant finally agreed to accept from plaintiffs $250 to partly cover the expenditure she had been put to in advertising and buying equipment, but plaintiffs declined to pay any greater sum than $100. This action was thereupon commenced. There are, of course, many other facts stated by the affidavits and the verified complaint, but we think the foregoing

statement is sufficient for the purposes of considering the law points involved.

[1] We are of the opinion that under the express statutory law of this state the lower court was justified, in view of the facts presented, in granting the preliminary injunction. The evidence shows without dispute that at the time of the commencement of the action plaintiffs were the exclusive owners of said trade-name by reason, first, of the issuance of said certificate of registration by the federal government; and, secondly, by the recordation of said trade-name with the secretary of state in this state and the subsequent assignment thereof to plaintiffs.

Sections 3199 and 3197 of the Political Code provide:

"Sec. 3199. Any person who has first adopted and used a trade-mark or name, whether within or beyond the limits of this state, is its original owner. Such ownership may be transferred in the same manner as personal property, and is entitled to the same protection by suits at law; and any court of competent jurisdiction may restrain, by injunction, any use of trade-marks or names in violation of this chapter."

"Sec. 3197. Any person may record any trade-mark or name by filing with the secretary of state his claim to the same, and a copy or description of such trade-mark or name, with his affidavit attached thereto, certified to by any officer authorized to take acknowledgments of conveyances, setting forth that he (or the firm or corporation of which he is a member) is the exclusive owner, or agent of the owner of such trade-mark or name."

These provisions seem to be clear and unambiguous. By them it is provided that ownership of a trade-name may be acquired, either by a prior adoption within or without the state, or by registering such name with the secretary of state. Here plaintiffs have done both. The statute also expressly provides that such ownership may be transferred. The rights thus acquired under the statute are property rights and may be protected by injunction from invasion. Spieker v. Lash, 102 Cal. 38, 36 Pac. 362; Italian-Swiss Colony v. I. Vineyard Co., 158 Cal. 252, 110 Pac. 913, 32 L. R. A. (N. S.) 439.

[2] Appellant's principal contention on this branch of the case is that the acquisition by plaintiffs of the name "Mary Elizabeth Tea Room" conveyed nothing, as the right to an exclusive use of a name is postulated on the user of the name in connection with some business, and that since plaintiffs did not purchase the business from Harris and wife, nor continue its use, but only purchased the name, that plaintiffs are not entitled to the relief sought. We do not understand that such is the law. It should be borne in mind that in this particular phase of the case we are not dealing with the question of "unfair competition," but with property rights. If plaintiffs were seeking the injunction upon the single theory that it was a case of unfair competition, appellant's point might be well taken.

There is nothing in the Code sections above quoted, we think, to justify appellant's contention in this respect, and certainly we are not allowed to enlarge upon the provisions of the statute. The principle that an assignee of a trade-name, who does not purchase or continue the business, may be protected by an injunction under the provisions of said Code sections above quoted, seems to be recognized in Spieker v. Lash, supra.

Appellant's final contention, to the effect that plaintiffs have no right to an injunction, because it does not appear that they have suffered irreparable injury or damage, is also, we think, without merit. Dealing with the question as we have, from the standpoint of the invasion of property rights, it was a proper case for injunction. Regis v. Jaynes, 185 Mass. 458, 70 N. E. 480, cited with approval in Modesto Creamery v. Stanislaus Co., 168 Cal. 289, 142 Pac. 845. Holding, as we do, that the preliminary injunction was properly issued, under the theory that plaintiff's property rights have been invaded it is unnecessary to discuss the question of "unfair competition."

The order appealed from is affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The application for an order that the above-entitled cause be heard and determined by this court after judgment by the District Court of Appeal is denied. In so doing we do not at this time either approve or disapprove that portion of the opinion which holds that a registered trade-mark or trade-name can be lawfully transferred, so as to separate it from the business or commodity to which it pertains. That holding was not necessary to the decision, because the order appealed from is sufficiently supported by the showing made in the trial court in support of the claim of unfair competition.

LENNON, WASTE, LAWLOR, JJ., and MYERS, Justice pro tem., concur.

58 Cal. App. 509

## GRIFFEY et al. v. PACIFIC ELECTRIC RY. CO. (Civ. 3853.)

(District Court of Appeal, Second District, Division 2, California. July 11, 1922. Hearing Denied by Supreme Court Sept. 7, 1922.)

**1. Appeal and error ⊜874(5)—Authority to change judgment not reviewable on appeal from grant of new trial.**

Right of court, on defendant's motion to vacate joint judgment for plaintiffs and enter judgment for each of different amounts, aggregating the amount of the first, cannot be considered on appeal from order granting new trial for excessive damages, any more than it could have been considered on the motion.

**2. New trial ⊜163(2)—Judgment falls on granting of new trial.**

Whatever judgment is legally in force prior to order for new trial falls with the order.

**3. Appeal and error ⊜933(4)—Relative to presumption, statement in order that new trial was granted for excessive damages tantamount to specification of insufficiency of evidence.**

Statement in order for new trial, that it is made on the ground of "excessive damages," is tantamount to specification that it is granted on insufficiency of the evidence to sustain the verdict, obviating the presumption, otherwise obtaining on appeal, under Code Civ. Proc. § 657, as amended by St. 1919, p. 141, that the order was not based on that ground.

**4. Death ⊜97—Award of damages not exempt from interference by trial judge.**

Provision of Code Civ Proc. § 377, that, in action for death by wrongful act, "such damages may be given as under all the circumstances of the case may be just," does not make amount of award exclusively a matter for the jury, with which the trial judge may not interfere.

**5. Appeal and error ⊜979(5)—Grant of new trial for excessive damages disturbed only for plain abuse of discretion.**

Order granting new trial on the ground of excessive damages will be disturbed only in case it clearly appears that the trial judge abused his discretion; every intendment being indulged in support of his action.

**6. Appeal and error ⊜1015(3)—Weight of uncontradicted evidence of damages for trial judge on motion for new trial.**

Though there be no conflict in the evidence as to the nature and extent of plaintiffs' pecuniary losses from deceased's death, the probative force and effect is ultimately for the trial judge's determination on motion for new trial.

**7. Appeal and error ⊜837(7)—Answers to special interrogatories looked to in determining how verdict was arrived at.**

Though, in action for death of an adult by wrongful act, Code Civ. Proc. § 377, gives the heirs a single joint cause of action, and the verdict, if against defendant, should be for a single lump sum, the jurors' answers to special interrogatories may be looked to, in order to determine how they arrived at the amount of their general verdict.

**8. Death ⊜85—Damages limited to pecuniary loss to beneficiaries.**

The damages recoverable under Code Civ. Proc. § 377, for wrongful death, are limited strictly to pecuniary loss to the beneficiaries caused by the death.

**9. Death ⊜58(2)—Evidence of competency and disposition of deceased adult child to aid parents necessary.**

To show damages to a parent from death of an adult child, by way of deprivation of direct financial assistance or services, there must be at least some evidence tending to show competency and disposition of the child to render service to, or contribute to the aid of, the parent.

**10. Death ⊜95(3)—Expectancy of life of parent considered in fixing damages for death of adult child.**

In estimating, as an element of a parent's damages from wrongful death of an adult child, the present value of financial assistance or service which could reasonably have been expected, the life expectancy of the parent, and not of the child, is to be considered.

**11. Death ⊜86(1)—Accommodations furnished by parent considered in estimating damages from death of adult child.**

In estimating the pecuniary value to a parent of services of an adult child as an element of damages from the child's wrongful death, the value of board, lodging, and other accommodations furnished to the child by the parent, with whom the child was living, is to be considered.

**12. Death ⊜88—Only "pecuniary" value of deceased's society recoverable as damages.**

It is only the "pecuniary" value of deceased's society, comfort, and protection which his beneficiaries can recover as an element of damages for his wrongful death.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Pecuniary.]

**13. New trial ⊜76(4)—No abuse of discretion shown in grant for excessive damages.**

Evidence in action by husband, father, and mother for wrongful death of adult woman *held* to show no abuse of discretion in granting a new trial on the ground of excessive damages.

**14. New trial ⊜76(4)—Properly granted in death action, where loss of any heir is assessed too high.**

The heirs having but a single joint cause of action for wrongful death, and the verdict being required to be for a single lump sum, it is properly set aside and new trial granted, where it appears from answers to special interrogatories that an excessive award was made in assessing loss of any of the beneficiaries.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Roy B. Griffey and others against the Pacific Electric Railway Company. From an order granting defendant a new trial, plaintiffs appeal. Affirmed.

Cooper, Collings & Shreve, of Los Angeles, for appellants.

Frank Karr, R. C. Gortner, and W. R. Millar, all of Los Angeles, for respondent.

FINLAYSON, P. J. This is an appeal from an order granting defendant a new trial in an action wherein plaintiffs, as the heirs of Gladys Rhodes Griffey, a married woman, sue defendant, under section 377 of the Code of Civil Procedure, to recover damages for the death of Mrs. Griffey, alleged to have been caused by the negligence of defendant. The plaintiff Roy Griffey is the surviving husband, and the plaintiffs Fred Rhodes and Margaret Rhodes are, respectively, the father and mother, of the deceased. The jury returned a general verdict in favor of plaintiffs for the sum of $10,000, and likewise made answer to certain special interrogatories which had been submitted to them. The questions submitted and the jury's answers thereto were as follows:

"(1) Q. How much pecuniary damage, if any, do you find that Roy B. Griffey suffered by reason of the death of his wife? A. One thousand [dollars].

"(2) Q. How much pecuniary damage, if any, do you find that Fred Rhodes suffered by reason of the death of the deceased? A. Eight thousand [dollars].

"(3) Q. How much pecuniary damage, if any, do you find that Margaret Rhodes suffered by reason of the death of the deceased? A. One thousand [dollars]."

On the same day that the general verdict was rendered and the answers to the special questions were returned, the clerk entered a judgment against defendant for $10,000. This judgment made mention of the general verdict only. Within 24 hours after the rendition of the verdict, the trial court, on defendant's motion, vacated that judgment and entered a judgment against defendant which, after reciting the general verdict, the special interrogatories, and the jury's answers thereto, adjudged that the husband of the deceased, Roy B. Griffey, recover of defendant the sum of $1,000, that the father, Fred Rhodes, recover the sum of $8,000, and that the mother, Margaret Rhodes, recover of defendant the sum of $1,000. Thereafter, and in due time, defendant moved for a new trial upon all of the statutory grounds. The order granting the motion states that it is granted "on the ground of excessive damages."

[1, 2] It is objected that the court had no authority to set aside the first and direct the entry of the second judgment. Whether the court possessed the right to vacate the first judgment and cause the second to be entered was not a question which could be agitated on the motion for a new trial, and it is not a matter which can be considered on this appeal from the order granting the new trial. Whichever judgment was legally in force prior to the time when the new trial was ordered fell with the granting of the new trial.

[3] Because the order granting a new trial did not state in so many words that it was granted upon the ground of the insufficiency of the evidence to sustain the verdict, it is claimed that it must be presumed, on this appeal, that the evidence was sufficient to sustain the verdict for the full amount thereof—$10,000. This claim is based upon that provision of section 657 of the Code of Civil Procedure which, since the amendment of 1919 (St. 1919, p. 141), reads:

"When a new trial is granted upon the ground of insufficiency of the evidence to sustain the verdict, the order shall so specify; otherwise, on appeal from such order, it will be presumed that the order was not based upon that ground."

By subdivision 5 of section 657, "excessive damages, appearing to have been given under the influence of passion or prejudice," is made one of the grounds for a new trial, and by subdivision 6 "insufficiency of the evidence to justify the verdict" is made another ground for a new trial. An order granting a new trial on the ground of "excessive damages" necessarily is made under one or the other of these two subdivisions. Whether the order in the instant case was made under subdivision 6—that is, whether it was made on the ground that, irrespective of the influence of any passion or prejudice, the evidence fails to show that the pecuniary loss suffered by plaintiffs amounted to $10,000—or whether it was made under subdivision 5 on the ground that the verdict was influenced by passion and prejudice, in either case the statement in the order that it is made on the ground of "excessive damages" is tantamount to a specification that the new trial was granted on the ground of the insufficiency of the evidence to sustain a verdict for $10,000. If a new trial on the ground of "excessive damages" be granted under the sixth subdivision, it necessarily is granted on the ground of the insufficiency of the evidence to sustain a verdict for the amount awarded by the jury. If it be granted under the fifth subdivision, it is equally true that it is granted on the ground of the insufficiency of the evidence to sustain a verdict for an amount as great as that returned by the jury; for, as our Supreme Court has pointed out, to say that a verdict has been influenced by passion or prejudice is but another way of saying that it exceeds any amount justified by the evidence. Doolin v.

Omnibus Cable Co., 125 Cal. 144, 57 Pac. 774; Graybill v. De Young, 140 Cal. 327, 73 Pac. 1067; Zibbell v. Southern Pacific Co., 160 Cal. 254, 116 Pac. 513. See, also, Meinberg v. Jordan, 29 Cal. App. 762, 157 Pac. 1005, 1007. For these reasons there is no merit in the claim that on this appeal we are precluded from determining whether the trial court abused its discretion in granting a new trial on the ground that the damages are excessive.

[4] Because it is declared by section 377 that, in actions of this character, "such damages may be given as under all the circumstances of the case may be just," it is claimed that the amount of the award is exclusively a matter for the jury, with which the trial judge may not interfere. There is not even the faintest semblance of merit in this point. There is no reason to believe that the Legislature intended to place cases of this character in a special class with respect to the right of the trial court to grant a new trial upon any of the grounds enumerated in section 657 of the Code of Civil Procedure. The right of the trial judge to grant a new trial in this class of cases when he deems the damages awarded by the jury to be excessive has received the sanction of our Supreme Court in a number of cases. See, for example, Harrison v. Sutter Street Ry. Co., 116 Cal. 156, 47 Pac. 1019. In Bond v. United Railroads, 159 Cal. 285, 113 Pac. 372, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50—an action by a mother to recover damages for the death of her son alleged to have been caused by the negligence of the defendant—Mr. Justice Shaw, speaking for the court, says:

"With regard to the danger of excessive verdicts, * * * we can only say that the remedy is practically committed entirely to the judge who presides at the trial in the court below. If he does his duty, he will carefully weigh the evidence himself, and will not allow a verdict to stand for its full amount, if he believes it gives more damages than the pecuniary loss that it may be reasonably supposed the plaintiff will actually suffer by being deprived of the services, earnings, society, comfort, and protection of the child. * * * Juries should be insistently cautioned not to allow compensation for the sorrow and distress which always ensues from such a death, nor for a pecuniary loss which is remote or conjectural in the particular case. The trial court should be vigilant to set aside verdicts where there is reason to believe this has been done, or that passion, prejudice, or sympathy has influenced the jury to give more than the facts reasonably warrant."

[5, 6] For the foregoing reasons, the order granting a new trial must be affirmed unless we can say that the trial court abused its discretion. When the action of a trial judge in granting a new trial on the ground of excessive damages comes before an appellate court, the order will not be reversed, unless it plainly appears that the trial judge abused his discretion. Every intendment is to be indulged here in support of his action, and it will not be disturbed if the question of its propriety is open to debate. Doolin v. Omnibus Cable Co., supra; Harrison v. Sutter Street Ry. Co., supra. And even though there be no conflict in the evidence as to the nature and extent of the pecuniary losses suffered by the plaintiffs, nevertheless the probative force and effect of the evidence upon that phase of the case is ultimately for the determination of the judge of the trial court upon the hearing of the motion for a new trial. Meinberg v. Jordan, supra.

[7] That the evidence in this case warranted the court in granting a new trial is clearly apparent. We know from the answers to the special interrogatories that the jury assessed the father's pecuniary loss at $8,000, the mother's at $1,000, and the husband's at $1,000. It is true that in this class of cases the Code gives to the heirs a single joint cause of action, and that the verdict, if against the defendant, should be for a single lump sum (Robinson v. Western States Gas Co., 184 Cal. 401, 194 Pac. 39); but this is no reason why we may not look to the jurors' answers to the special interrogatories in order to determine how they arrived at a total of $10,000.

Nowhere in the record can we find anything to warrant the conclusion that the father suffered a pecuniary loss of $8,000, or that the mother's actual loss was as great as $1,000. The sole evidence bearing upon the matters which were proper subjects for consideration in estimating the pecuniary damages resulting to plaintiffs from the death of Mrs. Griffey was the evidence given by the father, the plaintiff Fred Rhodes, whose testimony in that regard, stated in narrative form, is substantially as follows:

I am 58 years old. I have lived in Los Angeles county a year. I did not do any business here until last February, when I went into a variety store on American avenue in Long Beach. Gladys Rhodes Griffey was my daughter. She was married to the plaintiff Roy B. Griffey. My wife, the plaintiff Margaret Rhodes, and I separated about 15 years ago. At the time of the accident my daughter was living with me. Her husband was a salesman for the Cadillac automobile people. My daughter was 24 years old at that time. She had been married 4 years. She had no children. She was not employed at the time of the accident. She was keeping house for me. Her husband, who was the agent for the Cadillac automobile at Santa Ana, was always at my house in Long Beach on Sundays. He came to the house for Saturday night and Sunday. Except that she kept house for me, my daughter had never worked. Oh, yes; she did some moving picture work once at a studio, but she did not work there regularly; they called her at times. She had a friend that had a studio, and that friend called her occasionally, and she would go over and appear in pictures and then

come back. It was not steady. She didn't depend upon that at all. It was more a fancy, I guess, than anything else. It was just a notion. She was not earning any money. She was the only housekeeper I had. I depended on her, and her husband was there with us when he was at home. I did not pay her anything for keeping house for me, and she paid no board. Her only heirs are myself, her mother, and her husband. At the time of the accident my daughter's health was perfect. She had never been sick in her life, and was perfectly strong, healthy, and normal.

[8] The general rule in this class of cases is that the damages must be limited strictly to the pecuniary loss to the beneficiaries caused by the wrongful death. Bond v. United Railroads, supra, 159 Cal. 279, 113 Pac. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50. Since the amount recoverable is the pecuniary loss sustained by the beneficiaries of the statute, and since the elements which go to make up the value of a decedent's life to the designated beneficiaries are necessarily personal in each case, in the very nature of things the assessment of damages does not admit of mathematical precision, but is left to the sound discretion of the jury, which, however, is subject to the supervisory power of the court, and must be exercised in accord with the rules established for the assessment of damages in cases of this character.

The rules applicable to the instant case may be formulated substantially as follows: No damages can be given for the pain or anguish suffered by the person who is killed; the damages, as we have stated, being limited to the pecuniary loss suffered by the person or persons for whose benefit the right of action is given by reason of the death of the victim. Bond v. United Railroads, supra, 159 Cal. 277, 113 Pac. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50. This pecuniary loss may be a loss arising from a deprivation of something to which the statutory beneficiary would have been legally entitled if the person had lived, or it may be a pecuniary loss arising from the deprivation of something which, from all the circumstances of the particular case, it could reasonably be expected such beneficiary would have received from the deceased had his life not been taken—even though the obligation resting on the deceased to bestow such benefit may have been but a moral obligation. Sneed v. Marysville Gas., etc., Co., 149 Cal. 710, 87 Pac. 376; Bond v. United Railroads, supra. Thus, there might be a reasonable expectation that, if the life of a deceased had continued, he might have accumulated a greater estate, and that the increased estate would have been inherited by the statutory beneficiaries as his heirs; or there might be a reasonable expectation that, if the life of a deceased had not been taken, the statutory beneficiaries, or some of them, would have continued to receive from the one who was killed financial assistance, or services having a financial value. These are illustrations of direct financial benefits for the loss of which damages may be awarded. In addition to the direct financial benefits which heirs may reasonably expect to receive from the continuance of the life of the deceased, there is that less tangible, and not so immediate, but nevertheless real, pecuniary benefit which often may reasonably be expected from a continuance of the "society, comfort, and protection" of the deceased. Of the principles by which the jury is to be guided in determining the damages due to the pecuniary loss arising from the deprivation of the "society, comfort, and protection" of a deceased, we shall speak presently.

[9] There is a distinction between the injuries resulting to a parent from the death of a minor child and those resulting from the death of an adult child. In the case of the former the law gives to the parent the right to the child's services and the proceeds of his labor; and the probability that the minor would remain in the service of the parent during minority, or would have permitted the parent to have the proceeds of his labor, is said to be unimportant. But this rule does not apply in the case of injuries resulting from the death of an adult child, to whose services the parent has no legal right. In a suit to recover damages occasioned by the death of an adult child the plaintiff should show that there was a reasonable expectation that the parent would receive a benefit had the life of such child continued; and in the absence of a legal right to his services, such reasonable expectation of benefit to be received by the parent would depend upon the ability and will of the adult child to confer the benefit upon the parent. Winnt v. International, etc., R. Co., 74 Tex. 32, 11 S. W. 907, 5 L. R. A. 172. In Calumet, etc., M. Co. v. Gardner, 21 Ariz. 206, 187 Pac. 563, the court says:

"The measure of damages, where the child is an adult, as here, is the reasonable expectation of the parent of pecuniary benefit from the continuance of the life of the child. Dooley v. Seaboard Air Line Ry. Co., 163 N. C. 454, L. R. A. 1916E, 185, and note. * * * The expectation must be based upon some fact or facts aside from the relationship. When a child becomes of age, all his earnings and accumulations are his to use as he sees fit. The laws of this state do not require an adult child to contribute his services or his earnings to his parents' support."

See, also, Fordyce v. McCants, 51 Ark. 509, 11 S. W. 694, 4 L. R. A. 296, 14 Am. St. Rep. 69; Hines v. Nicols (Ind. App.) 130 N. E. 140, and 17 C. J. title "Death," par. 202.

And while it may not always be necessary to show that the adult child, after coming of age, had ever done anything for his parent, since the reasonable expectation may exist, even though the parent, not being in

need, had never received anything from the child after the latter had reached majority (Dooley v. Seaboard Air Line Ry. Co., 163 N. C. 454, 79 S. E. 970, L. R. A. 1916E, 185), nevertheless, to entitle the parent to recover for the death of an adult child, there must be some evidence showing, to a reasonable certainty, a pecuniary loss, and, with some reasonable probability, the amount thereof; that is, there must be evidence showing the competency and disposition of the adult child to respond to the parent's needs. Fordyce v. McCants, supra; Andrezejewski v. Northwestern Fuel Co., 158 Wis. 170, 148 N. W. 37. The rule that there must be some evidence tending to show the competency and the disposition on the part of the child, after reaching his majority to render service to the parent or to contribute to his aid, is generally satisfied by a showing that the deceased child, after having reached his majority, had been accustomed to aid his parent by the rendition of valuable services, performed in recognition of a filial duty and not under contract, or by the contribution of money, or its equivalent, toward the support of his parent. McCord v. Schaff, 279 Mo. 558, 216 S. W. 320; Fordyce v. McCants, supra; Chicago, etc., R. Co. v. Vester, 47 Ind. App. 141, 93 N. E. 1039. See, also, L. R. A. 1916E, 197, 198, note to Dooley v. Seaboard Air Line Ry Co., supra; 17 C. J. 1331; and Parsons v. Easton, 184 Cal. 770, 195 Pac. 419.

[10, 11] Though one of the elements of damage which may be suffered by the parent of an adult child is the present value of such future financial assistance as the parent might reasonably expect from a continuance of the child's life, or the present value of such future services as the parent could reasonably expect to have received, had the child lived, still, in estimating the amount of such damages, it is the expectancy of life of the parent, not the life of the child, which is to be taken into consideration; for, as is usually the case, the child's expectancy of life exceeds that of the parent. Fordyce v. McCants, supra. See, also, Parsons v. Easton, supra. And in estimating the pecuniary value to the parent of the services of an adult child, the jury should take into account the value of any board and lodging or other accommodations which the parent may be furnishing to the adult child, if the latter is living with his parent.

[12] Besides the pecuniary loss arising from the deprivation of direct financial assistance or from the deprivation of services, there may be, as we have said, a pecuniary loss arising from the deprivation of the "society, comfort, and protection" of the decedent. Beeson v. Green Mountain Co., 57 Cal. 38; Parsons v. Easton, supra. But while loss of society, comfort, and protection may be an element of the injury sustained by the statutory beneficiaries, it is only the pecuniary, and not the sentimental, value of such loss which may be taken into consideration in the assessment of damages. Nothing can be recovered as a solatium for wounded feelings. If the society of the deceased was of no financial value to the statutory beneficiaries, no damages can be awarded for its loss. Dickinson v. Southern Pacific Co., 172 Cal. 730, 731, 158 Pac. 183. In Wales v. Pacific Electric M. Co., 130 Cal. 523, 62 Pac. 933, the court, holding that damages may not be awarded for the mere loss of society not involving some element of actual pecuniary loss, employed this language:

"We have been cited to no case where the law says 'damages may be awarded for the loss of society.' As we read and understand the law, it says directly to the contrary. It is essentially and alone pecuniary loss to the parent which he may recover in damages for the death of his child."

What is meant by the "pecuniary" value of the society, comfort, and protection which may be lost through the untimely death of a spouse, parent, or child is fairly indicated by what was said in the Beeson Case, where the court employed this language:

"The loss of a kind husband may be a considerable pecuniary loss to a wife; she loses his *advice and assistance* in many matters of domestic economy." 57 Cal. 38. (Italics ours.)

See, also, Parsons v. Easton, supra, 184 Cal. 774, 195 Pac. 419.

[13] Without doubt, the evidence in this case, if tested by the foregoing rules, shows that there was no abuse of discretion in granting a new trial on the ground of excessive damages. There is no evidence that the father had any reasonable expectation of direct financial benefit from a continuance of his daughter's life. In the first place, there is no evidence that the daughter possessed any property or that there was any reasonable probability that she ever would acquire any property. Nor is there any evidence from which it might be inferred that the father would probably have outlived his daughter, if she had not been killed in the accident. On the contrary, the probability is that the daughter, who was strong and healthy and 34 years younger than her father, would have outlived him, but for the fatal accident. There is no evidence, therefore, to justify a reasonable expectation that, if the life of the deceased had continued, any pecuniary advantage would have accrued to the father, or, for that matter, to any of these plaintiffs, as an heir or possible legatee or devisee of the deceased. In the second place, there is no evidence to warrant a reasonable expectation that, if the life of the deceased had continued, she would have bestowed upon her father, or upon any of these plaintiffs, at any time during the remainder of her life, any direct financial assistance in the way of gifts of money or prop-

erty. She was not earning any money, and there is nothing to show that there was any probability that she ever would be a wage-earner or the recipient of an income. Nor is there any evidence that she ever was accustomed to giving money or making presents to any of her family.

The only other possible source of direct financial benefit that the father might reasonably have expected from a continuance of his daughter's life lies in the fact that she kept house for him. But the evidence upon this phase of the case is so extremely fragmentary that it affords no substantial basis for the proper estimate of the pecuniary value of the daughter's services as a housekeeper. There is no showing as to the size of the house of which she took care. So far as the evidence discloses, the house may have contained few or many rooms. There is nothing to show how much of her time the daughter gave to her household duties. It does not appear whether she cooked all or any of her father's meals. No showing was made respecting the contemplated duration of the arrangement. The deceased, as a married woman, was in duty bound to follow her husband to any reasonable fit abode which he might select. Mayhap the arrangement to which the father testified was but temporary. For aught that appears to the contrary, the deceased and her husband may have contemplated a change of residence. In these matters the jury may not be permitted to roam the field of fancy, and draw upon their imagination for facts not disclosed by the evidence. The several elements of damage, where they exist, must be based on facts furnished by the evidence, and not upon surmise and conjecture. Moreover, the food and lodging which the father furnished his daughter during all of the time that she was in his house, together with the food and lodging which was furnished the husband during a part of that time, had some financial value. For aught that appears to the contrary, what the daughter received from the father in the way of food and other accommodations may have equaled or exceeded in value all that she rendered in return in the way of housekeeping. It is quite possible that it might have been more profitable for the father, viewing the situation from a purely financial standpoint, to have hired an experienced professional housekeeper. These considerations will suffice to disclose how far short the evidence falls of showing that the father's expectation of a benefit from his daughter's services was worth anything like $8,000.

Unless, therefore, the daughter's society had a very considerable pecuniary value for the father, the award of $8,000 was grossly excessive. It is true that in estimating the damage which a surviving spouse, parent, or child may have sustained by being deprived of the society, comfort, and protection of the deceased, some latitude must be allowed to the discretion of the jury; for it is not possible to measure in exact terms of money the damage resulting from a loss of that character. But it must never be forgotten that, in fixing the amount, the jury is always bound by the fundamental rule that the pecuniary value of the society, comfort, and protection is the limit of recovery for a loss of that character, and the amount allowed therefor must have some reasonable relation to the pecuniary value shown by the evidence. In this case the father doubtless dearly loved his daughter; but—

> "It is pecuniary loss only, and not the loss of an object of love and affection, that the law recognizes as ground for allowing damages to the heirs of one whose death has been caused by the negligence of a third person." Parsons v. Easton, supra.

The evidence before us does not disclose any circumstance indicating that the society and comfort of this married daughter was of any pecuniary advantage to the father, or that there was any reasonable probability that it would be pecuniarily valuable in the future. There is nothing to show that by reason of superior business ability, or because of life's experiences, this young woman had become qualified to give her father valuable business advice or assistance. In short, there is nothing to show that the daughter's society had for the father any particular financial value. Eliminating, as we must, any consideration of the grief and mental suffering occasioned to the father by his daughter's death, it is impossible to conceive how the loss of the society and comfort of the deceased could have had for the father any appreciable money value.

The evidence is likewise lacking in definite substance with respect to the sum which the jury assessed in favor of the mother. We are utterly unable to perceive upon what theory it was supposed that the mother suffered a loss of $1,000. There is no evidence that her daughter ever gave her any sums of money. There is nothing to show that the mother ever received, or that she had any reasonable expectation of ever receiving, any financial aid or personal services from the daughter subsequently to the latter's marriage. And though the deprivation of society, comfort, and protection is an element of loss, it is, as stated, an element of damage only when it has a pecuniary value. Here the mother and father had lived apart for 15 years, and the daughter, at the date of her death, was living in the father's house. Upon what theory, then, can it be said that in the daughter's death the mother suffered a deprivation of society, comfort, and protection having for her a pecuniary, as distinguished from a sentimental, value? We can perceive none whatever.

[14] It is not necessary to determine the reasonableness of the amount which the an-

swers to the special interrogatories show was intended to be awarded to the husband —$1,000. Since a verdict against the defendant in this class of cases must be for a single lump sum, the heirs having but a single joint cause of action (Robinson v. Western States Gas. Co., supra), the verdict should be set aside, and a new trial granted, whenever it can be seen from answers to special interrogatories that the jury has made an excessive award of damages in their assessment of the loss sustained by any one or more of the statutory beneficiaries.

The order granting a new trial is affirmed.

We concur: WORKS, J.; CRAIG, J.

---

58 Cal. App. 347

## CHARLES NELSON CO. v. PACIFIC WHARF & STORAGE CO. et al.

(Civ. 3848.)

(District Court of Appeal, Second District, Division 2, California. June 29, 1922. Hearing Denied by Supreme Court Aug. 28, 1922.)

**1. Negligence ⟸134(2)—Direct evidence not required.**

Direct and positive evidence of negligence is not required, but circumstances from which it reasonably may be inferred will suffice.

**2. Appeal and error ⟸1011(1)—When evidence conflicting, question of negligence as proximate cause held for trial court.**

When the evidence of negligence as a fact is conflicting, or where it consists of circumstances from which inferences may be drawn for or against the alleged negligence, it is the province of the trial court to determine whether the evidence establishes negligence as the direct and proximate cause of the loss.

**3. Warehousemen ⟸34(7)—Evidence held to establish negligence of wharfinger as proximate cause of fire.**

Evidence that engineer of wharfinger operated mechanism of an oil-burning engine in such manner that oil in fuel tank overflowed and ignited, setting fire to wharf and burning plaintiff's lumber, deposited thereon, was sufficient to warrant finding that negligence of wharfinger was proximate cause of fire.

**4. Warehousemen ⟸34(7)—Evidence held to establish assumption of liability by wharfinger for loss of lumber deposited, except as attributable to striking longshoremen.**

In an action by a lumber company against a wharfinger for the destruction by fire of lumber rough piled on its wharves, evidence *held* sufficient to sustain finding that defendant assumed liability for loss, except that which might be directly attributable to striking longshoremen.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by the Charles Nelson Company against the Pacific Wharf & Storage Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

W. N. Goodwin and Goodwin & Morgrage, all of Los Angeles, for appellants.

Turner & Grainger, of Los Angeles, and Hahn & Hahn, of Pasadena, for respondent.

FINLAYSON, P. J. Defendants appeal from a judgment in favor of the plaintiff in an action to recover damages for the destruction of certain lumber, the property of plaintiff, which had been stored on the wharf of the defendant Pacific Wharf & Storage Company, a corporation, and was destroyed by fire, caused, it is alleged, by the negligence of the Pacific Wharf & Storage Company, hereafter referred to simply as the "defendant" or as the "appellant." With the exception of the defendant E. A. Mills, the defendants and appellants other than the Pacific Wharf & Storage Company are the holders of stock in that corporation, and as such are sued upon their stockholder's statutory liability. Mills is not a stockholder, judgment was rendered in his favor, and he is not a party aggrieved. As it is admitted that the defendant stockholders are properly chargeable with their respective proportions of plaintiff's claim for damages, if the defendant corporation is liable, we shall treat the case as though the Pacific Wharf & Storage Company were the sole defendant and appellant.

Defendant, a wharfinger, owns a wharf at East San Pedro—Port Los Angeles. On August 11, 1916, certain lumber, the property of plaintiff, shipped from Oregon, was unloaded from the steamer Daisy Gadsby at East San Pedro and delivered to defendant at the latter's wharf. The lumber had been consigned by plaintiff to a consignee at Miami, Ariz., and was to be forwarded by rail to that consignee by defendant. Through its inability to get the necessary cars, defendant permitted the lumber to remain rough piled on its wharf until it was consumed by fire on August 18, 1916. On the day of the fire defendant, through its employee, an experienced engineer, was operating a traveling crane, which was used by it to handle the lumber and other material piled on its wharf. The crane and the engine which operated it rested upon and were fastened to an ordinary railroad flat car of standard gauge, thus permitting the crane to be run to any spot on defendant's wharf. The engine was operated by steam generated by petroleum, which was conducted by gravity from a fuel tank through a one-inch pipe to an oil burner under the steam boiler. Between the fuel tank and the boiler, which was an upright or vertical boiler, was a space of about 8 inches. The fuel tank was 24 inches wide, 42 inches

deep, and 66 inches long. Its bottom was 36 inches above the floor of the flat car. In the top of the fuel tank was a circular hole 18 inches in diameter, through which the fuel oil was replenished when necessary. Inside the fuel tank, and connected with the boiler, was a steam coil, by means of which the petroleum in the fuel tank could be heated when it was too thick to run readily to the burner. In this steam coil was a cut-off valve, which, when closed, prevented the steam from entering the coil. The only cover for the 18-inch hole in the top of the fuel tank was a loose, flat, circular piece of iron a little larger than the hole. The pipe to the steam coil in the fuel tank passed through this iron covering in such a manner as to act as a hinge on which the cover could be turned from side to side without falling off, thus permitting access to the inside of the tank. Under the boiler of the engine was a fire box 48 inches in diameter, lined with fire brick. Its door, oval-shaped, was 12 inches by 9 inches. The burner in the fire box, at the end of a half-inch pipe which entered the fire box through a small hole in the door, was about 2 feet from the door.

The engineer in charge of the crane—and his is the only testimony upon the subject—testified that just before noon of August 18, 1916, he filled the fuel tank with petroleum from a storage tank on the premises; that he filled the fuel tank to within 6 or 8 inches from its top; that he noticed nothing unusual about the oil; that after filling the fuel tank he ran the crane back upon the wharf and ate his lunch; that he operated the crane for about an hour after lunch without noticing anything unusual; that after operating it for about an hour he discovered a fire on the platform of the flat car, covering a space about a foot square immediately under the fuel tank; that he instantly shut off the steam and the oil that was entering the feed pipe to the fire box, and jumped down onto the wharf; that he then looked up and saw the oil running over the fuel tank; that he saw it coming out of the hole in the top of the fuel tank and running down over the side of that tank to the platform of the crane. The engineer further testified that he could not recall having turned any steam that day into the steam coil in the fuel tank.

Plaintiff alleged, and the court found, that defendant negligently failed to provide and use upon the fuel oil tank suitable, proper, and necessary safety devices; that it negligently and carelessly operated the crane and fuel tank without such safety devices; that it operated the crane and used the fuel tank so negligently and carelessly that the fuel oil flooded out of the 18-inch manhole in the top of the tank and ran down the side thereof onto the floor of the crane near the fire box, where it was ignited, and the flames ran therefrom upon the wharf, which thereby caught fire; and that the fire of the burning wharf, spreading to plaintiff's lumber, burned it, and the destruction of the lumber was the direct result of defendant's negligence.

About the 1st of June, 1916, the stevedores —that is, the men, other than the sailors, who were employed by and worked upon the vessels, unloading the lumber therefrom, but who had nothing to do with the lumber after it was unloaded and placed upon the wharf—went on a strike. There began, at the same time, a strike of the longshoremen; that is, the men who worked upon the dock or wharf as lumber handlers, and attended to the handling and moving of the lumber after it was unloaded from the vessels, and who only worked upon the wharf and not upon the vessels. The longshoremen who handled material for the defendant were its employees. This strike of the longshoremen was called off August 1, 1916, and the men voluntarily returned to work on August 3, 1916. The strike of the stevedores continued for a long time thereafter—until long after the burning of plaintiff's lumber. By reason of the situation created by the strike of these two classes of laborers, defendant, at the beginning of the strike in the early part of June, had a verbal agreement or understanding with each of its customers, including the plaintiff here, whereby it sought to limit its liability as a wharfinger. The exact nature of the verbal agreement between defendant and this plaintiff is sharply disputed; defendant claiming for it a much broader scope than is conceded by the plaintiff or found by the trial court.

As an affirmative defense, defendant set up in an amendment to its answer that the lumber in question was discharged from the vessel and piled on the wharf under an express agreement between it and plaintiff that it was to be so discharged and piled "at the sole risk of plaintiff from loss of said lumber or damage thereto arising from fire or theft resulting from any cause whatsoever, so long as said lumber or any part thereof remained on said wharf." The trial court found that plaintiff did not contract to assume all loss of or damage to the lumber arising from fire resulting from any cause whatever. More specifically, the findings are that defendant's business as a wharfinger was interfered with by the strike of the longshoremen; that about the 1st of June, and while plaintiff was discharging certain lumber from the steamer Mukelteo, defendant informed plaintiff that it was having a strike, and that, owing to its inability to move lumber on account of the longshoremen's strike, it would expect plaintiff to assume any loss by fire or damage to material put on the wharf by plaintiff during that strike; that plaintiff understood, from the

conversation had between its agent and defendant's agent, that defendant was seeking to have plaintiff "assume all such loss or damage as might be caused by the strikers and for only such material as plaintiff might put on said wharf during said last-mentioned strike [the strike of the longshoremen]; and that the fire in question was not caused by any striker or strikers, but solely by the negligence of said defendant." The court further found that plaintiff never contracted or intended to contract to relieve defendant from its own negligence, but had in mind only the danger of loss or injury to lumber which might be caused by the strikers.

Appellant disputes its liability for the destruction of respondent's lumber, claiming that the evidence is insufficient to sustain either the finding that the fire was caused by its negligence, or the finding that respondent did not contract to assume all loss of or damage to the lumber arising from fire resulting from any cause whatsoever during the time that the lumber was on the wharf.

[1, 2] If there is any evidence to warrant the finding of negligence we cannot review it on appeal. Direct and positive evidence of negligence as a fact is not required. Any circumstances which tend to prove it or from which it reasonably may be inferred will suffice. When the evidence of negligence as a fact is conflicting, or when, as here, the evidence consists of circumstances from which inferences may be drawn for or against the alleged negligence, it is the province of the trial court to determine whether the evidence establishes negligence as the direct and proximate cause of the loss. If these principles be applied to the record before us, it will clearly appear that we cannot disturb the trial court's finding of negligence.

One witness, an inspector of oil for the city of Los Angeles and an expert upon the subject of petroleum oils, testified that in his opinion the fact that the petroleum ran out of the 18-inch manhole in the top of the fuel tank was directly attributable to one of three causes. One of the three possible causes given by this expert is that the oil had water in it, and that, being "wet," it was subjected to heat, thus causing it to foam and overflow. The second of these three possible causes is that the oil, though "dry," was heated to such a degree that it expanded and overflowed the space between it and the top of the tank. The third reason assigned by the witness as a possible cause of the fire was that, when the fuel tank was replenished from the storage tank, oil was permitted to run down the sides of the fuel tank.

[3] Of these three causes, the first seems the most probable. The second seems improbable. The engineer, according to his testimony, filled the fuel tank to a level that brought it within not less than 6 inches from the top. If the oil was "dry," and not nearer the top than 6 inches, as the engineer testified, it is not probable that it would expand by the mere application of heat, so as to fill the 6-inch space between the level of the petroleum and the top of the fuel tank. The expert so testified, in effect. Nor is there probability in the third reason assigned by the expert as one of the possible causes of the fire. The engineer was positive that he had not filled the fuel tank; and if any oil had dripped onto that tank from the filling pipe which extended from the storage tank, and been permitted to run down the side of the fuel tank, it probably would not have been ignited by the fire in the fire box, for it would not have been hot enough to generate the necessary combustible gases. Moreover, if that had been the cause of the fire, it probably would have manifested itself long before the expiration of the hour and more which ensued between the time when the engineer replenished the oil in the fuel tank from the storage tank and the time when the fire was discovered on the floor of the flat car. On the other hand, if, as sometimes happens, the oil in the fuel tank was "wet" with a small percentage of water, and the steam from the boiler had been allowed to flow for a considerable length of time into the coil pipe in the fuel tank, the oil ultimately would foam and flow over the 18-inch hole in the top of the tank.

The trial court, therefore, in spite of the fact that the engineer did not recollect having turned the steam into the coil pipe, so as to heat the oil in the fuel tank to make it flow more readily, was justified in inferring, as the most probable conclusion, that the oil in the fuel tank was not "dry," but "wet"; that is, that it carried a slight percentage of water, and that the engineer, thoughtlessly, had turned the steam into the steam coil and had forgotten to turn it off, and that thus there happened just what the expert said would happen under such circumstances, namely, a foaming and an overflowing of the oil in the fuel tank, which, running over and down the sides of that tank and being hot enough to throw off inflammable gases, took fire from the flame in the fire box and so caused the disastrous conflagration. It thus was a reasonable inference that the negligent manner in which the mechanism was operated by appellant's engineer occasioned the fire, and that, therefore the destruction of respondent's lumber was caused by appellant's negligence in the manner alleged in the complaint. For these reasons, our conclusion is that the evidence was sufficient to warrant the finding of negligence.

[4] The evidence was likewise sufficient to justify the finding as to the character and scope of the agreement or understanding respecting respondent's assumption of the risk

of loss by fire. It will be recalled that appellant's answer alleges that the understanding was that respondent was to assume the risk of loss by fire or theft resulting from any cause whatsoever, so long as the lumber was on the wharf, but that the court found that the real understanding was that respondent was to assume the risk of loss by fire or theft caused by the strikers, and only during the continuance of the longshoremen's strike.

If the record supported appellant's claim that the evidence justifies no other finding than one in accord with the allegations of its answer, a reversal of the judgment would be necessary, under the doctrine enunciated in Northwestern Mutual Fire Ass'n v. Pacific Wharf & Storage Co. (Cal. Sup.) 200 Pac. 934. In that case it was held that the general rule is that a depositary or bailee for hire in the course of his ordinary business cannot relieve himself by contract or notice from responding in damages for loss arising from his own negligence or that of his agents or servants; but in the case of a strike, with its attendant disorganization of discipline and system, the depositary, particularly if it be a corporation compelled to act only through its employees, may refuse to accept goods, except on condition of being released from liability for damages traceable to such disorganized conditions. There the trial court had found, in effect, that the wharf company received the lumber only upon the understanding that it would not be responsible for any loss or damage from any cause whatever until the strike was over. In the instant case the trial court has found that the understanding with respect to appellant's liability was much narrower than that which was found in the Northwestern Mutual Fire Association Case; and if in the instant case the court's finding be supported by the evidence, the judgment must be affirmed. That the evidence does suffice to justify the finding is, we think, clearly shown by the record.

Whatever be the understanding which was arrived at by appellant and respondent, it was the result of a conversation between a Mr. Forgie, representing the respondent, and Mr. Mills, representing the appellant. Forgie testified, in part, as follows:

"This whole conversation was with reference to lumber that we were going to discharge during the strike, and the sum and substance of Mr. Mills' conversation was that they [appellant] would not be responsible for loss by fire or damage on any material discharged from the dock during the period of the strike. * * * Q. Was anything said by Mr. Mills as to who he expected might cause a loss to any lumber piled on the wharf? A. He did. It was naturally what he thought, that it would be strikers he was afraid of. Q. Did he in words impress you with that view? A. In substance, yes; that was what he was afraid of, strikers —of any damage that they might cause. * * * The substance of what Mr. Mills said was that he was afraid of the strikers as regards fire or damage of material. * * * We were discussing the strike, and the thing he referred to was the movement of lumber owing to the strike. There was no question about lumber, or anything that was going to happen, other than just the trouble of the strike. Q. Referring to the agreement that was entered into between you and Mr. Mills respecting any lumber that was placed on this wharf by the plaintiff during the period of the strike, what strike was referred to? Do you refer to the men handling the lumber? A. They are called in this port lumber handlers. In every other port I ever heard of they call them longshoremen. The strike ended early in August—about the 1st of August. * * * My understanding was that there were two strikes; there was the stevedores' strike and the lumber handlers' strike. * * * It is my understanding that any one working on the wharves, the term is a longshoreman, and one working aboard a vessel, other than a sailor, is a stevedore. Q. Who employs the stevedores? A. The ship Q. Who employs the longshoremen? A. The wharf company. * * * The Nelson Company had to assume the responsibility of all lumber that was put on the Pacific Wharf & Storage Company's dock owing to the Pacific Wharf & Storage Company being unable to move material, owing to the strike of the men that were in their employ. * * * Q. In other words, you understood from Mr. Mills that it was his intention, or the intention of Pacific Wharf & Storage Company, that the lumber that you rough piled or placed upon that wharf should from that time on be insured by the Nelson Company? A. No; I took it that we had to carry insurance so long as the strike lasted. Q. What I am getting at is what he said, not what you assume. A. I took that from the conversation I had with him. Q. You know the strike lasted there long after the cargo was discharged from the Daisy Gadsby, don't you? A. No; I don't. The strike was over; the strike of the wharfmen was over. * * * Q. With regard to insurance, did you insure for the Charles Nelson Company the lumber unloaded from the Gadsby on defendant's wharf? A. No, sir. Q. Why not? A. Because on account of the strike of the lumber handlers was over, and the occasion for carrying insurance was past. * * * Q. That is your understanding of it? A. My understanding of it. Q. It wasn't anything Mr. Mills said to you not to insure? A. Other than my understanding at the start of the strike."

We think it clear from the foregoing that there was ample justification for the inference that the parties had in mind the danger of loss or injury caused by the strikers, and then only during the strike of appellant's employees—the longshoremen. There was no sharply defined, definite, and explicit verbal agreement between Mills and Forgie. It was from a rather desultory conversation that each received his impression of what the arrangement amounted to, and, since the burden was upon appellant to prove a mutually understood agreement, it follows that, if

there was no meeting of minds—that is, if Forgie did not understand the arrangement as Mills did—there was no agreement, and hence no defense to appellant's negligence. From Forgie's testimony the court was warranted in concluding that his understanding of the arrangement was that appellant was to be relieved from responsibility for such loss only as might be directly attributable to the striking longshoremen.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

---

58 Cal. App. 404

**TAYLOR v. BERNHEIM et al. (Civ. 4093.)**

(District Court of Appeal, First District, Division 1, California. July 1, 1922. Hearing Denied by Supreme Court Aug. 28, 1922.)

**1. Replevin ⊜72—Evidence held to establish ownership of automobile.**

In an action in claim and delivery, evidence that an automobile was purchased by a son for his father, the total purchase money being furnished by the father, the bill of sale executed to him, and the license ultimately transferred in his name, sufficiently established the father's ownership thereof.

**2. Fraudulent conveyances ⊜37—Use of automobile with consent of owner does not affect title.**

Where an automobile was purchased by a son for his father, the total price being furnished by the father, the bill of sale executed to him, and the license transferred in his name, its use by the son in no way tended to destroy the father's title, under Civ. Code, § 3440.

**3. Records ⊜9½, New, vol. 12A Key-No. Series—Transfer of automobile to plaintiff prior to action established ownership and right to maintain action.**

In an action in claim and delivery for an automobile, the required certificate of transfer issued to and signed by plaintiff prior to the commencement of the action, established plaintiff's ownership thereof under Motor Vehicle Act and his consequent legal right to maintain the action, though the license was not transferred until several weeks after purchase.

**4. Replevin ⊜10—Lies against persons constructively in "possession" of property at commencement of action.**

An action of claim and delivery will lie only against the persons who have the possession of the property in dispute at the time of its commencement; but the term "possession" is construed to mean either actual or constructive.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Possession.]

**5. Replevin ⊜10—One liable, if in control of or able to deliver property sought.**

In an action of claim and delivery, if it be shown that the property sought to be recovered is under control of a person, or within his power to deliver it, he is liable, although it may not be in his actual possession.

**6. Replevin ⊜10—Attaching creditor, indemnifying sheriff, held liable for wrongful detention of property.**

Where, in an action in claim and delivery of an automobile, the owner filed a third party claim, and the sheriff holding it under the writ demanded, and plaintiff as attaching creditor furnished, an indemnifying bond, it was always within the power of plaintiff to release the property by so instructing the sheriff, and thus having the ostensible and actual control of the property, he was consequently liable for any damages for its wrongful detention.

**7. Replevin ⊜22—Attaching creditor may be joined with attaching officer as defendant.**

The attaching creditor may be joined with the attaching officer as parties defendant in replevin.

**8. Evidence ⊜260—Held not admissible on theory of fraudulent conspiracy as to ownership of automobile.**

In an action for claim and delivery of an automobile, evidence of statements made as to its alleged ownership by plaintiff's son, not made in the presence of plaintiff, were not admissible on the theory that a fraudulent conspiracy existed between the father and son, because, before declarations of one conspirator may be competent evidence against his confederate, there must be independent proof tending to establish the conspiracy, which cannot be established as to either of the alleged co-conspirators by evidence of declarations of the other.

**9. Evidence ⊜243(7)—Statements made by agent, after termination of agency, as to ownership of automobile purchased under it, held inadmissible.**

In an action in claim and delivery of an automobile, statements made by a son as to its ownership, not made in the presence of his father, for whom he acted as agent in its purchase, were not admissible under the theory of agency, because made after the termination of the agency.

**10. Replevin ⊜76—Reasonable rental value of automobile measure of damages for detention.**

In action for claim and delivery for automobile, the court was authorized to fix the damages for detention on the basis of its reasonable rental value for the period for which plaintiff was deprived of its use.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Verne W. Taylor against J. H. Bernheim and another. From a judgment for plaintiff, defendants appeal. Affirmed.

---

Brownstone & Goodman, of San Francisco, for appellants.

Wm. M. Stafford, of San Francisco, for respondent.

KNIGHT, Justice pro tem. In this action judgment was rendered in favor of plaintiff, Verne W. Taylor, for the possession of an automobile, or for the sum of $1,000, the value thereof, in the event possession could not be had, and for the further sum of $400 damages against the defendant J. H. Bernheim for the wrongful detention of said automobile. The defendant Bernheim has appealed.

There are two persons named Taylor involved in this transaction, the plaintiff, Verne W. Taylor, and his son, Verne J. Taylor, and for convenience they will be hereinafter respectively referred to as Taylor, Sr., and Taylor, Jr. On October 21, 1920, the defendant Bernheim commenced suit against Taylor, Jr., to collect an indebtedness of $1,850, and a writ of attachment was issued and placed in the hands of the defendant Thomas F. Finn, as sheriff, for service. The latter levied the writ upon the automobile in question, which at the time was stored in the name of Taylor, Jr., in a public garage on Geary street, in San Francisco. The next day Taylor, Sr., claiming to be the owner of said automobile, presented to and filed with said sheriff a verified third party claim, in the form required by section 689 of the Code of Civil Procedure. The sheriff thereupon, pursuant to said Code section, exacted from Bernheim a bond indemnifying him against the claim of ownership asserted by Taylor, Sr. The possession of said automobile was thereafter retained by the sheriff, by virtue of said attachment, and on November 30, 1920, Taylor, Sr., commenced this action, to recover said machine, or its value, and damages for its detention. The main issue before the trial court was the one of the ownership of said automobile, that is, whether it belonged to Taylor, Sr., or to his son, Taylor, Jr.

According to the evidence, Taylor, Sr., who was a traveling salesman, was in need of an automobile for use in his business. On account of his absence from San Francisco he was unable to purchase one personally, so he told his son that, if the latter found a suitable machine, to buy it. A few days prior to July 20, 1920, Leon Leboire, the former owner of the car in question, advertised it for sale, and in answer to that advertisement, Taylor, Jr., called upon him for the purpose of examining said car. After some negotiations they came to terms, and Taylor, Jr., so reported to his father. The latter thereupon gave his son $1,400 with which to buy the car, of which $800 was in cash and the balance consisted of a check for $600. That check was produced at the trial. Taylor, Jr., deposited the check in his personal account in the bank, and on July 26, 1920, purchased the car, by delivering to Leboire a certified check, drawn by himself on his personal account for $1,400. At the request of Taylor, Jr., the bill of sale for the car was made out by Leboire to Taylor, Sr. The car was delivered to Taylor, Jr., and remained in his possession, and was used by him, substantially all of the time until it was attached on October 21, 1920. During that period Taylor, Sr., only drove the car on two or three occasions, and then around San Francisco, and at one time drove it on a hunting trip with his son for a period of about 15 days. The automobile license certificate accompanying the car was transferred direct from Leboire to Taylor, Sr., but the transfer was not completed until October 8, 1920.

[1, 2] Upon substantially the foregoing evidence the trial court found that Taylor, Sr., was the owner of said automobile. There are, of course, other circumstances shown by the record, which appellant urged before the trial court, in support of his theory that Taylor, Jr., was the owner of the car in question. But, at best, those circumstances merely raise a conflict, and we therefore deem it unnecessary to relate them here. Appellant now attacks the finding of ownership upon the ground that it is not supported by the evidence. It is obvious, however, we think, that, inasmuch as the trial court placed faith in the credibility of the Taylors, as witnesses, and believed their testimony, their evidence is sufficient in law to support the court's finding. It shows that, while Taylor, Sr., did not personally make the purchase, nevertheless the car was purchased at his request and with his money, and he became the owner thereof. The use of the car by Taylor, Jr., as shown by the evidence, with the consent of his father, tended in no way to destroy the title of Taylor, Sr. If Taylor, Jr., had acquired ownership of the car in the first place, and thereafter transferred the title to his father, then the use of the car thereafter by Taylor, Jr., in the manner and to the extent shown by the evidence, would present a different situation, and would have been sufficient to invoke the provisions of section 3440 of the Civil Code concerning fraudulent transfers. But that is not this case. Here the title to the car never did vest in Taylor, Jr., and, as above stated, title could not vest in him merely by allowing him to drive the car with the permission of the rightful owner.

[3] On this question of plaintiff's ownership, and his consequent legal right to maintain the action, appellant has sought the aid of the Motor Vehicle Act of California (St. 1915, p. 397, as amended by St. 1917, p. 382), upon the ground that the automobile license was not legally transferred to Taylor, Sr., for nearly three months after the purchase. In this respect said Motor Vehicle Act provides

that, until the transferee of an automobile has received a certificate of registration and has written his name upon the face thereof, delivery of said automobile shall be deemed not to have been made, and title thereto shall be deemed not to have been passed, and said intended transfer shall be deemed incomplete, and not to be valid for any purpose. We are of the opinion that this point is not available to appellant for the reason that, while said license was not transferred for several weeks after the purchase, the required certificate of transfer was issued to and signed by plaintiff on October 8, 1920, almost two months prior to the commencement of this action. Plaintiff's title was therefore complete, so far as the Motor Vehicle Law was concerned, at the time of the commencement of this action. In the case of Boles v. Stiles, 35 Cal. App. 721, [1] relied upon by appellant, the required certificate was neither issued by the motor vehicle department nor signed by the new owner at the time of the commencement of the action. The case is therefore not in point.

[4, 5] Appellant further contends that there is no evidence to sustain the judgment against Bernheim for the recovery of the car or for damages, for the reason that it was the sheriff, and not Bernheim, who seized the car and detained it from the possession of plaintiff. We are of the opinion that the point is without merit. It may be conceded that it is the general rule that an action of claim and delivery will lie only against the persons who have the possession of the property in dispute at the time of its commencement. Richards v. Morey, 133 Cal. 437; [2] Home Payment Jewelry Co. v. Smith, 24 Cal. App. 488, 141 Pac. 933. But the term "possession," as used in this class of cases, has been construed to mean either actual or constructive. 34 Cyc. 1396–1400; Eastern Outfitting Co. v. Myers, 39 Cal. App. 316, 180 Pac. 669. And if it be shown that the property sought to be recovered is under the control of a person, or if it be shown that it is within the power of such person to deliver the property, such person is liable, although the property be not in his actual physical possession. This latter rule is recognized in Richards v. Morey, supra, cited, and is relied upon by appellant. It is there said:

"But the finding shows that the property sought to be recovered was not in the possession of the defendant when the action was commenced, *nor within his power to deliver*, and therefore said finding would not have sustained a judgment in favor of the plaintiffs for the delivery. * * *" (Italics are ours.)

[6] In the instant case the evidence shows that the sheriff was acting merely as the agent of appellant, and had no interest in the matter other than as an officer, and that he was holding the property subject to the direction of appellant. Under the provisions of said section 689 of the Code of Civil Procedure, he was not bound to hold the property in the face of the third party claim, unless Bernheim, as the attaching creditor, furnished an indemnifying bond, which he did. Thereafter it was always within the power of appellant to cause the release of the property, if he cared to do so, by giving the sheriff instructions to that effect. It must therefore be held that appellant was in the ostensible and actual control of the property, and consequently is liable for any damages resulting from its unlawful detention.

[7] That the attaching creditor may be joined as a defendant with the attaching officer, in replevin, is not without precedent, for in the earlier decisions of the New York courts such was held to be the law. In Knapp v. Smith et al., 27 N. Y. 277, it was said:

"A point is made that the defendant Smith, who directed Moore, the constable, to make the levy, is not responsible in this form of action, because, as it is argued, he never had the property in his possession. That precise question was decided against the defendant's position in Allen v. Crary, 10 Wend. 349. The defendant in that case had done nothing but to direct the sheriff to levy upon the property replevied, under an execution against a person who was not the owner, and a levy was accordingly made. The court held, that this was a sufficient taking to enable the owner to bring replevin. * * * We therefore follow the case of Allen v. Crary, and hold that the action was properly brought against both defendants."

Under the rules above stated, we are of the opinion that the evidence fully justified the rendition of the judgment against the appellant.

[8] Appellant complains of the ruling of the trial court striking out, as hearsay, on motion of plaintiff, certain declarations claimed to have been made by Taylor, Jr., to one Samuels out of the presence of plaintiff, concerning the trading of an automobile belonging to Taylor, Jr., for the car in question. We are satisfied that the ruling of the trial court was correct. The declarations were not admissible under the theory that a fraudulent conspiracy existed between the two Taylors, as contended by appellant, for the reason that, before declarations of one conspirator may be competent evidence against his confederate, there must be independent proof tending to establish the conspiracy, and such conspiracy itself cannot be proved as to either of the alleged co-conspirators by the evidence of the declarations of the other. Barkly v. Copeland, 86 Cal. 483, 25 Pac. 1, 405. There was no such independent proof here,

[1] For opinion of Supreme Court, see — Cal. —, 204 Pac. 843.
[2] 65 Pac. 886

[9] Neither were the declarations admissible under the theory of agency, for the reason that the agency of Taylor, Jr., ended with the consummation of the purchase of the car, and these declarations were claimed to have been made some time thereafter. Declarations of an agent, with respect to a transaction, made after the completion of the transaction, are not provable against the principal. Such statements are merely hearsay, and, like those of any other person, cannot affect the principal. 1 Rul. Case Law, p. 510. In this respect it is said:

"A rule that would allow an agent, after a transaction is closed, to admit away the rights of his principal, would be too dangerous to be tolerated."

It cannot be successfully contended that the declarations were offered as contradictory statements, or for the purpose of impeachment, because the record plainly shows otherwise. The declarations were offered as affirmative proof; the witness who testified to them being called out of order, prior to the time that Taylor, Jr., became a witness in the case.

[10] The final contention of appellant is that there is no legal evidence in the record upon which the award of damages may be based. We are unable to sustain this contention. The measure of plaintiff's damages was the reasonable rental value of the car for the period during which plaintiff was deprived of its use. Tucker v. Hagerty, 37 Cal. App. 789, 174 Pac. 908. The testimony of Taylor, Sr., shows that, owing to the fact that he was deprived of the use of his own automobile, he was required to hire another one for over three months, for which he was obliged to pay a rental of $60 per week. From the description given in the testimony of the car in question, the court may well have inferred that the rental value of such a car would not be less than the one rented. Therefore the amount of damages awarded plaintiff was well within the limit of the rule. True, plaintiff was allowed to testify over appellant's objection as to the amount of financial loss suffered by him in his business by reason of being deprived of said automobile; but there is not the slightest indication in the record that the court used the amount of such losses, or any part thereof, as the basis for fixing the award of damages. It follows that the admission of such evidence, if error, was harmless.

We are of the opinion that no error has been shown, and therefore the judgment is affirmed

We concur: TYLER, P. J.; KERRIGAN, J.

58 Cal. App. 551

## IMPERIAL VALLEY LONG STAPLE COTTON GROWERS' ASS'N v. DAVIDSON.
## (Civ. 3532.)

(District Court of Appeal, Second District, Division 2, California. July 18, 1922.)

**1. Factors ⟸45—Entitled to reimbursement for necessary expenses and interest on advancements.**

A factor is entitled to reimbursement for necessary expenses in protecting or preserving the property, as for storage, handling, freight, and insurance, and for interest on advancements.

**2. Factors ⟸19—As against charge of conversion by pledging, must show it was not for more than owing by principal.**

Even if a factor has any authority, as between him and the principal, to pledge principal's property, which he did not have at common law, and which Civ. Code, § 2368, subd. 2, denies, he, having pledged it, must, to relieve himself of the charge of conversion, affirmatively show that it was not for more than the principal owed him.

**3. Customs and usages ⟸19(1)—Burden on factor to prove custom or usage, justifying confusion of principal's property with that of others.**

If a factor, mixing or confusing his principal's property with that of others, which as a general rule he has no authority to do, depends on custom or usage to justify it, as against charge of conversion, he must prove the custom or usage as any other fact.

**4. Factors ⟸38—Delegation of authority to independent broker conversion.**

Delegation by a factor of his authority to an independent broker, in contravention of Civ. Code, § 2368, subd. 3, unless authorized by the principal, constitutes a conversion.

**5. Trover and conversion ⟸32(4)—Allegation of conversion held sufficient.**

The affirmative allegation that plaintiff converted defendant's cotton sufficiently presents the issue of conversion, in the absence of special demurrer.

**6. Trial ⟸396(3)—Pleading of conversion and substantial evidence require finding.**

The answer presenting the issue of conversion generally necessitates a finding on any facts concerning which substantial evidence was introduced, which, if believed, would support the allegation of conversion.

**7. Factors ⟸45—Entitled to reimbursement for money properly advanced or expended before conversion.**

Though a factor be guilty of conversion by pledging or confusion of principal's property, or by delegation of authority, he is entitled to reimbursement for money properly advanced or expended before the conversion.

Appeal from Superior Court, Imperial County; Phil. D. Swing, Judge.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action by the Imperial Valley Long Staple Cotton Growers' Association against F. J. Davidson. Judgment for plaintiff, and defendant appeals. Reversed.

James L. Allen, of Santa Ana, and Conkling & Brown, of El Centro, for appellant.

J. S. Larew, of El Centro, and Dan V. Noland, of Los Angeles, for respondent.

CRAIG, J. The defendant, Davidson, delivered to the plaintiff, as a factor, 145 bales of cotton. As a part of the transaction the plaintiff advanced the sum of $18,406 to defendant. The trial court found that, after receiving the cotton, "the plaintiff, Imperial Valley Long Staple Cotton Growers' Association, commingled and mixed the said 145 bales of cotton belonging to the defendant with other cotton, not being the property of the defendant, F. J. Davidson, but being the property of other persons," and that "prior to the shipment of said cotton by plaintiff, for and on behalf of the said defendant, the said plaintiff hypothecated, mortgaged, and pledged the same, to various and divers persons, for various and divers sums and amounts." Thereafter the plaintiff shipped the cotton, confused with that of other persons, to other independent factors in Galveston, Tex., and New Orleans, La., who sold it for a total sum of $18,634.31. It appears that the plaintiff also paid out for freight, storage, insurance, and handling the cotton an amount found by the court to have been $9,078.94, which finding was probably intended to be for $978.94. Interest on the advances accrued in the sum of $381.19. October 10, 1918, plaintiff demanded payment from Davidson of $1,654.82, which was refused. This action was then instituted. The complaint states a cause of action for money advanced by plaintiff as a factor. The court rendered judgment for the plaintiff for $1,654.82, together with interest at the rate of 6 per cent. per annum from October 10, 1918.

[1, 2] A factor has authority to insure (subdivision 1, § 2368, Civ. Code), and he may collect for necessary expenses incurred in protecting or preserving the property as for storage, handling, freight, etc. (25 C. J. 382, 389), and for interest on advancements made over cash received (Heins v. Peine, 29 N. Y. Super. Ct. 420; Howard v. Behn and Foster, 27 Ga. 174). But the answer alleges that the plaintiff converted the merchandise consigned to it. The common-law rule was well settled that the factor has no authority to pledge his principal's goods (Wright v. Solomon, 19 Cal. 64, 79 Am. Dec. 196; Wisp v. Hazard, 66 Cal. 459, 6 Pac. 91); and this was so, even though the factor has a lien for advances (25 C. J. 351; Benny v. Rhodes, 18 Mo. 147, 59 Am. Dec. 293). In Akron Cereal Co. v. First Nat. Bank, 3 Cal. App. 201, 84 Pac. 780, it is said:

"A factor or a mere agent who is in possession of property with power to sell the same has authority to transfer it by way of pledge. Civ. Code, § 2368 (2)."

This language was used in discussing and construing section 2991 of the Civil Code. The case being considered was one in which the contest was between the pledgee and the factor's principal. Section 2368 of the Civil Code was not involved, except as its provisions might supply an element required in order that the defendant might take advantage of section 2991 of the Civil Code. The court held that, in order that the pledgee might claim the benefit of section 2991 of the Civil Code, among other things, it must be shown that the factor's principal had allowed another to assume the apparent ownership of the property in question for the purpose of making any tranfer of it, and that, under section 2368 of the Civil Code, the factor to whom the owner had consigned the goods received such power to sell or transfer them. As between the principal and the factor, the question whether the latter might pledge the goods received by him was not presented, nor was its determination necessary to a decision of the case. The language of section 2368, Civil Code, is not only unambiguous, but is clearly prohibitive against the factor pledging his principal's property. Subdivision 2 of the last-named section, which defines the authority of a factor, reads:

"To sell, on credit, anything intrusted to him for sale, except such things as it is contrary to usage to sell on credit; but not to pledge, mortgage, or barter the same."

Of course, section 2991 has no application in the instant case. It was designed to protect persons who deal with the factor concerning property in his possession. Wisp v. Hazard, supra.

The opinion in Wright v. Solomon makes no reference to the authority of a factor to pledge goods of his principal because of having made advancements. In that case the factor, Darling, had pledged the property for his own debt and without having made any advancements. Darling was not a "technical factor," being engaged in other business as well as that of a factor. The court, after an extended consideration of the matter, overruled certain earlier cases, which limited the application of the rule, that a factor could not pledge, to technical factors, and held that the same principle applies to all factors. It further determined that the authority to pledge might be inferred from acts, and that under certain conditions it must be so inferred; but a careful examination of the case shows that it contains no language even remotely suggesting that a factor might pledge the goods of a principal under any circumstances. This case also holds that the pledge of property is a special transaction not in the usual course of business, and therefore outside of the protection

extended to ordinary transactions of commerce. It is true that in some jurisdictions the factor is allowed this right to the extent of his advancements, but, before exercising it, he must demand from his principal the amount of his charges. Merchants' Nat. Bank of Memphis v. Trenholm, 12 Heisk. (Tenn.) 20. Where, as in the instant case, the factor pledges the goods of his principal, in order to relieve himself from the charge of conversion, he certainly must show affirmatively that the pledge was not for more than the amount that the principal owes. Here there is no finding or proof as to the amount for which the cotton was pledged.

[3] It appears, also, that plaintiff mixed or confused defendant's cotton with that of others and pledged it in a mass along with such other cotton. The general rule is that a factor has no right to do this. 25 C. J. 364. If custom and usage justify such a course, it would be necessary to introduce evidence to prove that fact as any other. This was not done in the instant case.

[4-6] Counsel for appellant contends that the court erred in not finding that the plaintiff delegated its agency as a factor to other brokers. It is claimed that such was the fact, and that such action constituted a conversion. Subdivision 3, § 2368, Civil Code, expressly prohibits the delegations of the factor's authority "to any person in an independent employment." This was the general rule at common law. 25 C. J. 348. However, plaintiff insists that the pleadings as they are framed do not present an issue on this point, and that therefore no finding concerning the delegation of authority was necessary. The answer alleges affirmatively that the plaintiff converted the cotton. Such an allegation sufficiently presents the issue in the absence of special demurrer. Lowe v. Ozmun, 137 Cal. 257, 70 Pac. 87. Hence a finding was necessitated upon any facts concerning which substantial evidence was introduced, and which, if believed by the trial court, would have supported the allegation of conversion. Evidence was presented that the plaintiff delegated its authority to independent brokers. If such evidence had been accepted as true by the trial court, this would have established a conversion. Subdivision 3, § 2368, Civ. Code; 25 C. J. 348. However, the plaintiff alleged in its complaint that the defendant authorized it to sell the cotton as it did. If true, this would relieve it of the charge of conversion; but the court made no finding upon this matter.

[7] We conclude, therefore, that the plaintiff converted the property of the defendant. This being so, the defendant was within his right in setting up that fact as a defense which he did in his answer. The findings do not indicate just what part of the amount for which judgment was rendered was advanced before, and what part after, the conversion took place. The association would be entitled to be reimbursed for money properly advanced or expended prior to the conversion.

Judgment reversed.

We concur: FINLAYSON, P. J.; WORKS, J.

---

(58 Cal. App. 492)

## WHITWORTH v. JONES. (Civ. 3790.)

(District Court of Appeal, Second District, Division 1, California. July 10, 1922. Hearing Denied by Supreme Court Sept. 7, 1922.)

**1. Appeal and error ⇐1012(2)—No right in appellate court to resolve questions as to preponderance of evidence.**

Where, in an action for injury to an automobile at a crossing, there was some evidence of negligence of defendant under Vehicle Act, § 20, as amended by St. 1919, p. 215, § 12, providing that at street intersections an automobile approaching from the right should have the right of way, unless the vehicle approaching from the right is further from the point of intersection than the other, any question as to the weight of evidence will not be reviewed.

**2. Municipal corporations ⇐705(10) — Records ⇐9½, New, vol. 12A Key-No. Series —Party, in whose name automobile registered, not deprived of right to maintain action for injury, though purchased with funds of another.**

Notwithstanding Vehicle Act, § 8, as amended by St. 1917, p. 391, § 7, providing that, until the transferee of an automobile has received the certificate of registration and indorsed it with his name, delivery shall be deemed not to have been made and the intended transfer incomplete, where a son purchased an automobile with his mother's funds, but registered it in his name, and later it was agreed to be the son's property, the son was not deprived of a right of action for its injury because the technical procedure of the statute had not been complied with.

**3. Bailment ⇐21—Bailee may sue for injuries to property by third persons.**

Bailees may sue for damages for injuries to property by third persons.

**4. Evidence ⇐83(1) — Presumed that father indorsed son's application for automobile operator's license.**

Vehicle Act preserves as against a parent liability for negligence of a minor child while operating the parent's automobile, and section 24, as amended by St. 1917, p. 408, § 18, provides that an operator's license shall not be granted to a minor unless his parent shall join in signing the application, and the negligence of the minor shall then be imputed to the person so signing; and where, in an action for injury from an automobile driven by defendant's minor son, the evidence showed that defendant owned the automobile and his son lived with him, under Code Civ. Proc. § 1963, subds. 15, 33, declaring the presumption that official duty had been regularly performed, the trial judge was

warranted in assuming that defendant indorsed his son's application.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by John C. Whitworth against Mack B. Jones. From a judgment for plaintiff, defendant appeals. Affirmed.

David R. Faries and J. R. Berryman, Jr., both of Los Angeles, for appellant.

Frank C. Dunham, of Pasadena, for respondent.

JAMES, J. The judgment in this case was for damages which the court found plaintiff had suffered by reason of a collision which occurred between an automobile driven by a son of the defendant and one belonging to the plaintiff. The defendant, on this appeal, urges several grounds for a reversal of the judgment. There was a plea of contributory negligence in the answer, and a cross-complaint asserting an alleged cause of action for damages in favor of defendant, growing out of the same collision.

[1] Considering first the claim that the evidence failed to establish any negligence on the part of the driver of defendant's machine. Los Robles avenue, in the city of Pasadena, extends in a northerly and southerly direction. Walnut street intersects it at right angles. Walnut street is 30 feet in width; Los Robles avenue is 50 feet wide. At about 7 o'clock in the evening, in November, 1919, a sister of the plaintiff was driving a large coupé westerly along Walnut street. She was accompanied by three other ladies. The three latter were witnesses at the trial; but, as none of them were paying heed to conditions upon the street at the time, their testimony furnishes little aid to a solution of the questions presented. For that reason no further reference will be made to their statements. Plaintiff's sister, who was driving the car, was an adult, and had operated automobiles for a number of years. She testified that, as she reached the intersection of Walnut and Los Robles streets, she looked up and down Los Robles, and saw at the north only a single light located at a point which was afterwards determined to be over 600 feet away; that, having slowed her machine down to a speed of between 10 and 12 miles per hour, she proceeded to cross Los Robles; and that, when beyond the center line of that street, her car was struck on the right-hand rear side by an automobile advancing from the north, which turned out to be one belonging to the defendant and then being driven by the 18 year old son of the latter. The witness further testified that it was nighttime, or "twilight," and an hour when it was necessary to have lighted the lamps on the car. She testified that, while Los Robles avenue was supplied with lights mounted on columns along its sides, she did not notice whether those lights were burning at the time; that she did not observe defendant's automobile, or know of its presence there, until it collided with the machine she was driving.

Chiefly involved in the decision of the trial judge is the question as to which machine had the right of way at the street intersection. Originally the Vehicle Act (St. 1915, p. 407) provided that at street intersections the automobile approaching from the right should have the right of way. In the Statutes of 1919 (page 215, § 12 [section 20, par. "f"]) the law was amended by adding the proviso:

"Unless such vehicle approaching from the right is further from the point of the intersection of their paths than such first named vehicle."

By the testimony of the defendant's son, it appears that he assumed that he had the right of way and would be permitted to cross Los Robles avenue in advance of plaintiff's machine. He testified that, as he came south on Los Robles avenue, he observed plaintiff's machine, even before it had reached the easterly curb of Los Robles; that, as the latter machine reached the latter point, he was about 50 feet north of the intersection of the two streets. His testimony at different points in the examination as to this fact varied, but the court was entitled to draw its own conclusions therefrom. Other evidence showed that the right-hand wheels of defendant's car were about 4 feet away from the westerly curb line of Los Robles avenue. When it is remembered that the total width of Los Robles avenue from curb to curb was 50 feet, it appears that there was some evidence from which the trial court was justified in concluding that, as between the two machines, that of the plaintiff as it entered Los Robles was nearer the point where the paths of the two would intersect than was that of the defendant. Under the provisions of the Vehicle Act such a condition gave to the plaintiff's machine the right to pass first. There is enough, also, in the evidence to warrant the statement that there was a conflict as to whether the headlights on defendant's machine were burning at the time. It is true that defendant's son testified that they were so burning. Plaintiff's sister had testified that she looked to the north on Los Robles and saw only a single light 600 feet away. Necessarily, considering the fact that the collision followed within two or three seconds of time, defendant's machine was at that time much nearer to Walnut street than was the single light noted. Hence the admissible inference from Miss Whitworth's testimony that, had the headlights been burning on defendant's machine, she would have noticed them. The case presented a close

question on the facts, but, as pointed out, there was some substantial evidence tending to establish negligence on the part of the driver of defendant's machine. Once that is determined, this court has not the right to resolve any question as to the preponderance of the evidence or weight of the proof.

[2, 3] Another contention of appellant is that the evidence was insufficient to show that plaintiff owned the automobile which was being driven by his sister. Plaintiff testified that he purchased the automobile in 1919 for his mother, who was then absent, and with her funds; that he caused it to be registered in his own name, and that when his mother returned, a month later, in the course of adjustment of the business affairs of the family, it was agreed that he should have the machine as his own. There was no evidence tending to dispute this state of facts. The objection at this point as made by appellant refers to the automobile law in force at the time of the purchase, which required that, in the event of change of ownership, indorsements be made upon the old registration certificate by the transferor and transferee and a new license be issued. This act (Stats. 1917, p. 391, § 7) provides further that—

"Until such transferee has received such certificate of registration and has written his name upon the face thereof in the blank space provided for said purpose by the department, delivery of said motor vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed, and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose. * * *"

As plaintiff purchased this machine and caused it to be immediately registered in his own name, and as it was agreed by his mother (who owned the funds used in the purchase price), about one month after the purchase, that he should be considered the owner, he ought not be deprived of his right to maintain this action because only that the exact technical procedure prescribed in the automobile law had not been complied with. The original license had been issued in the name of plaintiff, who at once had and continued to have actual control of the vehicle. Defendant's only concern in this regard is to be assured that he may not be subjected to another action for damages. Assuming that, by reason of the restriction of the Vehicle Act, the legal title to the automobile rested in the mother of the plaintiff, plaintiff had acquired the right, by reason of the agreement that title should be transferred to him, to have the mother complete the transaction and make the indorsements of transfer as the law provided should be done. Assuming that the law prevents the passing of title in such circumstances, the mother remained only as the holder of the bare legal title, with no substantial or beneficial interest in the property. There is not concerned here any question as to the rights of creditors of the mother, and, as between the parties mother and son, the mother should be held to be estopped from asserting any right of action for damages as against the defendant. This reasoning applies, regardless of whether it be considered that the original transaction involving the purchase of the machine was properly carried out, so as to vest title in the mother, or that the mother failed to make effectual the transfer of her title in the machine to plaintiff.

There is a second answer to the contention to which the foregoing discussion has been addressed, and that is this: Conceding that the plaintiff did not become the legal owner of the automobile, he did nevertheless, by reason of his having been given possession of the machine and having at all times exercised control over it, acquire the rights of a bailee. Among those rights is that to sue for damages for injuries caused to the property by third persons.

"The bailee is entitled to the possession of the property, * * * therefore has a special right or property in the chattel to the extent of his bailment contract, and can protect it against wrongdoers who occasion loss or injury. * * * In such cases the damages are not confined to the mere interest of the bailee, but in case of injury or loss of the property he may recover its full value, together with any special damage to him, and for all beyond his own interest he would be a trustee for the bailor or owner." Van Zile on Bailments and Carriers (2d Ed.) par. 57.

On the general subject, see, also, 3 R. C. L. pp. 138, 139; also Boles v. Stiles (Cal. Sup.) 204 Pac. 848.

That this right of the bailee to sue for all damages caused by injury to the property in his possession may be restricted by the contract of bailment should be taken as a qualification of the general rule stated. From the facts here shown no such restriction would be implied.

[4] It appeared in evidence that the son of defendant was 18 years of age and that he held a driver's license, authorizing him to operate an automobile on the public ways. It appeared at the time that his father was accustomed to allow the young man to use the automobile for his own purposes, and that, on the evening in question, the son was on his way to some place on a mission which had to do only with his own convenience or pleasure. Under this state of facts, appellant argues that there was no liability on the part of the father to respond in damages for the tort of the son. The case of Spence v. Fisher, 184 Cal. 209, 193 Pac. 255, 14 A. L. R. 1083, is cited in support of that argument. That was a case where an adult daughter, operating an automobile for her own con-

venience, and not for any necessary family purpose, was held to be solely responsible for damages caused through the negligent operation of the machine. The difference between that case and this is that the daughter there was an adult and the Vehicle Act of California expressly preserves as against a parent liability for negligence committed by a minor child while operating an automobile belonging to the former. Section 24 (a) of the act (Statutes of 1917, at page 408, § 18) provides that an operator's license shall not be granted to a minor, unless the parent or parents having the custody of the applicant shall have joined in signing the application, and that the negligence of such minor shall then be imputed to "the person or persons who shall have signed the application of such minor for said license."

Appellant insists that the father cannot be held responsible, because it does not appear that he signed the application for the operator's license which was issued to the son. It is true that the evidence is silent on that question, but certain presumptions may be indulged in in order to sustain the judgment. In the first place, the evidence showed that the father owned the machine, and that the son lived with him. The father was the head of the household, and the son was under his control. Necessarily, then, he would be the proper person to have indorsed the application for the operator's license. There are two pertinent presumptions declared to exist under section 1963, Code of Civil Procedure: (15) "That official duty has been regularly performed;" (33) "that the law has been obeyed." The trial judge was warranted in assuming that the father did indorse the son's application, and that the officers in charge of the motor vehicle department would not have issued the operator's license without such indorsement being supplied.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

---

58 Cal. App. 468

## HANSEN v. NORTHWESTERN PAC. R. CO. et al. (Civ. 4267; S. F. 9837.)

(District Court of Appeal, First District, Division 1, California. July 5, 1922. Hearing Denied by Supreme Court Aug. 31, 1922.)

**Railroads ⊂⊃443(7)—Evidence held to show negligence as to cows on track.**

In an action for the death of cows on a crossing, evidence *held* to show that the engineer had knowledge of something wrong on the track in time to stop the train and prevent the accident.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action by John Hansen against the Northwestern Pacific Railroad Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

James N. Gillett, of San Francisco, and F. A. Cutler, of Eureka, for appellants.

Puter & Quinn, of Eureka, for respondent.

PREWETT, Justice pro tem. It is averred that a train of the appellant company ran over and killed 13 blooded Jersey cows belonging to respondent, for which injury he seeks damages. The jury made an award in his favor, and the appellants bring this appeal.

Respondent maintained a dairy situated about three-eighths of a mile from the railroad track. He knew that the morning passenger train of appellant company was accustomed to pass down the track each morning at about 8:19, and he always waited until it had passed before driving his cows to pasture across the track. After crossing the track at the regular crossing, the cows follow a road along parallel to the track for a distance of about 400 feet before entering the gate to their pasture. This road is separated from the right of way by a wire fence. On the morning in question the respondent heard a train go down the track at about 8:19, and he assumed that this was the regular train. In fact, however, it was a special running on the regular time; the regular passenger train being some 20 minutes late. When the respondent heard the special go by, he started his cows down the lane toward the crossing. He was in the lead of the herd of 115 cows, and his trained dog drove them from the rear. The dog had been at this work for the past six years. After the respondent had crossed the track and had reached a point about 400 feet distant from the crossing (which brought him about opposite the pasture gate), he heard the belated passenger train coming. He sprang over the wire fence and ran along the track, waiving his hat in a futile effort to flag the train. At this time he had reached a point about 500 feet from the crossing. From this point he saw the train rounding a curve and coming into view. It was then distant from him about 450 feet. The engineer was looking along the track, and his engine was then distant from the crossing nearly 1,000 feet. It is not controverted that the train could have been stopped in this distance. The engineer testified that he could not see the cows on the crossing until he reached a point distant therefrom about 432 feet. There is evidence in the record, which the jury may have believed, that the train could have been stopped in this shorter distance.

A number of cows were on the track when

the train passed. The train ran over and killed 10 of these outright and severely maimed several others. This 1,000 feet of track describes an arc of a circle. Owing to a slight elevation in the territory within the arc, a person at its farthest extremity could not see objects upon the crossing, though a person about midway between could see both extremities. The engineer admits that he was looking ahead. If this is so, the jury had a right to believe that he could and would have seen the respondent standing on the track and waving his hat. Seeing him, it was his duty at once to stop the train, and it is clear that he had ample space within which to accomplish that result. He knew that his train was behind time, and that a special had just gone down the track on the regular schedule, and that this circumstance was likely to mislead persons near the track. He knew, also, that the respondent had been accustomed for a long period to drive his cows every day across the track to and from pasture.

In the foregoing résumé the only disputed points are the position of the respondent at the time he commenced to wave his hat to the engineer and the position of the latter at that time. The story of the respondent as to these matters sounds reasonable enough, and the jury was justified in believing it. It may be added that the experts did not agree as to the distance within which the train could have been stopped, but none of them insisted that it could not have been stopped in 1,000 feet. This state of facts meets the claim of the appellants that the respondent was guilty of contributory negligence. He had been using this crossing for his cows twice a day during the period of 14 years, and this with the knowledge of the engineers of the appellant company. But, even if the respondent had been negligent, the appellants had a space of about 1,000 feet within which to stop after knowledge of something wrong on the track. Under the doctrine of the "last clear chance," the engineer should have brought his train to a stop. No other points are urged.

The judgment is affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [1] In denying a rehearing of this cause after decision by the District Court of Appeal we desire to say that we do not approve of the statement in the last paragraph of the opinion that "under the doctrine of the 'last clear chance'" the engineer was required to bring his train to a stop. The last clear chance doctrine, in our opinion, is not involved in the case, and it is not under that doctrine that he should have brought his train to a stop.

The petition for a rehearing is denied.

SHAW, C. J., LENNON and WASTE, JJ., and MYERS, Justice pro tem., concur.

---

58 Cal. App. 555

## MOORE v. CITY COUNCIL OF CITY OF LOS ANGELES et al. (Civ. 4000.)

(District Court of Appeal, Second District, Division 2, California. July 18, 1922.)

**1. Statutes ⊂=199—"Manner" of doing thing does not ordinarily include time of doing it, and whether it does depends on intent.**

Whether the word "manner" in a statute shall be construed as including, not only the way or mode of doing a thing, but also the time of doing it, depends on the intention of the lawmakers, to be gathered from the context, and ordinarily the manner and time of doing the thing are distinct things, and "manner" will not be construed as including the element of time, unless it appears from the context that the lawmakers so intended.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Manner.]

**2. Municipal corporations ⊂=46—Constitutional provision requiring advertising of amendments to charter in same "manner" as new charter does not include element of time.**

Const. art. 11, § 8, providing that proposed amendments to city charter shall be advertised in the same "manner" as therein provided for the advertisement of a new charter, does not require that the amendment shall be advertised within 15 days after filing, as in the case of a new charter, in view of the further provisions for verifying the signatures to the petition and for submitting proposed amendments only during the six months preceding session of the Legislature, or thereafter and before its adjournment.

**3. Municipal corporations ⊂=46—Constitution held to require submission of amendments to charter during six months preceding next session of Legislature, or before adjournment.**

Const. art. 11, § 8, providing that proposed charter amendments shall be submitted only during the six months next preceding a regular session of the Legislature, or thereafter and before adjournment, is the equivalent of a mandatory requirement that the amendment shall be submitted during the six months preceding the regular session next succeeding the filing of the petitions, or before adjournment of that session, and, in view of the provision that the election shall not be less than 40 or more than 60 days after the completion of the advertising, sufficiently fixes the time when the amendments are to be advertised.

Original application by A. H. Moore for a writ of mandamus, directed to the City Council of the City of Los Angeles and others.

Alternative writ discharged, and application denied.

Jones & Weller, of Los Angeles, for petitioner.

Jess E. Stephens and Lucius P. Green, both of Los Angeles, and Charles B. MacCoy, of San Diego, for respondents.

FINLAYSON, P. J. This is a proceeding in mandamus to compel respondents to advertise, within 15 days from July 5, 1922, a proposed amendment to the charter of the city of Los Angeles. On application made to this court in the first instance an alternative writ of mandate was issued, and thereafter respondents appeared and filed their answer. From the uncontroverted averments of the petition, and the stipulations of the parties, the following facts are made to appear:

On July 5, 1922, a petition, signed by more than 15 per cent. of the registered electors of the city of Los Angeles, requesting the submission of an amendment to the city charter, was filed with the city council, and the signatures thereto were duly certified by the city clerk. On the same day, at a regular meeting of the city council, a motion was made to advertise such proposed amendment within 15 days, but, for lack of the requisite number of votes, the motion failed to carry. Thereafter, on July 13, 1922, at a regular meeting, the city council adopted a resolution whereby it declared it to be its purpose and intention to submit the proposed amendment to the electors of the city not later than the general election to be held next November.

Petitioner claims that by the provisions of section 8 of article 11 of our state Constitution, presently to be quoted, it is the bounden duty of the city council to advertise the proposed amendment not later than 15 days after the filing of the petition by the electors; that is to say, within 15 days after July 5, 1922. Section 8 of article 11 of the Constitution, in so far as it is necessary to an understanding of the question, reads:

"Any city or city and county * * * may frame a charter for its own government, consistent with and subject to this Constitution. * * * Any such charter shall be framed by a board of fifteen freeholders chosen by the electors of such city at any general or special election. * * * The charter so prepared shall be signed by a majority of the board of freeholders and filed in the office of the clerk of the legislative body of said city. The legislative body of said city shall *within fifteen days after such filing* [italics ours] cause such charter to be published once in the official paper of said city (or in case there be no such paper, in a paper of general circulation), and shall cause copies of such charter to be printed in convenient pamphlet form, and shall, until the date fixed for the election upon such charter, advertise in one or more papers of general circulation published in said city a notice that such copies may be had upon application therefor. Such charter shall be submitted to the electors of such city at a date to be fixed by the board of freeholders, before such filing and designated on such charter, either at a special election held not less than sixty days from the completion of the publication of such charter as above provided, or at the general election next following the expiration of said sixty days. * * * The charter of any city or city and county may be amended by proposals therefor submitted by the legislative body of the city on its own motion or on petition signed by fifteen per cent. of the registered electors, or both. Such proposals shall be submitted to the electors only during the six months next preceding a regular session of the Legislature or thereafter and before the final adjournment of that session and at either a special election called for that purpose or at any general or special election. Petitions for the submission of any amendment shall be filed with the legislative body of the city or city and county not less than sixty days prior to the general election next preceding a regular session of the Legislature. The signatures on such petitions shall be verified by the authority having charge of the registration records of such city or city and county, and the expenses of such verification shall be provided by the legislative body thereof. If such petitions have a sufficient number of signatures the legislative body of the city or city and county shall so submit the amendment or amendments so proposed to the electors. Amendments proposed by the legislative body and amendments proposed by petition of the electors may be submitted at the same election. The amendments so submitted shall be advertised *in the same manner as herein provided for the advertisement of a proposed charter* [italics ours], and the election thereon held at a date to be fixed by the legislative body of such city, not less than forty and not more than sixty days after the completion of the advertising in the official paper. If a majority of the qualified voters voting on any such amendment vote in favor thereof it shall be deemed ratified, and shall be submitted to the Legislature at the regular session next following such election, and approved or rejected without power of alteration in the same manner as herein provided for the approval or rejection of a charter."

As will be observed, it is provided by the Constitution that the legislative body of any city for which a proposed charter has been prepared by a board of freeholders and filed with the clerk shall, "within fifteen days after such filing," cause the same to be published once in the official paper of the city, or in a paper of general circulation if there be no official paper, and shall likewise cause copies of such charter to be printed in convenient pamphlet form and give notice by advertising in one or more papers of general circulation that such copies may be had upon application; and it will be recalled that it is further provided that all proposed *amendments* to any such charter shall be advertised "in the same manner as herein provided for the advertisement of a proposed charter." Whether, as petitioner claims, it is the duty of the legislative body of a city having a freeholders' charter to advertise a proposed amendment to the charter within 15 days

after the filing of a petition by electors for the submission of such amendment, depends upon the meaning to be given to the word "manner," as that word is used in the provision which declares that all proposed charter amendments shall be advertised "in the same *manner* as herein provided for the advertisement of a proposed charter." It is urged by petitioner that the phrase "in the same manner" refers, not only to the way or mode whereby the advertising must be done, but also to the *time* within which it must be done.

Whether the word "manner," or the phrase, "in the same manner," includes the element of time, has been answered by the courts both in the affirmative and in the negative. The Supreme Court of Nevada, in State v. Eureka, etc., M. Co., 8 Nev. 15, held, without discussion, that the word "manner," in the statute under consideration in that case, did not mean time. In United States v. Morris, Fed. Cas. No. 15,815, the word was also construed by the court as not including time. See, also, Bankers' Life Insurance Co. v. Robbins, 59 Neb. 170, 80 N. W. 484. On the other hand, Harris v. Doherty, 119 Mass. 142, and State v. McClure, 91 Wis. 313, 64 N. W. 992, are cases in which the word "manner" was construed as including the element of time.

[1] We think that the question is, in every case, one of intent, and that the true rule may be formulated substantially as follows: Whether the word "manner" shall be construed as including, not only the way or mode of doing a thing, but also the time of doing it, depends upon the intention of the lawmakers, to be gathered from the context; that is, the "manner" of doing a thing and the "time" of doing it are distinct things, and ordinarily the word "manner" will not be construed as including the element of "time," unless it shall appear from the context that the lawmakers intended that it should. Thus, in State v. McClure, supra, the Supreme Court of Wisconsin said:

> "The word 'manner' in a statute may undoubtedly include 'time,' if such seems to have been the intent of the lawmakers."

And in Porter v. Brook, 21 Okl. 885, 97 Pac. 645, a well-considered case, the Oklahoma Supreme Court used this language:

> "We think the language quoted from United States v. Morris, supra, to the effect that the 'manner' of doing a thing and the 'time' of doing it are distinct things, but that 'manner' *may* embrace 'time' if such was the intention of Congress, states the correct rule." (Italics ours.)

[2] It must be held, therefore, that the word "manner," in the phrase "shall be advertised in the same manner as herein provided for the advertisement of a proposed charter," does not include the element of time, but refers only to the mode or way of advertising a proposed amendment to a freeholders' charter, unless we can see from the context that the time, as well as the mode, of advertising was intended to be included in the word "manner."

Petitioner argues that it was intended that the word "manner," as here used, should include the time as well as the mode or way of advertising, because, as he claims, if the word were not construed as including the time of advertising, it would be possible for any city council to frustrate the will of the electors by indefinitely postponing the advertisement of a proposed charter amendment, and thus prevent the holding of any election thereon. We do not think the dilemma thus suggested by petitioner will ensue if the word "manner" be construed as meaning only the way or mode, and not the time, of advertising. The embarrassing possibility suggested by petitioner's argument is based upon the assumption that, if the Constitution does not make it obligatory to advertise a proposed charter amendment within 15 days from the filing of the petition for its submission, then no time is prescribed by the Constitution for advertising a charter amendment proposed by electors.

[3] An analysis of the provisions of the Constitution will show the fallacy of petitioner's contention. If the Constitution does not require the city council to advertise within 15 days from the filing of a petition for a proposed charter amendment, then it is true that no definite time for advertising is *directly* enjoined upon the council. But, even so, it still remains that, *indirectly*, a period for advertising is prescribed by the Constitution, although that period may cover a somewhat wide range of time. It is expressly declared by section 8 of article 11 that a proposed amendment to a city charter "shall be submitted to the electors only during the six months next preceding a regular session of the Legislature or thereafter and before the final adjournment of that session"; that petitions for the submission of any amendment shall be filed "not less than sixty days prior to the general election next preceding a regular session of the Legislature"; and that the election on such proposed amendment shall be held "at a date to be fixed by the legislative body of such city, not less than forty and not more than sixty days after the completion of the advertising in the official paper." We are satisfied that the declaration that proposed amendments "shall be submitted to the electors only during the six months next preceding a regular session of the Legislature or thereafter and before the final adjournment of that session" is the equivalent of a mandatory requirement making it the duty of the city council to submit all proposed amendments to the electors at some time during the 6 months preceding the regular session of the Legislature next succeeding the filing of the petitions, or before

the final adjournment of that session. And since the council must fix the date of the election "not less than forty and not more than sixty days after the completion of the advertising," it follows that, indirectly, the city council is commanded to advertise the proposed amendments at some time during a period having a fixed beginning and fixed ending, and that therefore it is not necessary to construe the word "manner" as including the element of time in order to escape the dilemma suggested by petitioner.

Another reason why this word "manner" should not be construed to mean "time" is that, if it were so construed, the time consumed in verifying the signature to a petition for the submission of a proposed charter amendment might exceed the 15 days within which, according to petitioner's claim, the proposed amendment should be advertised. When a freeholders' charter is to be submitted to a vote of the electors, the Constitution fixes a definite point of time from which to reckon the 15 days within which such charter is to be advertised. Not so, however, with respect to charter amendments; that is to say, the Constitution declares that a charter prepared by a board of freeholders must be advertised "within fifteen days after such filing" of the charter in the office of the clerk. No checking of names or verifying of signatures is required where a complete charter is to be submitted for ratification. It comes from the hands of the freeholders ready for advertising. But, where an amendment to the charter is proposed by 15 per cent. of the electors of a city, the signatures on the petitions for the amendment must be verified by the person having charge of the registration records of the city, who, in the instant case, is the city clerk. In the very nature of things, such verification must take some time, and mayhap considerable time. It is even conceivable that the time required for that purpose may, in some cases, consume more than 15 days. If it should take more than that length of time to verify the signatures to a petition, and if the word "manner," as here used, were construed as including the element of time, so that the advertising of any proposed charter amendment would have to be done within 15 days after the filing of the petition for the submission of the amendment, it is possible that it would be a physical impossibility to comply with the constitutional mandate to advertise the proposed amendment within 15 days from the filing of the petition.

Finally, there is, as we think, a conclusive reason why it must be held that the word "manner," as used in the phrase "shall be advertised in the same manner as herein provided for the advertisement of a proposed charter," was not intended to include the time for advertising proposed charter amendments. If it were necessary to advertise a charter amendment within 15 days from the filing of the petition for its submission to the electors, a case might readily arise where the council would either have to ignore the constitutional mandate to call an election "not less than forty and not more than sixty days after the completion of the advertising," or else violate the injunction not to submit the proposed amendment to a vote prior to 6 months next preceding a regular session of the Legislature. As we have seen, proposed amendments to a charter can be submitted to the electors "only during the six months next preceding a regular session of the Legislature or thereafter and before the final adjournment of that session." But, although an election upon a proposed charter amendment may not be held before the commencement of the period of time thus definitely fixed by the Constitution, petitions for such amendments, signed by 15 per cent. of the registered electors, may be filed with the legislative body of the city at any time prior to the period thus fixed by the Constitution as that within which proposed charter amendments may be submitted to a vote. The sole limitation upon the time for filing petitions for charter amendments is the requirement that they must be filed "not *less* than sixty days prior to the general election next preceding a regular session of the Legislature."

A hypothetical, concrete case will best serve to bring out the force of the point that, if petitioner's construction of the constitutional provision in question were adopted, the legislative body of the city might be confronted with a situation where it would be impossible for it to fix the time for an election in compliance with the constitutional mandate. Let us suppose, for example, that a petition for an amendment to a city charter, signed by 15 per cent. of the registered electors, is filed in the month of February of a year in which a general election is to be held. In that case, if it were the duty of the city council to advertise such proposed amendment within 15 days after the filing of the petition, then the amendment would have to be submitted to vote not later than the month of April, if the council complied with the constitutional mandate to call an election on all proposed charter amendments "not less than forty and not more than sixty days after the completion of the advertising in the official paper." But the election could not be held in the month of April without violating the constitutional requirement that all proposed amendments shall be submitted to the electors of the city "only during the six months next preceding a regular session of the Legislature or thereafter and before the final adjournment of that session."

For the foregoing reasons, we conclude that it was not intended that the element of time should be included in the word "manner," as that word is used in the constitutional requirement that proposed amend-

ments to a charter shall be advertised "in the same manner" that is provided for the advertisement of a proposed charter, and that therefore respondents are not obligated to advertise the amendment in question within 15 days after the filing of the petition for its submission to a vote of the city electorate.

The alternative writ of mandate heretofore issued is discharged, and the application for a peremptory writ of mandate is denied.

We concur: WORKS, J.; CRAIG, J.

---

58 Cal. App. 529

## CALIFORNIA DRILLING & MACHINERY CO. v. CROWDER et al. (Civ. 2474.)

(District Court of Appeal, Third District, California. July 17, 1922.)

**1. Evidence ⟸441(7) — Parol evidence inadmissible to vary agreement implied by law as to time for performance.**

Where a well-drilling agreement specified no time for performance, Civ. Code, § 1657, providing that in such case a reasonable time is allowed, was as much a part of the contract as though written therein, and parol evidence of an agreement fixing the time was inadmissible to change or vary it.

**2. Contracts ⟸167—Presumed that statutory rule as to reasonable time for performance was known to parties and considered by them.**

Where a written agreement specifies no time for performance, it is presumed that the settled legal meaning of such an agreement, under Civ. Code, § 1657, allowing a reasonable time for performance, was known to the parties, and considered by them in the execution of the contract.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by the California Drilling & Machinery Company against C. L. Crowder and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Frank Freeman, of Willows, for appellants.

C. D. McComish, of Colusa, for respondent.

BURNETT, J. The action was for the recovery of the sum of $2,900, claimed to be due on a contract in writing executed March 30, 1920, whereby plaintiff agreed to furnish the material and drill certain wells for defendant for the consideration and under the conditions therein specified. The judgment was in favor of plaintiff for the sum of $2,514, from which the appeal is taken.

Appellants declare:

"The question that is presented on this appeal arises from the rulings of the trial court rejecting certain evidence offered by counsel for defendants, which tended to show that, when the contract between plaintiff and defendants was entered into, a collateral oral agreement was entered into between them, by which the plaintiff became bound to complete its contract not later than May 1, 1920."

The importance of the ruling is disclosed by the fact that the work was not completed until July, and it is claimed by appellants that thereby they suffered great damage by reason of having been deprived of a water supply for their rice crop. It appears that appellants desired to have this limitation of time embodied in the written contract, but respondent refused to so incorporate it. However, the claim is that there was an oral contract to that effect, and evidence was offered and received in its support, but afterward stricken out by the court.

Appellants contend for the application of the rule that:

"Parol evidence is admissible as to a collateral agreement upon which the main writing is silent, and which does not purport to affect the terms of the instrument, * * * and when the evidence offered, or the oral agreement sought to be proved, is not inconsistent with the terms embodied in the instrument."

To the contrary, respondent claims that said oral contract is entirely inconsistent with the written instrument. To show this, it is pointed out that the defendants had several options, which, if exercised, would render the contract impossible of fulfillment by May 1, or any other fixed date. For instance, the written contract gave defendants the privilege of going as far below 100 feet as they might see fit in their search for water. "This one option alone," so says respondent, "makes defendants' alleged oral agreement absolutely irreconcilable with the written contract."

Again, defendants could stop the work at any time to pump out sand, and the testimony showed they actually spent five days of the month in thus getting rid of the sand. No one could anticipate how much time would be required for this purpose. The defendants also had the right to determine whether they would have one well or three wells, and at the time of the execution of the contract it was not known, of course, how many they would choose. An additional option was the right to have the location of the wells changed, and it seems that, acting under the advice of a certain "water witch," named Cofer, they changed the location of both wells; one of them after it was down 30 feet, requiring the work to be started over again, including the taking down, moving, and setting up of the rigs.

[1] These considerations certainly furnish strong reasons in support of the theory that there was no such agreement to finish the work within a month after the contract was

executed; but we need not decide that such time limitation would be so repugnant to the written terms as to bring it within the rule forbidding parol evidence "to vary or contradict the terms of a written instrument," as we are of the opinion that the case is governed by the principle contained in section 1657 of the Civil Code, as follows:

"If no time is specified for the performance of an act required to be performed, a reasonable time is allowed."

This court had occasion to give to the subject very careful attention in the case of Standard Box Co. v. Mutual Biscuit Co., 10 Cal. App. 750, 103 Pac. 938, wherein the Supreme Court denied a rehearing. Therein it was said:

"It is a well-settled principle that that which is implied by law becomes as much a part of the contract as that which is therein written, and if the contract is clear and complete, when aided by that which is imported into it by legal implication, it cannot be contradicted by parol in respect of that which is implied any more than in respect of that which is written."

Therein an option was given to purchase, which was silent as to the time for acceptance, and it was held that proof of an oral agreement as to the time was inadmissible. The decisions of the Supreme Court upon the subject are specifically reviewed, and while it was pointed out that some of them contain expressions apparently inconsistent therewith, it was declared that:

"Where the law fixes the time of performance, parol evidence of some other definite time is inadmissible as varying the written instrument."

In 17 Cyc. 570, the rule is stated as follows:

"The legal effect of a written instrument, even though not apparent from the terms of the instrument itself, but left to be implied by law, can no more be contradicted, explained, or controlled by parol or extrinsic evidence than if such effect had been expressed. Thus, where no time of performance is specified in a contract, the legal effect is that it is to be performed within a reasonable time, and parol evidence is not admissible to show an agreement that it shall be performed at a particular time."

In 10 R. C. L. 222, we find the following:

"When a writing upon its face imports to be a complete expression of the whole agreement, and contains thereon all that is necessary to constitute a contract, it is presumed that the parties have introduced into it every material item and term, and parol evidence is not admissible to add another term to the agreement, although the writing contains nothing on the particular item to which the parol evidence is directed."

[2] Various decisions are cited by both parties in support of their respective contentions, and it must be admitted that some conflict in the authorities exists; but the weight preponderates and the better reason operates in favor of the view that, where the written contract is silent as to the time of performance, and the law fixes a reasonable time in such cases, the statutory provision becomes a part of the contract as though written therein, and parol evidence is inadmissible to change or vary it. In such instance the written agreement has a settled legal meaning as to time of performance, and it is presumed, of course, that this meaning was known to the parties and considered by them in the execution of the contract.

We may add that Whittier v. Home Savings Bank, 161 Cal. 311, 119 Pac. 92, and Blaeholder v. Guthrie, 17 Cal. App. 297, 119 Pac. 524, decided since the Standard Box Co. Case, supra, are entirely dissimilar to the case at bar. In the former, parol evidence was held to be admissible to show an agreement to repay to certain assignees, who had taken assignments of a part of the contract to secure advances to the contractor, the sum of $2,600 from the first collections under the written contract for the improvement of certain streets; the written instrument being silent as to such matter and its terms not being affected by said parol agreement. Not only was the written contract incomplete in that respect, but there was no provision of law that supplied the omission, and the Supreme Court properly held that the case fell within the principle announced in Savings Bank of So. Cal. v. Asbury, 117 Cal. 103, 48 Pac. 1083, as follows:

"The rule that an agreement in writing supersedes all prior or contemporaneous oral negotiations or stipulations concerning its matter has no application to a collateral agreement, upon which the instrument is silent and which does not purport to affect the terms of the instrument."

In Blaeholder v. Guthrie, supra, the parol evidence was admitted to show the particular crop to which the written contract related, the written instrument being uncertain in that respect. It was said by the Court of Appeal for the Second District:

"If there was any uncertainty or ambiguity in the contract, or the application of the same, it was competent in aid of its interpretation to show the situation of the parties and the surrounding circumstances as they existed when the contract was made"—citing Preble v. Abrahams, 88 Cal. 245, 26 Pac. 99, 22 Am. St. Rep. 301.

In view of the considerations to which we have adverted, we think there was no uncertainty or ambiguity in the contract herein; the parties having impliedly agreed that plaintiff should have a reasonable time in which to complete the work.

As we view the foregoing decisive of the controversy, we need not consider the further contention of respondent that appellants

must fail at any rate, because they did not show that they suffered any damage by the delay.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

---

(58 Cal. App. 433)

## In re CHEDA'S ESTATE.

## CHEDA v. CHEDA et al.

(Civ. 4277.)

(District Court of Appeal, First District, Division 1, California. July 3, 1922. Hearing Denied by Supreme Court Aug. 31, 1922.)

**1. Corporations ⇐116—Option to buy stock held converted by credit allowed thereon into accepted offer.**

Where a note maker assigned to payee, his brother, in full payment of the note plus the amount of a disputed claim, stock worth the amount of the entire indebtedness, and the payee thereafter gave an option to assignor's wife to purchase the stock for such amount, with interest, and later, on the assignor's objecting to being charged with the disputed claim, the payee agreed to "wipe out" such amount, which he did, not by returning it in cash, but by crediting it with the assignor's consent as a cash payment on the option, the effect of such crediting was to convert the option into an accepted offer.

**2. Corporations ⇐116—Option to purchase stock held accepted by payment of less than full purchase price.**

Where an option to purchase stock provided that, on default in payment of interest on the unpaid portion of the purchase price, the option might be terminated by repaying to the optionee "any sum paid on account of above principal," the option might be exercised and converted into an accepted offer by a payment of less than the whole amount of the price.

**3. Executors and administrators ⇐96—Contract to purchase stock not forfeitable by owner's executor without return of payments made.**

Where an option to purchase stock provided that, on default in payment of interest on the unpaid portion of the purchase price, the option might be terminated by repaying to the purchaser "any sum paid on account of above principal," and the seller had agreed, as respects a disputed claim against purchaser's husband, which had been paid by the husband's transfer of the stock to the seller, to "wipe out" such amount, and had done so, not by returning it in cash, but by crediting it, with the husband's assent, as a cash payment on the wife's option, the seller's executor, in attempting to declare a forfeiture, failed of his purpose, where he made no offer to return the amount of the disputed claim in cash, nor was the effect of the provision as to repayment avoided by the executor's inviting the husband to file a claim against the estate of the seller for any sum that might be due him under the terms of the option, as neither husband nor wife would have any claim against the estate for the disputed amount until the contract had been lawfully terminated.

**4. Corporations ⇐118—Receipt of dividends on stock by seller of stock held to operate as set-off to accruing interest on purchase price.**

Where the seller of stock constantly recognized the fact that the acceptance of his offer, embodied in an option given by him to buy the stock and the payment of a part of the purchase price, had converted the option into a mutual contract, and that thereupon the purchaser became the owner of the stock and entitled to its dividends, the receipt of the dividends by the seller constituted by operation of law a set-off to the accruing demands for interest on the unpaid portion of the purchase price.

**5. Executors and administrators ⇐96—Executor of seller of stock held bound to notify buyer to make prompt payment before resorting to forfeiture.**

Delays granted by seller of stock in the payment of interest on the balance of the purchase price made it incumbent on his executors to give notice to the buyer, before resorting to forfeiture, that they would require prompt payment of the interest.

**6. Corporations ⇐118 — Delay in making prompt payment of interest on stock purchase held waived.**

Where one of the executors of the seller of stock, when asked by husband of the buyer to figure up the amount necessary to pay the full purchase price, pleaded his desire to go on a vacation, and the matter was accordingly delayed until his return, this operated as waiver of delay in making prompt payment of interest on the unpaid balance of the price.

**7. Appeal and error ⇐1009(2)—Findings reasonably sustained by competent evidence in proceeding to compel delivery of assets by executors are conclusive on appeal.**

The Supreme Court having held that a proceeding to require executors to transfer and deliver bank stock pursuant to a contract by decedent for the sale thereof is practically a proceeding in equity terminating in a final judgment, the findings of the trial court are conclusive on appeal, if reasonably sustained by competent evidence.

**8. Specific performance ⇐121(8)—Findings as to truth of allegation of equity in petition to require delivery of bank stock under contract with decedent held sustained.**

Findings of the trial court, in a proceeding to require executors to deliver bank stock pursuant to a contract for the sale thereof by decedent, that the allegation of equity in the petition was true, *held* sustained by sufficient evidence, as against the contention that the value of the stock was so far in excess of the agreed price as to render specific enforcement of the contract inequitable.

---

Appeal from Superior Court, Marin County; Percy S. King, Judge.

In the matter of the estate of S. H. Cheda, deceased. From an order directing execution of a contract by decedent with Elenore A. Cheda and V. J. B. Cheda, George A. Cheda, one of the executors, appeals. Affirmed.

See, also, 202 Pac. 133.

Henry E. Greer and Thos. P. Boyd, both of San Rafael, for appellant.

Jos. K. Hawkins, of San Rafael, for respondent V. J. B. Cheda.

Roy C. Lewis, of San Rafael, for respondent Elenore A. Cheda.

PREWETT, Justice pro tem. This is an appeal from an order of the trial court directing said executors to carry into execution the terms of a written contract entered into by said S. H. Cheda in his lifetime with said Elenore A. Cheda. The facts of the controversy are numerous, but in the main they are established by evidence that is free from contradiction.

More than 20 years ago S. H. Cheda organized the Marin County Bank and the Marin County Savings Bank. The two institutions have been affiliated ever since their organization, and have been conducted in the same place of business and under the same management. S. H. Cheda had been for many years the president and active manager of both banks. A few years after the organization of the banks S. H. Cheda gave to his brother, said V. J. B. Cheda, 95 shares of the capital stock in each of said two banks. V. J. B. Cheda held and owned this stock for more than 15 years and up to October 30, 1916. On this date he was indebted to said S. H. Cheda on a promissory note in the sum of $19,000, and in addition thereto the latter claimed a balance as due to him from said V. J. B. Cheda of $6,650, alleged to be due on account of certain losses incurred in a barley deal and other matters, aggregating an entire claim of $25,650. On said October 30 said V. J. B. Cheda assigned to S. H. Cheda, in full payment of said sum of $25,650, all his said bank stock, to wit, 190 shares. The parties appraised this stock as worth, and the evidence shows that it was in fact worth, at least said sum for the payment of which it was assigned. The immediate motive for this assignment at this time is not clearly shown in the record, but on the following day, October 31, there came on for trial a suit brought against said V. J. B. Cheda by some third person.

On January 9, 1917, more than 2 months after the assignment, S. H. Cheda, without consideration, executed to Mrs. Elenore A. Cheda, the wife of said V. J. B. Cheda, a written option to purchase this bank stock. About this document revolve most of the facts of this controversy. It is in the words and figures following:

"In consideration of the sum of one dollar and other valuable consideration, the receipt whereof is hereby acknowledged, I hereby give to Elenore A. Cheda, her heirs and assigns, the option of buying for the full price of $25,650, together with interest thereon at the rate of 6 per cent. per annum, interest payable quarterly, and, if not so paid, then to be added to the principal sum of $25,650 and bear interest at the same rate, the following stock, to wit: Ninety-five shares of the stock of the Marin County National Bank of San Rafael; 95 shares of the stock of the Marin County Savings Bank. The said Elenore A. Cheda shall have the right to close this application at any time within ten years. If default be made in the payment of interest for the period of one year, at the option of the undersigned, this option may be terminated by paying to Elenore Cheda any sum paid on account of above principal sum of $25,650, and I agree to deliver to Elenore Cheda, or to any one named by her, certificates in due form for the above-described stock.

"Dated San Rafael, California, Jan. 9, 1917.

"Original. S. H. Cheda.

"Signed in triplicate."

V. J. B. Cheda objected to being charged with said sum of $6,650 on the barley transactions, claiming that the investments were entered into without his consent or approval, and that he should not be held liable therefor. Thereupon, and on the following day, S. H. Cheda agreed to "wipe out" this amount. He did not return it in cash, but he credited it, with the consent of V. J. B. Cheda, as a cash payment on said option. This payment was evidenced by a written receipt, subscribed by said S. H. Cheda. It is an important factor in the case and we quote it, as follows:

"$6,650.00. San Rafael, Cal., 1/10 1917.

"Received of Elenore A. Cheda six thousand six hundred and fifty dollars on % of option to purchase stock of bank dated Jan. 9, 1917.

"Original. S. H. Cheda."

If, as we have stated, the stock was worth the amount due on the promissory note, to wit, $19,000 plus the amount of $6,650 involved in the barley deal, it follows that V. J. B. Cheda actually paid to S. H. Cheda, by transfer of the stock, the equivalent of the full sum of $25,650 in cash. Thereupon the latter, when he consented to "wipe out" the claim against the former on the barley deal, actually held $6,650 to his credit, and it was turned over as a cash payment in that sum on the option. This is according to the findings, and they are fully sustained by the evidence. There is, in fact, no evidence to the contrary. It results then, that this court must accept as a fact in the case that this payment of $6,650 was made on the option on the day following its execution. The payment thus made was, beyond question, the equivalent of so much cash.

On the 16th day of July, 1920, S. H. Cheda died, leaving a last will wherein he appoint-

ed said V. J. B. Cheda and another brother, George A. Cheda, as joint executors thereof. He left one minor son as his sole heir. For a period of about 18 months prior to his death, he was practically incapable of attending to business. During this period V. J. B. Cheda, assisted more or less by George A. Cheda, handled his affairs and managed the two banks. V. J. B. Cheda had control of the bank account of the deceased during his illness, and made deposits therein and drew checks thereon as occasion required. Sometimes he signed simply the name S. H. Cheda, and at other times he followed the signature with his own initials. About the time of the payment of the $6,650 on the option contract, S. H. Cheda orally agreed that the dividends accruing upon the bank stock should regularly be credited to Elenore A. Cheda on the interest account on the option. The dividends on the stock more than paid the interest on the option, and the excess was paid, from time to time, to Elenore A. Cheda. These dividends, up to and including the month of January, 1918, were by S. H. Cheda, in his own handwriting, credited in liquidation of the interest accruing on the option. These credits paid the interest to the month of January, 1918. Shortly after this he suffered a collapse, and he did not thereafter personally attend to any business.

In the month of May, 1919, there had accrued as unpaid dividends on said 190 shares of stock the sum of $855, which sum was, by said George A. Cheda, credited on the interest account on said option. This credit was made by him in his own handwriting and as agent for S. H. Cheda. On or about the 2d day of July, 1920, and very shortly before the death of S. H. Cheda, said George A. Cheda received the sum of $855 as dividends upon said stock, and he then and there paid the same into the bank account of S. H. Cheda, although no entry or indorsement was made upon said option contract to show that the same, or any part thereof, was applied toward the payment of interest. If Elenore A. Cheda was entitled to have it so credited, then she was not delinquent as much as one year in the payment of interest and no delinquency on account of nonpayment of interest ever accrued.

On September 3, 1920, George A. Cheda, acting as one of said executors, served upon V. J. B. Cheda a notice of forfeiture on the alleged ground that a payment of interest was more than one year overdue. No notice was ever served upon Elenore A. Cheda. The service was made upon her husband on the theory that a certain indorsement upon one of the triplicate copies of the option operated as a transfer thereof to him. This indorsement was made upon that copy retained by S. H. Cheda, and it was found among his papers after his death. It was in the following words:

"For value received, I hereby sell, assign, and transfer all my right in and to above option to V. J. B. Cheda. Elenore A. Cheda."

The evidence shows, without conflict, that V. J. B. Cheda had no knowledge of the execution of said assignment and that it was never delivered to him. The dividends accruing on the stock in January, 1920, although actually paid into the bank to the credit of S. H. Cheda, were drawn out of the account by V. J. B. Cheda and apparently applied to his own use. No offer was made at the time of service of the notice of forfeiture, or at any other time, to repay to Elenore A. Cheda, or to V. J. B. Cheda, the said sum of $6,650, paid on the option on January 10, 1917.

On the day following the service of said notice, Elenore A. Cheda paid to V. J. B. Cheda, as one of said executors, the sum of $1,400 by way of interest and in about one week thereafter she paid to him the entire balance of $19,000. These payments were accepted by V. J. B. Cheda, but not by George A. Cheda, and a few days thereafter the full amount of both payments was deposited in one of the banks to the credit of the two executors, and notice thereof given to George A. Cheda.

[1] The first and most important question in the case is the effect of the payment of $6,650 made on the option on the day following its execution. It should be remarked that, although V. J. B. Cheda strenuously insisted that he was not liable for and should not be bound by the transactions which resulted in the losses on the barley and other deals, he is made to say on cross-examination as a witness that he "owed" said sum to S. H. Cheda; but an examination of his entire testimony shows clearly that he disputed and controverted the claim, and shows that his brother S. H. Cheda acquiesced therein and returned the money by way of credit on the option. The effect of this payment was to close the option and to convert it into an accepted offer. From that time the contract was fully binding upon S. H. Cheda. In the late case of Flickinger v. Heck, decided by the Supreme Court on September 17, 1921, and reported in 200 Pac. 1045, the court says:

"An option contract may be regarded as embodying an offer. When the optionee, or person to whom the option is made, signifies his desire to accept in accordance with the terms of the option, the optioner, or person making the offer, becomes obligated to perform. This acceptance of the offer contained in the option contract is called 'election,' and it gives rise to a subsequent contract between the parties to buy and sell or perform whatever other acts have been specified in the option contract."

[2] The payment of part of the purchase price and its voluntary acceptance by S. H. Cheda constituted an election by Elenore A.

Cheda to buy the stock. This is so, even if it be conceded that S. H. Cheda might have refused to accept less than the entire contract price. But, in fact, it was contemplated by the parties that payments less than the whole amount might be made on the principal. This is conclusively shown by the provision in the option that no forfeiture could be declared without first returning such portions of the principal as may theretofore have been paid. Its language is:

"This option may be terminated by paying to Elenore A. Cheda any sum paid on account of above principal of $25,650."

[3, 4] When George A. Cheda, on September 3, 1920, attempted to declare a forfeiture, he failed of his purpose, since he made no offer to return said payment. His position is that the death of S. H. Cheda revoked the option. It is quite true that the death of a party before acceptance revokes a mere option. Section 1587, Civ. Code. But we have no such case here. It is evident that both parties, after the payment of said sum of $6,650, regarded the option as closed. S. H. Cheda constantly recognized the obvious fact that an acceptance of the offer and the payment of a part of the purchase price converted the option into a mutual contract, and that thereupon she became the owner of the stock and entitled to its dividends. This being so, the receipt by S. H. Cheda of the dividends constituted by operation of law a set-off to the accruing demands for interest. As long as he lived, unless the dividends of January and July, 1920, should constitute exceptions, they were regularly credited upon the interest. At most, the defenses interposed by appellant are purely technical, and they are clearly at variance with the desires and intent of the contracting parties.

Although the option expressly provided that there could be no forfeit for nonpayment of interest, unless all payments of principal were returned, the appellant made an effort to avoid the effect of this provision by inviting V. J. B. Cheda to file a claim against the estate of S. H. Cheda for any sum that might be due to him under the terms of the option. But this was not according to the terms of the option. Moreover, neither V. J. B. Cheda nor his wife had any claim against the estate. They could have had no claim upon the $6,650 until there had first been a lawful termination of the contract, and this event could be brought about only by returning the payment to him or her.

[5] It is insisted by the respondent that the delays granted in his lifetime by S. H. Cheda made it incumbent upon his representatives to give notice that they would thereafter require prompt payment of the interest before resorting to the remedy of forfeiture. This claim is well founded. Stevinson v. Joy, 164 Cal. 279, 128 Pac. 751.

[6] The executors waived the delay in making prompt payment. George A. Cheda, when V. J. B. Cheda asked that he figure up the amount necessary to pay the full purchase price, pleaded his desire to go on a vacation, and suggested that to take it up then would interfere with his vacation. The matter was delayed until his return. This lulled the payee into a sense of security, and operated to extend the time until a reasonable time after his return.

The respondent insists that the payments to V. J. B. Cheda and their acceptance by him as an executor cured any default theretofore existing. This view receives the support of our Supreme Court in Willis v. Farley, 24 Cal. 491, and In re Sanderson, 74 Cal. 199, 15 Pac. 753; but, in view of our conclusions on other points, it becomes unnecessary to examine the question at length.

[7, 8] The appellant submits the claim that the value of the stock at the time of the execution of the option, and especially at the time of the commencement of this proceeding, was so far in excess of the agreed price that it would be inequitable to order a specific performance of the contract. This position is wholly untenable. As to the value at the time of making payment of the $6,650, the point is not fairly open to discussion. S. H. Cheda was a man of affairs, and evidently a banker of wide experience. He, better than any other person, knew the value of the stock. He knew, when he accepted the payment of $6,650, whether or not he was asking a proper price for the stock. The Supreme Court, in Estate of S. H. Cheda, 202 Pac. 133, has held that this proceeding is practically a proceeding in equity terminating in a final judgment; the findings of the trial court are therefore conclusive on the court on appeal, if reasonably sustained by competent evidence. In this case, the trial court found that the allegation of equity in the petition is true. This finding is justified by the testimony of V. J. B. Cheda, when he testified that each and every allegation of the petition is true. It is sustained by other evidence that goes more into detail. In every view, the value is not so out of proportion to the agreed price as to justify a court in overriding the deliberate contract of the parties. Equity does not require the highest price obtainable, but merely that it should be fair and adequate under the circumstances. Haddock v. Knapp, 171 Cal. 59, 151 Pac. 1140. We are unable to say that the finding of the trial court on this point is not sustained by ample evidence. We may add that the option was closed within about two months after S. H. Cheda bought the stock, and at the precise price that he paid for it.

Lastly, our attention is directed to that provision of the Probate Act which directs the trial court, if the right of the petitioner

is found to be doubtful, to dismiss the petition without prejudice. Section 1602, Code Civ. Proc. However, we discover no particular wherein her right may be deemed doubtful as viewed in the light of the findings and evidence. It does not appear that any point has arisen that could be handled more satisfactorily by a court of equity than by the probate court.

The order appealed from is affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

---

58 Cal. App. 610

**In re DUNSCOMB et al.**

**BARTLETT, Mayor, v. DUNSCOMB et al.**

**(Civ. 4244.)**

(District Court of Appeal, First District. Division 1, California. July 24, 1922. Hearing Denied by Supreme Court Sept. 21, 1922.)

**1. Municipal corporations ⊜168—Acts of mayor must be authorized or necessarily implied.**

The functions of a mayor are of an executive or administrative character, and whatever power he may exercise must be warranted or necessarily implied, or his acts will be illegal and a usurpation of authority.

**2. Municipal corporations ⊜168—Mayor not authorized to investigate bill approved by council.**

After the council had approved a printing bill, the mayor was not authorized to investigate it on the theory that the charge was excessive, as under the charter, amended in compliance with Const. art. 11, § 6, the council is invested with the legislative powers of the municipality and has the sole power to determine this question, and its determination, in the absence of fraud, excessive jurisdiction, or other plain violation of law, is final.

**3. Municipal corporations ⊜168—Mayor not authorized to issue subpœna to investigate claim against city.**

Provision of the city's charter authorizing the mayor to see that all ordinances are faithfully observed, and giving to every official board the power to issue subpœnas to compel parties to produce records concerning matters before the board, did not authorize the mayor to issue a subpœna to a creditor of the city to compel the production of records concerning a claim which had been approved by the council, as whatever power the mayor has in this respect must be exercised in conjunction with the other members of the council.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Application by Louis Bartlett, as Mayor of the City of Berkeley, for an order to compel Charles E. Dunscomb and others to obey a subpœna. From an order sustaining a demurrer to the application, petitioner appeals. Affirmed.

Lemuel D. Sanderson, City Atty., of Berkeley, for appellant.

Redmond C. Staats, of Berkeley (George L. Hughes, of Berkeley, of counsel), for respondents.

TYLER, P. J. This is an appeal from an order sustaining a demurrer, without leave to amend, to an application for an order to compel obedience to a subpœna issued by appellant as mayor of the city of Berkeley. It appears from the petition that the city ordered the printing of certain sample and official ballots from the Berkeley Gazette, a corporation of which respondents are officers. No specified price was agreed upon, but the work was performed and a bill therefor rendered to the proper authorities. The city council approved the same, but before payment was made petitioner, as mayor, was informed, so it is alleged, that the charge was excessive, and he thereupon determined to ascertain the truth as to whether or not the account was fair and reasonable. With this purpose in view he issued a subpœna to respondents directing them to appear and testify before him, and to produce probative evidence, consisting of certain described books and papers.

Respondents failed to obey the subpœna, and the petitioner thereupon presented an application to the superior court of Alameda county for an order to show cause why respondents refused to do so. A demurrer was interposed thereto on several grounds, both general and special. The trial court sustained the same, without leave to amend, and this is an appeal from such judgment. No claim of fraud was raised, nor that either the council or any member thereof acted improperly. The main question, therefore, presented for determination, is whether or not the mayor has the legal authority or power to investigate the bill in question, and to this end require respondents to produce papers and documents and appear before him in obedience to his subpœna.

[1] The source of the powers and duties of the mayor is the charter of the municipality. In the various chapters of that instrument are to be found the provisions for his appointment and an enumeration of his powers and duties. He is one of ten elective officials. As chief executive he must see that all ordinances are duly enforced, and he is charged with general oversight of the several departments of the municipal government, and directed to ascertain whether all contracts made with the city are faithfully performed, and he must annually and from time to time give the council information

relative to the affairs of the city and recommend to its consideration such matters as he may deem expedient. He is given the power to make an examination of the books of officials and employees, and has supervision over public utility companies, and he performs such other powers and duties as may be prescribed by law and ordinance. He is made a member of the council, and is president thereof, and presides at its meetings, and all resolutions and ordinances are signed by him; but he has no veto power. The council is made the governing body of the municipality, subject to the express limitations of the charter, and is vested with all powers of legislation in municipal affairs adequate to a complete system of local government consistent with the Constitution of the state. Money is drawn from the treasury upon warrant and allowed by the council or proper board, and then only when such warrant is signed by the president and secretary or clerk of such body and properly numbered and dated. Every official board or commission is, under the charter provisions, given the power to issue subpœnas to compel the production of books, papers, and documents, and to take and hear testimony concerning any matter or thing pending before such official board or commission. It thus appears that the functions of the mayor, as such, are intended in the main to be, and they are, of an executive or administrative character; but whatever power he may at any time exercise, be it executive, legislative or judicial, it must be warranted or authorized, or be necessarily implied, or his acts will be deemed illegal and a usurpation of authority. Von Schmidt v. Widber, 105 Cal. 151, 38 Pac. 682.

[2] In compliance with the provisions of section 6 of article 11 of the Constitution, giving to cities the right and power to make and enforce all laws and regulations in respect to municipal affairs, the city of Berkeley amended its organic law. It is the claim of appellant that by reason of this amendment the charter, instead of being a grant of power, became in effect a limitation of powers, and that the mayor, in carrying out his official duties, has therefore complete authority to investigate any matter relating to municipal affairs, unless prohibited from so doing by direct limitation. Matter of Nowak, 184 Cal. 701, 195 Pac. 402; Civic Center Association, etc., v. Railroad Commission of the State of California, 175 Cal. 441, 166 Pac. 351; Cole v. City of Los Angeles, 180 Cal. 617, 182 Pac. 436. Whatever the effect of the amendment to the charter may be is a question that is not necessary to discuss generally.

By the charter amendment (section 115, art. 16) the city is given the right to make and enforce laws, subject to the limitations and restrictions provided for in the charter. By that instrument the powers and duties of the mayor are restricted. The council is invested with the legislative powers of the municipality, and is its governing body. True, the mayor is a member thereof, and as such he has the same, but no greater, power than any of the other members, and that body must function as a whole, and not by its members separately. The authority of each official, board, or department of the municipality to exercise any corporate powers with which it has been clothed must be distinctly conferred or necessarily implied, in order to entitle it to act. As mayor, appellant could undoubtedly refuse to order a claim paid, and upon such refusal the proper remedy could be invoked against him; but the question of the regularity of a claim is one for the council, which has the sole power, under the charter, to determine such question, and its hearing and determination, in the absence of fraud, excessive jurisdiction, or other plain violation of law, is final and conclusive. McConoughey v. Jackson, 101 Cal. 265, 35 Pac. 863, 40 Am. St. Rep. 53; McFarland v. McCowen, 98 Cal. 329, 33 Pac. 113.

[3] The fact that the mayor, as chief executive, is given power to see that all ordinances are faithfully observed, does not confer the authority here attempted to be exercised. Whatever power he has to object to the correctness of a charge of the character here involved must be exercised in conjunction with all the other members of the council. The question of the reasonableness of a demand is not one for the mayor as such to determine. Any other conclusion would totally distort the plain intention of the framers of the charter, and stultify and destroy the limitations sought to be placed upon the various boards and officers.

Considering the conclusion we have reached, the questions as to the sufficiency of the pleadings and the right of the mayor to institute the proceeding become unimportant.

From what we have said it follows that the judgment of the lower court, sustaining the demurrer to appellant's application without leave to amend, should be, and it is, hereby affirmed.

I concur: RICHARDS, J.

58 Cal. App. 584

## PAVILION ICE RINK v. BRYANT, Tax Collector et al. (Civ. 3976.)

(District Court of Appeal, First District, Division 2, California. July 20, 1922.)

**Mandamus ⊂=163—Demurrer to petition, admitting its allegations, held improperly sustained.**

Demurrer to petition for mandamus to compel issuance of a license and permit to continue the conduct of a dancing pavilion is improperly sustained; it admitting the petitioner's allegations that plaintiff was arbitrarily and capriciously forced out of its lawful business, properly conducted and not injurious to persons, property, or public welfare, while others in like situation and condition were permitted by the same authorities to continue.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Mandamus by the Pavilion Ice Rink against Edward F. Bryant, Tax Collector of the City and County of San Francisco, and others. Demurrer to petition was sustained, and proceeding dismissed, and plaintiff appeals. Reversed.

H. J. Stafford, Edward A. Cunha, and John T. Williams, all of San Francisco, for appellant.

George Lull, City Atty., and Chas. S. Peery, Asst. City Atty., both of San Francisco, for respondents.

NOURSE, J. Plaintiff filed its petition for a writ of mandate to require the defendant Bryant, as tax collector, to issue a license, and the other defendants, as members of the board of police commissioners, to issue a permit, to continue the conduct of a dancing pavilion in the premises known as the "Winter Garden" and located on the corner of Pierce and Sutter streets, San Francisco. A general demurrer to the petition was sustained, without leave to amend, and judgment followed, denying the application and dismissing the proceeding.

The petition alleged that the plaintiff was in possession of the premises under a lease running until August 1, 1926; that on the 1st day of June, 1918, acting under the ordinances enacted by the board of supervisors, the police commissioners granted to petitioner a permit to conduct a dancing pavilion in the premises, and that this permit had been renewed without protest on each succeeding quarter thereafter until January 1, 1921; that the commissioners refused to renew the permit for the quarter commencing on that day, giving as a reason therefor that the premises were located in a residence district; that in truth and fact the premises were not located in a residence district; that the street on which the premises were located was a business street; that the locality had not changed since the original permit had been granted, except that, since said time, it had assumed more of a business character from day to day; that in fact there was only one residence in the block in which said premises were located, and the residents thereof consented to the maintenance of said business; that the declaration that the premises were located in a residence district "was a sham and a pretense, and not based upon the fact or the truth, all of which is and was well known to the members of the said board; that the said board and the members thereof well knew that the said district surrounding the plaintiff's place of business, and the street upon which it faces, were and are not a residence district, or a residence street; and in this behalf plaintiff avers that said declaration was made for the purpose of affording the said board and its members an excuse to arbitrarily, maliciously, oppressively, unreasonably, and unlawfully destroy plaintiff's business and impair plaintiff's contract of lease, and to cause plaintiff great and irreparable injury." It was further alleged that the refusal to renew said permit was in deference to a protest filed with the commissioners, based upon a popular hue and cry against the "Winter Garden" as a place where "Howard street gangsters" met their victims, and that though the police commissioners, after a hearing, affirmatively found that those grounds of protest were untrue, they nevertheless refused to issue the permit unless the protestants would formally withdraw their protest; that, when this was refused, the police commissioners devised the pretense of denying said permit on the ground that said premises were in a residential district; that this action was arbitrary, capricious, and unreasonable; that it discriminated against plaintiff and in favor of other proprietors of similar pavilions located in districts which are of a far more residential character. Allegations followed relating to the character of the dancing conducted in the premises and the general conduct of the place. This, it was alleged, was without criticism. It was also alleged that plaintiff had expended large sums of money in fitting up its place of business for a dancing pavilion, and that it would suffer great injury if it was denied the right to continue it.

From the allegations of the petition, it appears that, without any legal cause, but arbitrarily, oppressively, and capriciously, the board suddenly terminated plaintiff's right to conduct a lawful and profitable business upon premises which were leased for that purpose upon the faith of the permit theretofore granted. It is not necessary to discuss the many constitutional questions argued by the parties. The right of the city to regulate a

business of this nature may be conceded. The point of the case is that the petition alleges that the appellant was not subjected to regulation, but that it was arbitrarily and capriciously forced out of business, while others in like situation and condition were permitted by the same authority to continue.

It is not necessary to cite authority to the point that a lawful business, properly conducted, and not injurious to persons, property, or public welfare, cannot be confiscated by the arbitrary and capricious dictation of any official body. The complaint alleges that this was what was done in this case, and, of course, the demurrer admits the truth of these allegations.

Judgment reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

---

58 Cal. App. 623

## TANNAHILL v. SUPERIOR COURT OF ORANGE COUNTY et al. (Civ. 3928.)

(District Court of Appeal, Second District, Division 2, California. July 25, 1922.)

**Courts ⊂=472(2) — District Court of Appeal will not compel settlement of bill of exceptions in action over which Supreme Court has exclusive appellate jurisdiction.**

As a matter of policy, the District Court of Appeal will not by writ of mandate compel settlement of a bill of exceptions in an action involving the title to realty, since under Const. art. 6, § 4, the Supreme Court has exclusive appellate jurisdiction of such an action.

Original application for writ of mandate by J. M. Tannahill against the Superior Court of Orange County and Z. B. West, Judge thereof. Alternative writ discharged, and peremptory writ denied.

J. R. Jaffray, of Los Angeles, for petitioner.

Adair & Winder, of Riverside, for respondents.

FINLAYSON, P. J. This is an original application to this court for a writ of mandate to compel the settlement of a bill of exceptions. An alternative writ of mandate was issued—inadvertently, as it now appears. In due time respondents appeared and presented a general demurrer to the petition. Thereafter the briefs were filed, and the matter has been regularly submitted. Because we think the proceeding is not properly here, we refrain from expressing any opinion upon the merits of the controversy, or upon the propriety of the issuance of the writ of mandate by the proper court.

Though contending that the trial judge was justified in refusing to settle the bill of exceptions, respondents have argued and submitted this proceeding without questioning the propriety of the issuance of the writ by this court, if the facts disclose it to be a proper case for commanding the trial judge to settle the bill. Upon reading the briefs, our attention is for the first time directed to the fact that the appeal in which petitioner intends using the bill of exceptions is not one of which this court has jurisdiction. Upon a more careful examination of the contents of the petition than was given when the alternative writ was issued, we find that the action in the superior court is one involving the title to and possession of real property. On an appeal from the judgment in such an action the Supreme Court has exclusive jurisdiction. Section 4, art. 6, Const. A bill of exceptions is ultimately used as a basis for presenting the merits of a case upon an appeal. The writ of mandate, when issued by an appellate court to compel the settlement of a bill of exceptions, is issued to aid the court in the exercise of its appellate jurisdiction. The writ, therefore, should be issued by the court which possesses the appellate jurisdiction—in this case the Supreme Court of this state. Stewart v. Torrance, 9 Cal. App. 209, 98 Pac. 396. See, also, Matter of Application of Davidson, 24 Cal. App. 407, 141 Pac. 216, 144 Pac. 147.

We do not say that we would not have jurisdiction, if we chose to exercise it. The Constitution gives equal and concurrent jurisdiction to the Supreme Court and to the District Courts of Appeal to issue writs of mandamus in all proper cases. Const., art. 6, § 4. See Favorite v. Superior Court, 181 Cal. 265, 184 Pac. 15, 8 A. L. R. 290. But as a matter of policy and practice, both the Supreme Court and the District Courts of Appeal, respectively, refuse to take jurisdiction of an original mandamus proceeding in aid of appellate jurisdiction where that appellate jurisdiction is vested originally in the other court. See Collins v. Superior Court, 147 Cal. 264, 81 Pac. 509; Favorite v. Superior Court, supra.

Because the alternative writ of mandate was inadvertently issued, it is discharged, and the petition for the peremptory writ of mandate is denied.

We concur: WORKS, J.; CRAIG, J.

---

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

58 Cal. App. 625

## ANGLO-CALIFORNIA TRUST CO. v. WALLACE et al. (Civ. 4182.)

(District Court of Appeal. First District, Division 1, California. July 26, 1922.)

**1. Novation ⟸12 — One relying on novation must establish substitution.**

The burden is on the one relying on a novation to establish that the new obligation was intended as a substitution or extinguishment of the old one.

**2. Bills and notes ⟸430—New note does not extinguish old indebtedness, without express agreement.**

Before a note extinguishes and satisfies the indebtedness evidenced by an earlier one, there must be an express agreement or understanding to that effect.

**3. Bills and notes ⟸140—Execution of new note as renewal of old one simply postpones payment of the old one.**

Where a new note is given as a renewal of an old one, the new note only postpones the time of payment of the old one until default is made in the payment of the new note.

**4. Pledges ⟸25—Lien of pledge not lost by renewal of debt.**

Collateral security pledged for the payment of a note is not released by the taking of a new note in renewal of the old.

**5. Bills and notes ⟸348—Indorsee's rights as purchaser before maturity held not affected by subsequent transaction of indorser amounting to renewal of note.**

Where a payee indorsed notes before their maturity to a bank to secure a debt, the fact that she later incorporated her business and had the corporation give a note to the bank for her indebtedness did not change the position of the bank as holder of the note in due course to that of holder after maturity, though she guaranteed payment of the corporate note, as the subsequent transaction merely amounted to a renewal of the original obligation.

**6. Pledges ⟸30(2)—One holding note to secure debt may seek to recover on the note, though debt is not due.**

One holding a promissory note deposited as security for a debt evidenced by another note may seek to recover on the collateral note, and hold the proceeds in satisfaction of the principal debt, though the note evidencing the debt is not dishonored by nonpayment.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Action by the Anglo-California Trust Company against George J. Wallace and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Wm. J. Hayes, of Oakland, for appellants.

F. A. Denicke and H. S. Young, both of San Francisco, for respondent.

TYLER, P. J. This was an action brought to recover judgment upon certain promissory notes executed by the defendants, who were doing business under the firm name and style of George J. Wallace & Co. The notes were four in number and were in the principal sum of $500 each, and were made payable to their codefendant, Emma B. Freeman. They were all executed on August 29, 1919, and matured thereafter in two, three, four, and five months, respectively. On the 20th day of October, 1919, and prior to maturity thereof, they were indorsed by the payee to respondent, Anglo-California Trust Company. The first two notes having become due and not having been paid, suit was filed thereon on December 12, 1919, and thereafter on March 1, 1920, and after their maturity another suit was instituted on the two remaining notes. Defendants by answer set up certain defenses, including fraud and rescission. The actions were consolidated, the parties and questions being identical. At the trial and before the submission of the cases, the defendants other than Emma B. Freeman duly moved the court for permission to file certain answers supplementary, and to reopen the cases for further testimony. These motions were denied, for the reason, as found by the court, that plaintiff accepted the notes before maturity for a valuable consideration and without notice of the alleged defenses attempted to be set up in the proposed amended pleading. It is the contention of appellants that this finding is not supported by the evidence. Defendant Emma B. Freeman has not appealed.

It is admitted that the notes were indorsed by the payee and transferred to respondent before maturity. It is also admitted that at the time of the indorsement Emma B. Freeman was a customer of respondent and was indebted to it, and that she received additional accommodation in the nature of advances on the strength of the notes so indorsed, and that they were held by respondent as security for the payment of this indebtedness. It is further conceded that there is nothing in the evidence to show that prior to the transfer the trust company had any knowledge of the alleged defenses of appellants. Notwithstanding these admissions, it is urged that the evidence disclosed certain facts which altered and changed the position of respondent as holder of the notes in due course to that of holder after maturity, and that such facts had the effect of opening the door for the defenses alleged in appellants' answer, and their proposed amendments.

For a full understanding of the question a brief summary of the transactions of the parties becomes necessary. On August 22, 1919, the defendant Emma B. Freeman occupied a certain store and conducted a business therein, known as Freeman Art Com-

pany. She held the premises under a lease for the term of five years. The lease contained restrictions against assignment or subletting without the written consent of the lessor, and provided for forfeiture in the event of a breach of either of these conditions. On August 22, 1919, pursuant to representations on the part of Mrs. Freeman that she had a right to sell her lease, appellants agreed to purchase the same for the sum of $5,000. Thereafter Mrs. Freeman informed them that she was having difficulty in obtaining the consent of her landlord to a transfer of the lease. She subsequently, however, presented to Wallace & Co. what purported to be an assignment thereof. Wallace & Co., believing the instrument to be satisfactory, completed their agreement. The notes sued on, which constituted a part of the consideration for the sale, were executed and delivered, and Wallace & Co. then went into occupation of the premises. Shortly thereafter the owner demanded possession thereof, on the ground that the covenant against assignment had been violated, and a suit in unlawful detainer was instituted by him against the purchasers. Four months thereafter Wallace & Co. moved to other premises.

It is claimed by appellants that at this time a rescission of all contractual relations between Mrs. Freeman and appellants took place, and that appellants abandoned the premises and surrendered the same to Mrs. Freeman, and that she thereupon went into full possession thereof and resumed the conduct of the busines she had theretofore carried on prior to the sale, and subsequently incorporated the business under the name of the Freeman Art Company, and that its assets were transferred by her to this corporation, which in turn assumed all of her liabilities. This corporation executed and delivered to respondent bank its promissory note in the sum of $3,000 in payment of the indebtedness to it of Emma Freeman, a guaranty of payment being indorsed thereon by her.

[1-4] It is the claim of appellants that, respondent bank having assented to this transaction and accepted the corporate note, Emma B. Freeman's indebtedness to the bank was thereby novated, and the bank merely held the notes here sued on as collateral to the corporate note, and as the transaction took place after their maturity, appellants' defenses are material and competent. We see no merit in this contention. One relying upon a novation must establish that the new obligation was intended as a substitution and extinguishment of the old one. Here the only evidence that in any manner indicated a novation was the execution of the note by the corporation and its acceptance by the bank. The rule is well established in this state that, before a note extinguishes and satisfies the indebtedness evidenced by an earlier one, there must be an express agreement or understanding to that effect. It is not contended that there was any express agreement upon the subject, and whatever presumption, if any, which might arise from the transaction itself, is dispelled by the testimony of the teller of the bank, which shows there was no such agreement, but on the contrary, that the corporate note was simply a renewal of the original indebtedness. Comptoir D'Escompte de Paris v. Dresbach, 78 Cal. 15, 20 Pac. 28; Savings & Loan Society v. Burnett, 106 Cal. 514, 39 Pac. 922; Bonestell v. Bowie, 128 Cal. 511, 61 Pac. 78; Gnarini v. Swiss-American Bank, 162 Cal. 181, 121 Pac. 726. In such a case the note only postpones the time of payment of the old note until default is made in the payment of the new note. Clark v. Berlin Realty Co., 33 Cal. App. 50, 164 Pac. 333. Nor is the collateral security pledged for the payment of the original debt released by the taking of such new note. 8 Corpus Juris, p. 442.

[5] Counsel for appellants argues that the doctrine announced in the Gnarini Case has no application to the instant one, for the reason that Emma B. Freeman guaranteed payment of the corporation note. We fail to see how this fact in any manner affects the doctrine there announced. The note executed by the Freeman Art Company was for the same debt, and was manifestly executed simply to meet the changed conditions brought about by the incorporation of the business. The rights of the bank became fixed at the time it took the notes, and they were in no manner affected by the subsequent transaction, which merely amounted to a renewal of the original obligation.

[6] Appellants' further contention that, assuming that a novation never took place, nevertheless Mrs. Freeman's liability to the bank was suspended so long as the corporate note was not dishonored by nonpayment. Assuming this to be so, a pledgee of commercial paper takes it as a trustee for the owner and pledgor, and the suspensive condition as to payment could in no manner affect the bank's right to seek to recover upon a matured promissory note deposited as security for this debt, and to hold the proceeds, if and when recovered, in satisfaction of the principal debt secured by it. 2 Randolph, Commercial Paper, § 795.

For the reasons given, the judgment is affirmed.

I concur: RICHARDS, J.

58 Cal. App. 618

## FRANCIS v. SUPERIOR COURT OF KERN COUNTY et al. (Civ. 3916.)

(District Court of Appeal, Second District, Division 2, California. July 25, 1922.)

**Attachment ⊜131—Superior court authorized to hear application for increase of bond, the amount of which was fixed by clerk.**

The superior court has jurisdiction to hear and determine an application for an increase in an attachment undertaking, the amount of which was fixed by the clerk of that court, under Code Civ. Proc. § 539, for the clerk, in fixing the amount of the undertaking before issuing the writ, was acting merely as a constituent part of the court.

Original application for writ of prohibition by Mary F. Francis against the Superior Court of Kern County and Howard A. Peairs, as Judge thereof. Alternative writ discharged, and peremptory writ denied.

Matthew S. Platz, of Bakersfield, for petitioner.

George E. Whitaker, of Bakersfield, for respondents.

FINLAYSON, P. J. This is an original application for a writ of prohibition directed to the superior court for Kern county, and Hon. Howard A. Peairs, judge, commanding and directing them to desist from hearing a motion to increase the amount of an undertaking on attachment which had been given in an action wherein the petitioner here is the plaintiff and L. W. Lowell and others are the defendants. To the alternative writ of prohibition, issued out of this court, respondents have made a return, which petitioner has not seen fit to traverse.

The petition and the return thereto disclose the following facts: Petitioner commenced an action against L. W. Lowell and others to recover $11,250, alleged to be due on a contract. Petitioner, as the plaintiff in that action, caused an affidavit for attachment to be filed in the superior court; at the same time the clerk of that court fixed the amount of the undertaking on attachment at $500, as he was authorized to do by section 539 of the Code of Civil Procedure, whereby it is provided that the clerk, before issuing the writ, shall require an undertaking on the part of the plaintiff in a sum not less than $200 and not exceeding the amount claimed by the plaintiff. Petitioner gave an undertaking in the amount required by the clerk—$500—and thereupon the writ of attachment was issued. Acting under this writ, the sheriff, on March 11, 1922, levied upon certain debts then due and owing to the defendants in that action by the Midway Northern Oil Company, which debts were sufficient to satisfy plaintiff's demand for $11,250, with interest thereon at 7 per cent. per annum from the date of the commencement of the action.

The return, which, as we have stated, has not been traversed by petitioner, further alleges that it will take approximately three years before the action in which the attachment was issued can be finally concluded; that the interest which will accrue on the moneys or debts garnisheed by the sheriff, together with costs, will amount to approximately $2,500; that if the defendants in that action shall prevail the sum of $500 named as the penalty of the undertaking on attachment will be entirely inadequate to compensate them for the damages which they will sustain by reason of the attachment; and that if, pending the final outcome, disaster should overtake the oil company whose indebtedness to the defendants was thus levied upon and garnisheed, the full amount of $11,250 so tied up by the attachment might be dissipated and the defendants further damaged thereby.

The defendants, whose property has thus been attached, have given notice to the plaintiff in that action, the petitioner here, that they will move the superior court for Kern county to increase the amount of the undertaking on attachment from $500 to $11,250, on the ground that an undertaking in the sum of $500 is wholly inadequate. It is to prevent the hearing of that motion that the present proceeding was commenced; petitioner claiming that the superior court is without jurisdiction to alter the amount of the undertaking, once it is fixed by the clerk of the court prior to the issuance of the writ.

If the clerk could have been aware that solvent credits, aggregating the full amount sued for, due and owing to the defendants, were about to be attached and held for three years, possibly, while awaiting final disposition upon a crowded calendar, there can be little doubt that he would have required a very different undertaking. The clerk cannot be said to have found judicially upon the amount of security which was really required, for it does not appear that the circumstances as at present seen, now that the attachment has been levied, were brought to his attention when fixing the amount of the undertaking; and if the security as originally required by the clerk proves now to be insufficient, why cannot the superior court, looking to the interests and rights of both plaintiff and defendants, make it sufficient? The clerk, who is a ministerial officer, is an arm of the court and an essential constituent thereof (In re Durant, 60 Vt. 176, 12 Atl. 650), and when fixing the amount of the undertaking before issuing the writ he is but acting as a constitutent part of the court. He is not exercising jurisdiction as a separate and independent tribunal. It is true that, in deter-

mining the amount of the undertaking which should be required of a plaintiff, the clerk is exercising a judicial or a quasi judicial function, but his act and judgment is not the act or judgment of an independent judicial entity; and if subsequent developments, arising after the levy of the writ, show that the amount of the undertaking required by the clerk before issuing the writ is insufficient to indemnify the defendant for the costs which may be awarded him and the damages which he may sustain by reason of the attachment, why may not the court, whose ministerial officer prescribed the amount of the undertaking in the first instance, make an order, after a hearing, increasing the amount, upon a showing that the security is inadequate?

The security to be given by a plaintiff who obtains a writ of attachment is intended to be an indemnity to the defendant in the action against his costs and damages. The affidavit on attachment, which is intended to prevent the wrongful suing out of the writ, is a restraint upon the conscience of the plaintiff, and the undertaking imposes an additional restraint by fixing a definite liability upon the plaintiff and his sureties as indemnity to the defendant against loss from the wrongful and vexatious use of the process. Ex parte Damon, 103 Ala. 477, 15 South. 862. But if, through an error of judgment or a mistake of fact, the clerk has failed to require an undertaking in an adequate amount, the defendant may have no real protection against loss from the wrongful or vexatious use of the writ unless the court has the right and the power to require additional security.

We think the power of the court to require an increase in the amount of the undertaking is incidental to the provisional remedy of attachment. It is true that in some jurisdictions this power is expressly conferred by statute, but it exists without such express statutory authorization. Thus, in Manda v. Etienne, 13 App. Div. 237, 43 N. Y. Supp. 194—a case involving the jurisdiction of the Special Term to require the plaintiff in an action to give an additional undertaking on attachment—it was said:

"The plaintiff's main contention is that the Special Term 'was wholly without jurisdiction, power, or authority to make' the order in question. He seems to overlook section 682 of the Code of Civil Procedure, where this power is expressly conferred. It is a power which is frequently exercised. *Before it was thus expressly conferred, it was held to be an incident to the regulation and conduct of provisional remedies.* Whitney v. Deniston, 2 Thomp. & C. 471." (Italics ours.)

And in the case thus referred to (Whitney v. Deniston, 2 Thomp. & C. [N. Y.] 471) we find this language:

"The court has general power to discharge attachments the same as all other provisional remedies. Code, § 241. It may be exercised for all proper reasons, including those where, for any cause, the plaintiff's proceedings are in any respect defective, and they certainly are so where the amount of the undertaking is insufficient to indemnify the defendant for the costs which may be awarded to him and the damages he may sustain by reason of the attachment. Code, § 230. It is the intention of the law that the defendant shall have that indemnity where his property is attached; and if the undertaking given, when the attachment is obtained is insufficient for that purpose, the law cannot be properly administered without requiring an adequate increase in the amount to be made. *The power is incidental to all the provisional remedies provided by the Code,* and its existence is in substance provided for in the authority which the court has for supplying omissions in any proceeding." (Italics ours.)

In Ex parte Damon, supra, it is said that the undertaking on attachment—

"must be regarded as defective, when it is insufficient in security, as well as when it is lacking in some particular, which, while it does not render it absolutely void, does render it an imperfect obligation for the purposes intended. 1 Wade on Attachment, §§ 114, 115, 288; Bumberger v. Gerson, 24 Fed. 257. It is the right, then, of the defendant to have the attachment dissolved whenever, at any stage of the cause, the bond shall become defective or insufficient, as an indemnity, on account of the insolvency of its securities; but the plaintiff should be accorded the right of maintaining his cause by repairing a defect brought about by no fault of his."

See, also, Gapen v. Stephenson, 18 Kan. 140, and Bumberger v. Gerson (C. C.) 24 Fed. 257.

Our conclusion is that the superior court is not without jurisdiction to hear and determine the application for an increase in the amount of the undertaking on attachment.

The alternative writ of prohibition is discharged, and the application for a peremptory writ of prohibition is denied.

We concur: WORKS, J.; CRAIG, J.

58 Cal. App. 571

## GALLAGHER v. BOYLE, City and County Auditor. (Civ. 4084.)

(District Court of Appeal, First District, Division 1, California. July 19, 1922.)

**Courts ⟸57(1)—Superior court not authorized to order persons not official reporters to make transcripts of testimony in police court.**

An order made by the superior court to a city auditor to issue a warrant for services by one not the official reporter, in making a transcript of the testimony in a criminal case in the police court, was void; Code Civ. Proc. § 128, subds. 4, 5, empowering the superior court to compel obedience to its orders, not authorizing such an order, and sections 274, 274a, and 274b, authorizing shorthand notes, referring solely to superior court proceedings and that court's official reporters.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Application for writ of mandate by John F. Gallagher against Thomas Boyle, Auditor of the City and County of San Francisco. From a judgment denying the application, plaintiff appeals. Affirmed.

W. C. Flynn, of San Francisco, for appellant.

George Lull, City Atty., and Maurice Dooling, Jr., Asst. City Atty., both of San Francisco, for respondent.

RICHARDS, J. This appeal is from a judgment of the superior court of the city and county of San Francisco, denying the application of the appellant for a writ of mandate by which he was seeking to compel the respondent, as auditor of said municipality, to issue his warrant upon its treasury for the payment to appellant of the sum of $66 claimed by him to be due for the transcription of certain testimony taken by him as a police court reporter at the preliminary examination of one Bernardino Caterini in the police court of said city and county upon a charge of felony, upon which he was discharged from custody by the judge of said police court. The transcription of said testimony was made upon an order of the superior court of said city and county entered in another criminal case, to which said Caterini does not appear to have been a party. The purpose for which such transcription was made does not appear, but the appellant attempts to justify the order for its transcription under subdivisions 4 and 5 of section 128 of the Code of Civil Procedure, which read as follows:

The superior court shall have power—

"4. To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein;

"5. To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto."

We find nothing, however, in either of these subdivisions of said section of the Code which would give a semblance of authority to the superior court to make the order in question. The appellant was not the official reporter of said superior court, nor did the case of Caterini ever reach that tribunal. The sections of the Code of Civil Procedure which confer authority upon superior courts or the judges thereof to have shorthand notes of proceedings in said courts taken and transcribed, and which render the expense of so doing a charge against the public treasury payable out of its general fund, are sections 274, 274a, and 274b of said Code. These have reference solely to proceedings in said courts and to the official reporters thereof.

Neither by these nor by any other sections of the Code of Civil Procedure is any authority conferred upon judges of the superior courts to order persons not official reporters of said courts to make transcriptions of the testimony taken in other courts and in cases other than those pending in the superior court and to create a charge therefor upon the public treasury. In the absence of such statutory authority for the making of such orders, we are satisfied that the power to make the same does not exist, and hence that the making of the transcriptions and copies thereof under a void order could not be made the basis of a valid claim against the public treasury. The auditor was therefore justified in refusing to draw his warrant for the payment of such claim.

Judgment affirmed.

I concur: TYLER, P. J.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

58 Cal. App. 614

## CARR v. INTERNATIONAL INDEMNITY CO. (Civ. 3840.)

(District Court of Appeal, Second District, Division 1, California. July 25, 1922.)

**1. Insurance ⟸424 — Exception of glazing damage in plate glass window policy held inapplicable to break after completion of glazing.**

Clause in policy against breakage of plate glass in window, excepting insurer from liability for damage by glazing, is inapplicable to a break after the work of glazing had been completed.

**2. Insurance ⟸424—Under exception in plate glass window policy, break must have been caused by unworkmanlike manner of installing.**

For clause in plate glass window policy, excepting from insurer's liability any damage "occurring before the glass is completely glazed in a workmanlike manner," to avail insurer, the break, occurring after the glazing had been completed, must have been caused by unworkmanklike manner of installing the glass.

**3. Insurance ⟸646(6)—Insurer held to have burden of showing loss within exception to liability.**

On insured making prima facie showing of loss within the terms of the policy, insurer has burden of showing it was within some exception to liability.

**4. Appeal and error ⟸1011(1) — Determination of facts on conflicting evidence conclusive.**

Trial court's determination, on conflicting evidence, of cause of damage not being within insurance policy's exception to liability, is final.

**5. Trial ⟸395(3)—Form of general findings held sufficient.**

Findings in form that all the allegations of the complaint are true, and that all denials and allegations of the answer are untrue, are sufficient to determine the material issues.

**6. Trial ⟸377(2)—Case may be opened for further evidence after minute order for judgment.**

The trial court has discretion at any time before decision is rendered to reopen case for further evidence; and, where findings of fact are required, a mere minute order directing judgment does not constitute a decision.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by J. E. Carr against the International Indemnity Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.
Donald Barker and William H. Neblett, both of Los Angeles, for respondent.

JAMES, J. Plaintiff brought this action to recover upon a policy of insurance which covered loss by breakage of plate glass in a store front. Judgment was in plaintiff's favor, and the defendant has appealed.

The insurance, as expressed in the policy, provided against "loss by breakage from accidental causes beyond the assured's control." The policy contained clauses exempting the insurer from liability for—

"(4) Any loss or damage caused by the glazing of any light of glass or by the removal of any light of glass from its frame or caused by the repairing of any frame; (5) any loss or damage occurring before the glass is completely glazed in a workmanlike manner."

Appellant's main contention that the evidence shows that breakage of the glass was caused by the unworkmanlike manner in which the same was set. It was shown in evidence that plaintiff, in December, 1919, owned a newly constructed store building, in which a plate glass front was then being installed. He notified his agent to have the glass covered by insurance, and the policy was issued, effective as at noon on the 30th day of December, 1919. The final work of setting the glass was completed on Monday, the 29th of December. The contractor in charge of the special matter of setting the glass and fastening it in place testified that there was nothing wrong with the glass on Monday, the 29th, after the work of attaching the fastenings or "stops" had been completed; that on Tuesday it was not broken, but that at about 10 o'clock on Wednesday, December 31st, he observed one of the curved plates, and saw that it was cracked, the crack extending for 16 or 18 inches. He further testified as follows:

"The glass was not broken because of the improper manner in which it was set. I cannot say what caused the break in the glass; or, in other words, I do not know."

The mechanic who actually put in the "stops," or final retaining supports of the glass, testified that he observed the general condition of the glass at the time he put in the "stops," and said:

"When I completed my work, everything was all right; there was no break at that time."

This witness testified that he had had long experience in installing glass; that he was an adept in work of that character. Two other witnesses who were employed about the building testified that, after the completion of the work of setting the glass and affixing the supports, they saw no breaks in it. Upon cross-examination of the architect of the building, that witness testified as follows:

"In my opinion, the break in this glass, I rather think, was produced by unequal expansion of the bars. That might have been some undue stress at one place."

This witness testified that, when the "bars" (referring to the supports holding the glass) are in place, the glass would be permanently fixed. One witness, called on behalf of the defendant, testified that, assuming no exterior violence to have been applied, the damage might have resulted by reason of the retaining strips or "stops" being too tight. He testified that, if such was the case, it would show that the glazing job was not properly done. Another witness for the defendant, after testifying that he had heard a description of the manner in which the work of installing the glass had been done, said:

"Based upon my experience, and assuming that this glass was not broken by exterior force, direct force, applied, I would be unable to say what was the cause of its breaking. The break might be caused from various reasons."

There was testimony, also, that there were no marks upon the glass showing the application of exterior force; but it was not shown but that exterior force might have been applied, and caused the break, without leaving any mark other than the break itself.

[1-4] As the work of glazing had been completely finished before the break occurred, plainly the first excepting clause quoted (4) would have no application. As to the second excepting clause, in order to relieve the defendant it must have appeared that the break was caused by reason of the unworkmanlike manner in which the glass was installed. Prima facie there was ample evidence to show that the work was properly done, and the testimony introduced on behalf of the defendant can at best be said to have produced a conflict in the evidence. Moreover, after the plaintiff had proved damage within the terms of the policy, the burden rested with the defendant to show that such loss was produced through some excepted cause. "Where proof is made of a loss apparently within a policy, the burden is on the insurer to prove that the loss occurred from a cause for which it is not liable." 14 R. C. L. p. 1437, par. 599; Blasingame v. Home Insurance Co. et al., 75 Cal. 633, 17 Pac. 925; Dennis v. Mut. Life Ins. Co., 84 Cal. 570, 24 Pac. 120. A determination of the facts, under a state of conflicting evidence, would, of course, rest with the trial judge, whose decision upon that matter would be final.

[5] Another contention of appellant is that the findings are insufficient to support the judgment. The court made general findings "that all the allegations of the complaint herein are true," and "that all denials and allegations of the answer herein, including the amendments thereto, are untrue." Findings in this form have been held to sufficiently determine material issues in a cause. Fritz v. Mills, 170 Cal. 449, 150 Pac. 375; Moore v. Clear Lake Water Works, 68 Cal. 146, 8 Pac. 816; County of Sutter v. McGriff, 130 Cal. 124, 62 Pac. 412.

[6] Appellant points to one other alleged error: It is claimed that the court had no jurisdiction to reopen the case for further evidence after a minute order had been made directing judgment for the defendant. The record shows that upon the first hearing evidence was introduced and the cause submitted to the court, and that the judge ordered judgment for the defendant. The plaintiff immediately gave notice of a motion to set aside that order (which latter was expressed only in the minutes of the court), assigning various grounds therefor. At the hearing of this motion the court refused to enter judgment for the plaintiff, which was asked for, but set the case down for the hearing of further evidence. It came on at the time so fixed, and certain amendments were made to the answer, and further pertinent evidence heard. It hardly needs citation of authorities to support the statement that the trial judge had discretion at any time, before decision was rendered, to order further hearing in a cause and require additional testimony to be given. A minute order, where findings of fact are required to be made, as in this case, does not constitute a judgment or decision, to vacate which a motion for a new trial must be made. Brownell v. Superior Court, 157 Cal. 703, 109 Pac. 91.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

88 Cal. App. 587

## FEENEY v. STANDARD OIL CO. (PENNSYLVANIA FIRE INS. CO. OF PHILADELPHIA, PA., Intervener). (Civ. 2354.)

(District Court of Appeal, Third District, California. July 20, 1922.)

**1. Master and servant ⊂=302(6)—Master not liable for servant's negligence in lighting cigarette.**

Where defendant's servant, delivering gasoline to plaintiff's premises, was not negligent in spilling the gasoline, his act in dropping a lighted match used in lighting a cigarette into the gasoline was not an act for which defendant was liable, under Civ. Code, §§ 2338, 2339, relative to a principal's liability for the negligence of his agent, though defendant had instructed him not to smoke while delivering gasoline.

**2. Master and servant ⊂=305—Violation of instructions no defense to action for servant's negligence.**

An agent's violation of instructions as to the manner of transacting any business is no defense in a third person's action against the principal for the agent's negligence.

**3. Pleading ⊂=398—Variance held not to have misled defendant to his prejudice.**

Where the only negligence alleged was in spilling gasoline and dropping a lighted match into it, but there was evidence that defendant's driver, who spilled the gasoline, did nothing to clean it up, and the case was tried as if this was in issue, the variance did not mislead defendant to its prejudice, within Code Civ. Proc. §§ 469, 470, providing that, when a variance has not actually misled the adverse party to his prejudice, it is not deemed material, etc.

**4. Explosives ⊂=8—Express finding of negligence in not removing spilled gasoline held not necessary to support judgment.**

The danger arising from leaving 2½ gallons of gasoline on the cement floor of a garage in the Sacramento valley, where it was spilled, in the middle of an afternoon in August, would be so apparent to a man of capacity and prudence that no express finding of negligence is required to support a judgment.

**5. Explosives ⊂=8—That proprietor of garage was negligent in not removing spilled gasoline does not necessarily relieve seller of negligence in delivery.**

That the proprietor of a garage knew defendant's driver spilled gasoline, which he was delivering, and was guilty of negligence in not promptly removing it, does not necessarily relieve defendant from the charge of negligence in not removing it.

**6. Explosives ⊂=8 — Intervening independent act of negligence held not to defeat liability.**

Where defendant's driver spilled gasoline, which he was delivering, his independent act of negligence in dropping a lighted match, used by him to light a cigarette, did not relieve defendant from the consequences of his negligent failure as its agent to remove the gasoline spilled.

**7. Explosives ⊂=8 — Seller spilling gasoline owed duty of reasonable effort to regain control.**

A seller of gasoline, spilling it when delivering it to the buyer's garage, owed the duty of making a reasonable effort to regain control of the gasoline in order to prevent injury.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by P. W. Feeney against the Standard Oil Company, in which the Pennsylvania Fire Insurance Company of Philadelphia, Pa., intervened. From a judgment for intervener, defendant appeals. Affirmed.

Pillsbury, Madison & Sutro, of San Francisco, and Brown & Albery, of Colusa, for appellant.

Frank Freeman, of Willows, for respondent.

Goodfellow, Eells, Moore & Orrick, of San Francisco (George Herrington, of San Francisco, of counsel), for intervener.

FINCH, P. J. Plaintiff was the proprietor of a garage conducted by him in a building which he occupied under a lease from the owner thereof. The building was destroyed by a fire alleged to have been negligently caused by the defendant. Plaintiff sued as assignee of the owner to recover damages suffered by the destruction of the building. The Pennsylvania Fire Insurance Company, having insured the building against loss by fire, paid the owner the sum for which it was insured and intervened in the action. The intervener was given judgment for the sum so paid, and this appeal is from the judgment so rendered.

The facts are simple and undisputed. The only question presented by the appeal is whether the fire was caused by negligence of the defendant. The court found:

"That on the 23d day of August, 1917, plaintiff ordered certain quantities of gasoline from defendant, and on said last-mentioned date defendant, by its agent, McDonald, delivered a quantity of gasoline to plaintiff at the above-mentioned building owned by said Steel. Plaintiff had a tank inside the said building, and it was necessary for the said McDonald to draw the gasoline from the delivery wagon tank, in which he had brought the gasoline to the said building, and carry the same in buckets to the tank in said building. That in order to pour the gasoline into the said tank it was necessary for the said McDonald to be elevated to some extent, and a box had been provided by plaintiff, upon which the said McDonald stood when pouring the gasoline into the said tank. This box was not strong, and before the delivery of gasoline was completed on said day, and while the said McDonald was upon the said box with some buckets of gasoline, the said box broke, and at that time and because of that accident a large quantity of gasoline was spilled upon the cement floor of the said building above men-

tioned. McDonald did nothing in the way of removing the gasoline spilled as before mentioned, or preventing it from catching fire. After completing delivery of the gasoline, McDonald attempted to have his delivery tags approved by the plaintiff; but plaintiff put him off for a short time upon the claim that he (plaintiff) was busy at that particular moment. McDonald waited for plaintiff some 10 or 15 minutes, during which time he engaged in some conversation as to going swimming with some young men about the said building, and while so waiting lighted a cigarette and carelessly and negligently dropped a match lighted for said purpose on the floor and into the gasoline that had been spilled as aforesaid. The said gasoline caught fire from said match, and as the result thereof the said building belonging to the said Edward L. Steel was destroyed by fire."

Neither party contends that the foregoing findings are not supported by the evidence. There appears to be no evidence supporting the finding that the plaintiff provided the box on which McDonald stood at the time the gasoline was spilled, but that fact is immaterial, since there is no finding of negligence in that connection on the part of either McDonald or plaintiff. The evidence shows that the fire occurred about 3 o'clock in the afternoon, and that the quantity of gasoline spilled was from 2½ to 3 gallons.

[1, 2] Since the court did not find that the gasoline was negligently spilled, the judgment must have been grounded upon McDonald's negligence in igniting the gasoline, or his failure to promptly remove it from the cement floor of the garage. Section 2338 of the Civil Code provides:

"A principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business."

Section 2339 provides:

"A principal is responsible, for no other wrongs committed by his agent than those mentioned in the last section, unless he has authorized or ratified them, even though they are committed while the agent is engaged in his service."

Under the rule thus declared it seems clear that the defendant is not responsible for McDonald's negligent act in dropping the lighted match into the gasoline. The lighting of the cigarette was no part of the transaction of the defendant's business. It was an independent act for McDonald's personal enjoyment. It occurred during the time of his transaction of the defendant's business, but was no part thereof and was not in the course of his employment. The fact that defendant had instructed McDonald not to smoke while delivering gasoline does not enter into the problem. An agent's violation of instructions as to the manner of transacting any business is no defense in an action by a third person against the principal for negligence of the agent. Was the failure of McDonald to remove the spilled gasoline actionable negligence for which defendant is responsible? Appellant contends that the finding as to such failure is insufficient to support the judgment on the issue of negligence on three grounds: (1) That such failure was not alleged in the complaint in intervention; (2) that the court did not find that the omission to remove the gasoline constituted negligence; (3) that no duty rested upon defendant to remove it.

[3] The only negligence alleged was that of spilling the gasoline and igniting it. Two witnesses testified without objection, in answer to direct questions on the subject, that McDonald did nothing "to clean it up, or mop it up." In cross-examination of such witnesses, appellant proved that no one else removed the gasoline from the floor. From the foregoing it appears that the case was tried upon the theory that McDonald's failure to remove the spilled gasoline was in issue. Had defendant objected to such testimony at the trial, the court probably would have permitted intervener to amend by alleging such failure.

"No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be amended, upon such terms as may be just." Code Civ. Proc. § 469.

"Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs." Code Civ. Proc. § 470.

It cannot be said that the defendant was misled to its prejudice by the variance under consideration.

[4] The omission to find in express terms that the defendant's failure to remove the gasoline from the garage floor constituted negligence is not fatal. The highly inflammable and volatile qualities of gasoline are well known. That the gas generated therefrom is a dangerous explosive is a matter of common knowledge. The danger arising from leaving 2½ gallons of gasoline spread out over the cement floor of a garage in the Sacramento valley in the middle of an afternoon in August would be apparent to a man of ordinary capacity and prudence. The necessity of its prompt and careful removal to avoid probable injury is plain. The probability of ignition by a spark from an automobile engine, a carelessly lighted match, or the fire of a cigar or cigarette, is a matter of common experience. The danger to be apprehended was well within the range of reasonable foresight. The facts and circumstances were such that no inference but that

of negligence can be logically drawn from the failure to remove the gasoline which had been accidentally spilled. Under such state of facts an express finding of negligence is not required. Cooley v. Brunswig Drug Co., 30 Cal. App. 58, 157 Pac. 13; Catlin v. Union Oil Co., 31 Cal. App. 597, 161 Pac. 29; Van Praag v. Gale, 107 Cal. 438, 40 Pac. 555; Jacobson v. Northwestern Pac. R. R. Co., 175 Cal. 468, 166 Pac. 3; Grossetti v. Sweasey, 176 Cal. 793, 169 Pac. 687.

[5-7] The next question is whether it was the duty of defendant to remove the spilled gasoline. The evidence shows that during the time of the delivery of the gasoline, and until the fire started, the proprietor of the garage was working on an automobile in some part of the garage not definitely located by the evidence in the record. The exact location seems to have been made clear to the trial court by means of a diagram referred to by the witnesses, but this diagram was not included in the record on appeal. It does not appear from the evidence whether the proprietor knew, prior to the fire, that any gasoline had been spilled. If it be assumed, however, that the proprietor had such knowledge, and that he was guilty of negligence in not promptly removing it, it does not necessarily follow that the defendant was not also negligent. Nor would McDonald's independent act of negligence in dropping the lighted match relieve the defendant from the consequences of his negligent failure, as its agent, to remove the gasoline.

"If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." Lynch v. Nurdin, 12 Q. B. (A. & E. [N. S.]) 29.

Having accidentally lost possession of a dangerous material, of which it had voluntarily taken charge, the defendant owed the duty to others of making reasonable effort to regain control, in order to prevent injury. If a person engaged in the transportation of dynamite should knowingly leave a part thereof, accidentally dropped, in a place where it probably would be exploded through accident or the negligence of others, he certainly would be responsible, in the event of an explosion thereof, for injury inflicted on persons who were without fault. The duty of safely keeping the dangerous material would be continuous from the time it was received until it was safely delivered, a duty which could not be escaped by knowingly abandoning the explosive after the accidental loss of its possession. In Pittsburgh, etc., Ry. Co. v. Shields, 47 Ohio St. 387, 24 N. E. 658, 8 L. R. A. 464, 21 Am. St. Rep. 840, the employees of the defendant, wantonly and without any necessity therefor, and contrary to the rules of the company, placed some torpedoes in front of the wheels of the caboose in which some women were riding, with the intention to frighten them. When the train moved forward, one of the torpedoes failed to explode, and it was later picked by some children, one of whom was injured by its explosion. The court said:

"The duty intrusted by the railway company to the conductor in regard to these torpedoes was, not only to use them as signals with the requisite care and caution, but to observe like care and caution in the custody of them, when not in use. The servant's custody of them, when not in use, was as much a part of his employment as was the use of them as signals when required. In taking them from the place where they were carried when not in use, and, in mere caprice, placing them on the track for the purpose of frightening the ladies, he was not, it is true, within his employment as to the use of them; but in so doing he violated the duties connected with his employment as the custodian of them, and thereby made his master liable for the consequences of his neglect, in the same manner and to the same extent as if it had been done by the company itself. * * * Suppose a servant, with others under his control, employed with a construction train. * * * He may for a time quit his employment, and with his men go off on affairs of his own. Whilst thus out of the master's employment, he may build a fire, which, through his negligence, may consume the property of another, and in the meantime loss of life and property may result from a collision with the train negligently left standing on the track. Now, whilst, as has been held, the master would not be liable for the loss resulting from the fire, because the act was done outside the servant's employment, * * * yet it is equally certain that for the loss occasioned by the servant's negligence in leaving the train on the track the master would be liable in damages, for the plain reason that, in abandoning the custody of the train, he was guilty of negligence in the employment of the master, whilst in building the fire he was not."

See, also, Wells v. Gallagher, 144 Ala. 363, 39 South. 747, 3 L. R. A. (N. S.) 759, 113 Am. St. Rep. 50. While the extent of injury likely to result from the negligent control of other explosives may be greater, the probability of injury from gasoline left under the circumstances here disclosed is not less than is usual in the case of higher explosives, and the point of law under discussion has to do with the probability rather than the extent of injury. That the same rules apply to the safe-keeping of gasoline as to that of other explosives is illustrated by the following cases: Childs v. Standard Oil Co., 149 Minn. 166, 182 N. W. 1000; Newton v. Texas Co., 180 N. C. 561, 105 S. E. 433; Leahy v. Standard Oil Co., 220 Mass. 90, 107 N. E. 458; Id., 224 Mass. 352, 112 N. E. 950; Watson v. Kentucky & Indiana Bridge & R.

Co., 137 Ky. 619, 126 S. W. 146, 129 S. W. 341. It seems clear that the findings support the judgment.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

---

58 Cal. App. 594

## PEOPLE v. PAULI. (Cr. 1047.)

(District Court of Appeal, First District, Division 1, California. July 21, 1922.)

**1. Witnesses ⟸37(4)—Striking out evidence of character witnesses, based on limited personal acquaintance held not error.**

Where, in a prosecution for forgery, it developed that the evidence of character witnesses was based on personal contact with defendant, who was a stranger in each community in which the witnesses resided, and had not lived long enough in either community to have a general reputation therein, there was no error in excluding the evidence.

**2. Criminal law ⟸379—That character or reputation of a person has not been discussed is cogent evidence of good character and reputation.**

That the character or reputation of defendant in the community in which he resides has not been discussed or questioned is cogent evidence of good character and reputation, but the application of this rule presupposes a sufficient period of residence and extent of acquaintanceship in the community for the person's character to have become known.

**3. Criminal law ⟸379—Stranger in a community has not such a good reputation to which any one may testify.**

Defendant, a stranger in a community, working for a single employer therein for a few months, going about little, and forming no associations, does not have a general reputation for truth, honesty, and integrity therein to which any one can testify.

**4. Criminal law ⟸1170(1)—Excluding evidence of good reputation held not prejudicial, where accused testified to a prior conviction.**

The exclusion of evidence of good reputation of defendant in a prosecution for forgery was not prejudicial, where defendant later testified that he had served a term in the penitentiary under an assumed name on plea of guilty of the crime of forgery.

**5. Criminal law ⟸834(4)—Instruction that the information is merely a charge, and cannot be considered in determining guilt, held properly modified.**

In a prosecution for forgery, an instruction that the information is merely a charge brought against defendant, and as such can have no more consideration in determining whether defendant is guilty than if such information had not been filed or charge made, and defendant is to be accorded every presumption of innocence in his favor, *held* properly modified.

**6. Forgery ⟸5—Instruction that, though defendant forged the check, if he did not utter it with intent to defraud, he should be acquitted, held properly refused.**

Under Pen. Code, § 470, the making, forging, or uttering of a false check constitutes a crime; hence an instruction that, though defendant did make and forge the check, if he did not utter, publish, and pass the check with the intent to defraud the particular person named, he should be acquitted, was properly refused.

**7. Indictment and information ⟸149—Instruction attacking information on ground of uncertainty, being in nature of a demurrer, comes too late.**

In a prosecution for forgery, an instruction that the information was defective in failing to sufficiently charge defendant with having made and forged the check in question with intent to defraud, which in substance was a demurrer to the information, was properly refused, where no demurrer was interposed by defendant on his arraignment.

**8. Criminal law ⟸829(1)—No error to refuse instructions covered by given instructions.**

No error can be predicated on the refusal to give instructions which are substantially covered by the instructions given.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

George H. Pauli was convicted of forgery, and he appeals. Affirmed.

Peter F. Morettini, of San Jose, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

RICHARDS, J. The defendant was charged in the information with the crime of making and uttering a forged check with intent to defraud. He was tried, convicted, and sentenced to imprisonment for the term provided by law. His appeal is from the judgment of conviction.

[1-4] The first contention which the appellant makes upon said appeal is that the trial court committed prejudicial error in granting the motion of the prosecution to strike out the testimony of two certain character witnesses who had testified to the good reputation of the defendant for truth, honesty, integrity and veracity. The record touching this contention shows the following state of facts:

The defendant called three witnesses to his good reputation—Manuel Picano, E. H. Crane, and Daniel B. Wade. The first of these witnesses, Picano, who was a life insurance agent and postmaster, and who also

kept a general merchandise store in San Lorenzo, Cal., gave strong testimony as to defendant's good reputation while he was working in and about San Lorenzo from about April, 1920, to October, 1920, and his testimony was allowed to stand. The next witness, E. H. Crane, was an orchardist at San Lorenzo, for whom the defendant had worked from March to October, 1920, and who on direct examination, in response to the usual inquiries, stated that he knew the defendant's reputation in that community and that it was good. On cross-examination, however, it developed that his opinion on that subject was based wholly on his personal dealings with the defendant and the quality of his work with him; that the defendant was a stranger to him and to the community when he came to work for him; that he lived on his place, went out little, did not form any associations, and left the community when he had ceased to work for him. The witness further testified that he never heard his reputation discussed; never heard any one mention his name or refer to him in any way. The court upon this showing granted a motion to strike out the testimony of this witness. The next witness, Daniel B. Wade, also answered the usual inquiries upon direct examination by testifying that he knew the defendant's reputation and that it was good; but upon cross-examination it developed that the defendant had come, a stranger, to work for him on his ranch near Alviso, in the county of Santa Clara, in the fall of the year 1920, and had lived and worked on his place about two months, and that he had also worked for him at another time for a brief period; that he formed his opinion as to his good reputation wholly from the work he had done on the place, and that he never heard any one mention his name or talk about him or criticize him, and had never discussed his reputation with any one. The testimony of this witness was also stricken out on motion of the prosecution.

We perceive no error in the ruling of the trial court in striking out the testimony of these last two witnesses. It is, of course, a well-known rule regarding evidence of reputation that the fact that the character or reputation of a person in the community in which he resides has not been discussed or questioned is cogent evidence of the person's good character and good reputation. It was so held in People v. Adams, 137 Cal. 580, 70 Pac. 662, and the quite recent case of People v. Stennett (Cal. App.) 197 Pac. 372, and there can be no doubt that this is the general rule upon the subject. But the application of this rule presupposes a sufficient period of residence and extent of acquaintanceship, in the community from which such testimony is drawn, for the person's character to have become known, and for some sort of reputation thereof to have arisen. A stranger in the community, working for a single employer therein for a few months, going about little, and forming no associations, cannot be said to have a general reputation for truth, honesty, and integrity therein to which any one can testify. The cross-examination of both of these witnesses developed precisely this state of facts concerning this defendant, and showed conclusively in each case the opinion of the witness was based upon his personal contact with the defendant, who was a stranger in each community, and had not lived long enough in either place to have a general or any reputation therein. It may be said in addition that the prosecution in this case made no attack upon the reputation or character of the defendant, and that, in addition to the presumption which attaches in every case, he had the affirmative testimony of one witness to his good reputation. It may be further said in this connection that the defendant took the witness stand in his own behalf and testified that he was an ex-convict, having served a term in Folsom under an assumed name upon his plea of guilty of the crime of forgery. It cannot, therefore, be said that the defendant was prejudicially affected by the rulings of the trial court upon the motion to strike out the testimony of these two witnesses, even if such rulings were conceded to be erroneous.

[5] The appellant's next contention is that the trial court was in error in refusing to give without modification the following instruction:

"You are instructed that the information is merely a charge brought against the defendant (and is not evidence in the case), *and such a charge can have no more consideration with you in determining whether or not the defendant is guilty of the offense charged than if such information had not been filed or charge made; and in your deliberations you are to put this fact out of your minds, and are to accord to the defendant every presumption of innocence in his favor. Even if you find that the defendant did make and forge this check, but did not utter, publish, and pass said check with the intent then and there and thereby to defraud the particular person named in the information, then and in that event you must acquit the defendant, and your verdict must be not guilty.*"

The words in parentheses in the above instruction constituted the modifications made by the court, and the underlined portion thereof was the portion stricken out by the court. The abbreviated instruction, as thus modified, was given. The appellant contends that he was entitled to the whole instruction without modification or elision. We cannot sustain this contention. The instruction as requested embraced two distinct propositions, as to the first of which the court's modification in parentheses merely made the instruction state more tersely what the defendant had requested more diffusely.

[6] As to the second proposition, the portion of the instruction stricken out by the court was not sound in law. The defendant was charged in the information under section 470 of the Penal Code with the making, forging, and uttering of a false check. Either of said acts under said section constituted a crime, and hence the defendant's requested instruction to the jury to acquit the defendant if they should find that he made and forged said check, but did not utter the same, is unsound in law, and hence was properly stricken from said instruction by the trial court.

[7] The appellant's next contention is that the trial court erred in refusing to give an instruction requested by him, wherein he undertook to have the court charge the jury that the information was defective, in failing to sufficiently charge the defendant with having made and forged the check in question with intent to defraud. The instruction asked was in substance and effect a demurrer to the information upon the ground of uncertainty. No demurrer was interposed by the defendant upon his arraignment, and we think a demurrer upon this ground comes too late when it appears for the first time embodied in an instruction to the jury. Besides, we are satisfied from a reading of the information that it is not subject to the criticism which the defendant had aimed at it, and hence that the instruction was properly refused. A similar instruction directed to the same objection to the information was also properly refused by the court.

[8] As to the defendant's other instructions, which the court refused to give, we find that their substance is embodied in the instructions which the court gave to the jury, and for that reason the duplication of instructions already substantially given was properly refused.

Finding no error in this record, the judgment is affirmed.

I concur: TYLER, P. J.

2. Negligence ⊂⊃141(3)—Instruction that contributory negligence may be ignored because of any negligence of defendant erroneous.

Any instruction from which the jury might fairly infer that conduct of plaintiff which amounts to contributory negligence may become free from negligence because of any act of neglect on the part of defendant is contrary to the doctrine of contributory negligence, and is erroneous.

3. Evidence ⊂⊃14—That traffic upon highways is so great that driver of a vehicle must take into account the conduct of others is a matter of common knowledge.

It is common knowledge that the traffic upon our highways is so great, involving continual streams of powerful vehicles of many classes, proceeding at varying rates of speed and not bound to follow any particular track, that such thoroughfares have become places of danger, where one who is himself driving a motor vehicle and who fails to continually take into account the conduct of others and to anticipate their movements as far as possible is negligent.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Polk McPherson against J. C. Walling and others. Judgment for plaintiff, and defendants appeal. Reversed.

Ernest Walling, of Fresno, and Power & McFadzean, of Visalia, for appellants.

J. A. Chase, of Visalia, and Max B. Jamison, of Porterville, for respondent.

CRAIG, J. On May 28, 1920, the automobile driven by plaintiff and respondent collided with the stage of the defendant and appellant on a public highway in Tulare county. The respondent charges the appellant with negligence in that connection, and asks damages because of injuries to his automobile. The appellant, as a defense and by way of counterclaim, alleged contributory negligence on the part of the respondent. It appears that at the time of the collision smoke of a varying density, sometimes so thick that witnesses testified an object could not be seen more than 10 feet ahead, covered the highway for a considerable distance. A trial by jury was had and verdict and judgment were rendered for the plaintiff and respondent. This appeal is taken therefrom and from the order denying appellant's motion for a new trial.

[1] At the request of plaintiff the court gave the following instruction:

"The reasonable care which is required of persons using the public highways must be measured by the conditions and circumstances found to exist at the time and place in question. Each may rightfully expect that the other will, at the proper time, discharge his proper duties toward the other. He may not rely wholly on the care of others, nor on that account neglect to use the precaution which the

(58 Cal. App. 563)

**McPHERSON v. WALLING et al. (Civ. 3587.)**

(District Court of Appeal, Second District, Division 2. California. July 19, 1922.)

1. Trial ⊂⊃253(9)—Instruction in action for injury to automobile by collision held erroneous as ignoring evidence of contributory negligence.

In an action for injuries to an automobile caused by a collision with a stage on a highway, an instruction as to the reasonable care which is required of persons using the public highways *held* erroneous, as ignoring evidence showing that plaintiff had violated the Motor Vehicle Act.

particular situation demands of him. But he frequently must, to some extent, depend upon others in such situation, and his conduct must be considered in view of the facts determining whether or not there was negligence. His care, or want of care, in such matters is a matter to be determined by the jury from all the circumstances surrounding him at the time and place in question."

We think the giving of this instruction constitutes reversible error. The rule stated in the second sentence and to which recurrence is made in the fourth would disregard the doctrine of contributory negligence. The third sentence does not cure the vice of the instruction taken as a whole. We now proceed to a fuller discussion of these propositions.

By the second sentence of the instruction the jury were told that the plaintiff had the right to expect that the defendant would at the proper time discharge his proper duties toward him, the plaintiff. This statement, standing alone, is not distinguishable from similar instructions which have been held erroneous in other cases. In Hutson v. So. Cal. Ry. Co., 150 Cal. 701, 89 Pac. 1093, the following statement and other language to the same effect in an instruction was held to be error:

"The plaintiffs and each of them were authorized to assume that the men in charge of the train would approach the crossing with due care."

Thompson v. Southern Pacific Ry. Co., 31 Cal. App. 567, 161 Pac. 21, is another case in which the same ruling was applied to a similar instruction.

It is true that the opinion in the Hutson Case stressed the idea that a railroad crossing is inherently a place of danger. This fact is emphasized as a reason for holding that such an instruction, conveying as it does the suggestion that a traveler may have the right to omit some degree of care in approaching a railroad crossing in reliance upon the presumption that another will perform his full legal duties, is erroneous. But the opinion also states that—

"Such a rule would abrogate the doctrine of contributory negligence in all such cases."

In the railroad crossing cases and also the Zarzana Case, 180 Cal. 32, 179 Pac. 203, 15 A. L. R. 401, the only claim of negligence on the part of the plaintiff consisted in the assertion that he did not anticipate the negligence of the defendant. In the instant case the error in giving the instruction in question is more apparent and prejudicial to the defendant because there was substantial evidence before the jury that the plaintiff was guilty of contributory negligence by various violations of the Motor Vehicle Law (St. 1915, p. 397, as amended by St. 1917, p. 382).

Where no question exists as to the lawfulness of the plaintiff's acts, it may be proper to instruct the jury that:

"The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which can come to him only from violation of law or duty by such other person" (29 Cyc. 516).

—but no authority has been called to our attention, and we apprehend none can be found, where such a proposition has been approved in a case where the lawfulness of the acts of plaintiff were themselves in question and an issue existed as to whether or not such unlawful acts were the proximate cause of the injury. Medlin v. Spazier, 23 Cal. App. 245, 137 Pac. 1078, was a case where the above quotation from Cyc. was cited with approval. It aptly illustrates the type of a case where such a principle of law applies. There the plaintiff was alighting from a car within a zone where the defendant was prohibited by law to run his auto. It was held that the plaintiff, while in this zone, was not negligent in failing to look up and down the street to make sure that drivers of vehicles were not operating the same contrary to law. But in the instant case there was substantial evidence to support the plea of contributory negligence by showing that the plaintiff was himself on the wrong side of the road, was exceeding the speed allowed by the Motor Vehicle Act under the circumstances, and was otherwise transgressing the law, and that such transgressions contributed proximately to the collision. To inform the jury that the plaintiff, acting as he did, might rightfully expect that the defendant would discharge his duty at the proper time without distinguishing between that conduct of the plaintiff which was lawful and that which the jury might find to be unlawful is prejudicially erroneous. It not only directs the jury to apply the rule to the plaintiff's conduct if they find that he himself violated no law, but it would require that they also view such conduct on his part as exceeding the speed limit in the same light and exclude it from consideration on the theory that he had a right to assume that defendant would not break the law. This rule would plainly abrogate the doctrine of contributory negligence.

The instruction before us does not leave it to the jury to decide from all the facts and circumstances in evidence whether or not the plaintiff had a right as a reasonable man to expect that the defendant would perform his legal duty. It forecloses it from deciding the question for itself.

[2] It is earnestly contended by respondent that the cases of Hutson v. So. Cal. Ry. Co. and Thompson v. S. P. Ry. Co., supra, are not applicable because they are both railroad cases in which the doctrine of "stop, look, and listen" is peculiarly applicable.

Of course, that doctrine applies to railway crossing cases only, but the law of contributory negligence is not limited to any class of actions ex delicto. The criticisms of the instructions in these cases, which were similar to that part of the one here in question, were not based alone upon the proposition that especial care was required because the plaintiff in each case was passing over a railway crossing, but upon the broader objection that the principle therein enunciated was squarely opposed to the doctrine of contributory negligence. As our court has well elucidated the matter in Antonian v. S. P. Co., 9 Cal. App. 718, 100 Pac. 877, a traveler approaching a railway crossing is only required to use the care of an ordinarily prudent man; the highest degree of care is not demanded. Ordinary prudence, however, may require, and in such cases does make necessary, cautious conduct such as looking, listening, and sometimes stopping. In requiring such acts of prudence, however, no different principle of law is applied, and no higher degree of care required than in other cases involving the issue of negligence. The difference is wholly one of fact. As a matter of law it is of no moment whether the alleged contributory negligence of the plaintiff be his failure to stop, look, and listen before crossing the railway, or to observe the inhibition of the Motor Vehicle Act against traveling at an excessive rate of speed, or upon the wrong side of the road or what not. The essential object of inquiry is, Was the plaintiff guilty of contributory negligence? If so, he cannot recover. Any instruction from which the jury might fairly infer that conduct of the plaintiff which amounts to contributory negligence may become free from negligence because of any act of neglect on the part of defendant is contrary to the doctrine of contributory negligence, and for that reason cannot be upheld. In cases where the plaintiff has been injured while passing over a railroad crossing it has been held that he was bound to stop, look, and listen for his own protection, because a railroad crossing is in itself a place of danger. Common experience and prudence requires such precautions upon his part. In the Hutson Case it is said that there are instances where as a matter of law it is negligence not to anticipate the negligence of others, and that the one then before the court was such case.

[3] In the case of Zarzana v. Neve Drug Co., supra, the rule which requires one to anticipate the presence of others having equal rights with oneself is applied to the driver of a motor vehicle upon the public highways. It is common knowledge that the traffic upon our highways is so great, involving as it does continual streams of powerful vehicles of many classes, proceeding at varying rates of speed and not bound to follow any particular track, that such thoroughfares have become places of danger, where one who is himself driving a motor vehicle and who fails to continually take into account the conduct of others and to anticipate their movements as far as possible is negligent. Such anticipation is demanded without regard to the Motor Vehicle Act. Zarzana v. Neve Drug Co., supra. At least one who is himself violating that act must then proceed with such caution as to avoid another vehicle whether its driver discharge its duty or not. If he fails to do so and is injured through a collision and his own negligent violation of the law is a proximate contributing cause, he cannot recover; his contributory negligence will bar his right of action; under such circumstances he had no right to assume that the other driver would not be negligent and would discharge his duty. But our Motor Vehicle Act expressly provides:

"Any person operating, or driving a motor or other vehicle on the public highway shall operate or drive the same in a careful and prudent manner and at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the highway, and no person shall operate or drive a motor vehicle * * * on a public highway at such a rate of speed as to endanger the life or limb of any person or safety of any property." Section 22.

If the law were as respondent contends, it would constitute a modification of this statute, which clearly requires the driver to operate his motor vehicle in a "careful and prudent manner." Other provisions of the same statute regulate with greater definiteness the rate of speed, the portion of the highway in which each driver may lawfully proceed, and other details. These mandates are nowhere conditioned that one may lawfully disregard them upon the expectation that others will take heed and discharge their full duty.

Let us now proceed to a further examination of the entire instruction to determine whether or not, regardless of the erroneous statements contained in it, it can be construed as having, in its entirety, contained a correct and reasonably clear statement of the law. The first and last sentences are themselves free from criticism, but have no tendency to qualify the erroneous character of the sentences whose objectionable features have been pointed out. But, after stating in effect that the plaintiff had the right to rely upon the assumption that the defendant would discharge his duty and conduct himself lawfully, the instruction goes on to say, "He may not rely wholly upon the care of others, nor on that account neglect to use the precaution which the particular situation demands of him." Respondent asserts that this sentence cured the error in the preceding one, assuming that such error existed. The two statments appear to be both confusing and contradictory. As to whether or not the jury would be misled depends upon

the issues involved and the evidence before it. It appears without contradiction that just before the collision the plaintiff had entered an area where the air was filled with smoke. The statement in the instruction that the plaintiff on account of relying upon the care to be used by others may not "neglect to use the precaution which the particular situation demands of him" was probably intended to apply, and would have been understood as referring to the precaution which might reasonably be expected of the plaintiff on account of the existence of the smoke. If so understood, that part of the instruction would not modify the proposition previously stated to the effect that the plaintiff had a right to rely upon the defendant at the proper time performing his duties under the law. For example, regardless of the smoke, the plaintiff might proceed at an unlawful rate of speed, but keeping his machine under such control that he could stop upon another vehicle coming in sight before a collision would take place, providing the other vehicle was traveling at a lawful rate of speed. Nevertheless, if the plaintiff, proceeding in this negligent manner, and the defendant also was violating the law by exceeding the speed allowed, and a collision resulted which the jury found to be a proximate result of the plaintiff's unlawful conduct, it would be a case of contributory negligence, and the plaintiff would not under such circumstances have a right to rely upon the defendant discharging his proper duties at the proper time, so that the instruction would have been prejudicially erroneous. Again, the third sentence is contradictory of the second and fourth; at least the whole matter with which the instruction attempts to deal is left in a condition of uncertainty. But an extended consideration of this phase of the matter is unnecessary. The Hutson Case is so directly in point as to leave no room for argument. In that case the trial court in the first instance erroneously instructed that—

"The plaintiffs and each of them were authorized to assume that the men in charge of the train would approach the crossing with due care."

However, as is pointed out in the dissenting opinion of Mr. Justice Shaw, the court further informed the jury that—

"While travelers in a vehicle approaching a railroad crossing 'have a right to rely upon the presumption that railway employees engaged in running trains toward such crossing will use precautions to prevent collisions, yet that such travelers have no right, on that account, to relax in any way the vigilance required of them by law in such circumstances and at such a place. They are under the duty of both listening and looking, and of listening and looking at points and places and in such circumstances that the listening and looking will give them protection.'"

But the court held that even this statement was insufficient to remove the error in the incorrect portion of the charge. Yet the instruction last quoted is clearly more definite and comprehensive than is the sentence relied upon to cure the error in the instruction here under consideration.

It is easily conceivable that, but for the instruction in question, the jury might have found that the respondent was guilty of contributory negligence. Consequently this error will require a new trial. It will be unnecessary to consider other grounds urged for reversal. The judgment is reversed.

We concur: FINLAYSON, P. J.; WORKS, J.

---

58 Cal. App. 792

## McPHERSON v. WALLING et al.
(Civ. 3821.)

(District Court of Appeal, Second District, Division 2. California. July 19, 1922.)

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Polk McPherson against J. C. Walling and others. Judgment for plaintiff, and defendants appeal. Reversed.

Ernest Walling, of Fresno, and Power & McFadzean, of Visalia, for appellants.

J. A. Chase, of Visalia, and Max B. Jamison, of Porterville, for respondent.

CRAIG, J. The issues involved in this appeal are identically the same as those in McPherson v. Walling, Civil No. 3587, 209 Pac. 209, decided this date. The records were presented on appeal in one transcript. The reasons given in granting a reversal in that case apply to this, its companion case.

The judgment is reversed.

We concur: FINLAYSON, P. J.; WORKS, J.

58 Cal. App. 598

## WYSEUR v. DAVIS, Director General of Railroads. (Civ. 2445).

(District Court of Appeal, Third District, California. July 21, 1922.)

**1. Railroads ⊂=307(6)—Notice of time of operation of gates must be given.**

If the law requires crossing gates to be operated part of the day only, failure to operate them during the rest of the day is not negligence because travelers are presumed to know the law, but where the company voluntarily installs and operates gates during part only of each day, it owes the duty to give reasonable notice of the hours during which they will not be operated, and the open gates give the same assurance of safety to persons without knowledge of the limited operation as if there were no such limitation, in the absence of reasonable notice by signs or otherwise.

**2. Appeal and error ⊂=930(4)—Presumed in support of judgment for plaintiff that jury found issue submitted against defendant.**

Where at defendant's request the court charged that it was for the jury to determine whether the rate of speed of a train was negligent, it must be presumed in support of the verdict for plaintiff that the jury decided the issue of negligent speed against defendant.

**3. Appeal and error ⊂=999(3)—Implied finding that speed of train was negligent is conclusive.**

Implied finding that it was negligence to run a train at a speed of 45 miles an hour at the time of a crossing accident is conclusive on appeal.

**4. Railroads ⊂=346(5)—Reasonable inference nonresident did not know hours for operation of crossing gates.**

Where one killed in a railroad crossing accident was not a resident of the place where the accident occurred, it is a reasonable inference that he did not know the hours during which crossing gates were operated.

**5. Railroads ⊂=350(21)—Contributory negligence of automobile occupant question of fact.**

Where there was no evidence as to what one riding in automobile driven by another and killed in crossing collision did for his own protection, it cannot be said as matter of law that he was guilty of contributory negligence.

**6. Death ⊂=99(5)—Verdict for $30,000 held excessive to extent of $18,000.**

Where deceased was an unmarried mining engineer 47 years old, earning $250 a month and contributing $100 a month to the support of his parents, his only heirs, who were 70 years old and with life expectancies of 9 years, a verdict for $30,000 was excessive to the extent of $18,000.

**7. Trial ⊂=256(13)—More specific instruction as to damages for death should have been requested.**

Instruction in action for death to award such damages as would fairly compensate for the injuries sustained fairly stated the law; and, if defendant desired the more specific instruction that the recovery should be limited to the pecuniary damages sustained by deceased's father and mother, it should have been requested.

**8. Death ⊂=88—Damages allowable for loss of society, comfort, and protection.**

In action for death of adult son, damages may be allowed for deprivation of society, comfort, and protection, not in addition to pecuniary loss, but as a part thereof.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Leopold J. Wyseur, administrator of Roy J. Wyseur, against James C. Davis, Director General of Railroads, as Agent, etc. From a judgment for plaintiff, defendant appeals. Affirmed on condition that plaintiff file release of part of judgment.

Joseph M. Raines, of Fairfield, and Henley C. Booth, of San Francisco, for appellant.

Joseph P. Lacey, of Oakland, and W. U. Goodman, of Fairfield, for respondent.

FINCH, P. J. The defendant appeals from a judgment in favor of plaintiff for damages in the sum of $30,000 for the death of Roy J. Wyseur, who was killed at a railroad crossing in Dixon by a train operated by the United States Railroad Administration.

The main line from Sacramento to San Francisco runs through Dixon in a general southwesterly direction. First street is the main highway leading out of Dixon to the north. At the intersection of First street and the railroad right of way the defendant had maintained gates operated from a tower on the west side of the street for several years prior to the accident. It had been the custom to operate the gates from 7:30 in the morning to 7:30 in the evening and to leave them open at other times. At 7:26 in the morning the deceased was riding as a guest in an automobile being driven north on First street by James F. Salaberry at a speed of about 15 miles an hour. At the crossing the automobile was struck by the engine of a west-bound train, running at 45 miles an hour, and both men were killed. The engineer had shut off steam, and the train was quietly drifting toward the station. The usual whistles had been sounded, and immediately before the collision, but too late to avoid it, on seeing the danger thereof, the engineer gave the usual warning whistles. The towerman, who was going to his post at the time, endeavored to warn the occupants of the automobile, but it does not appear that he succeeded in attracting their attention. The driver of the automobile apparently was not conscious of the approaching train until too late to avoid the collision, at no time reducing his speed, but turning

slightly to the left at the moment thereof. When at a distance of 80 feet or more from the point of the accident, and thereafter until it occurred, the occupants of the automobile had a clear view of the approaching train, and could have seen it had they looked. For the purposes of this case it may be assumed that the driver of the automobile was negligent, notwithstanding the open gates. Koch v. Southern California Ry. Co., 148 Cal. 677, 84 Pac. 176; Griffin v. San Pedro, L. A. & S. L. R. Co., 170 Cal. 772, 151 Pac. 282, L. R. A. 1916A, 842.

[1] It is contended by appellant that it was not negligence to leave the gates open and unattended at the time of the accident. There was no law or ordinance requiring the maintenance of gates at the crossing, but defendant maintained them voluntarily. If the law required gates to be operated during 12 hours of the day only, failure to operate them during the other 12 hours would not constitute negligence, because travelers would be presumed to know the law, and open gates at a time when they were not required to be operated would furnish no assurance of a safe crossing. Where, however, the railroad company, though not required to do so, installs gates which it operates during a part only of each day, it owes a duty to the traveling public to give reasonable notice of the hours during which the gates will not be operated. In discussing a similar question, the absence of a flagman from a crossing, in the case of Elias v. Lehigh Valley R. Co., 226 N. Y. 154, 123 N. E. 73, it is said:

"The danger is obvious. It is like in kind to that caused by raised and untended gates. To some extent it is an assurance that the way is safe. That the railroads recognize the danger is seen by the familiar sign at country crossings giving notice that the flagman is absent after 6 p. m."

See, also, Washington v. Birmingham Southern R. Co., 203 Ala. 295, 82 South. 545.

Where operated during certain hours of the day only, open gates during the remainder of the day give the same assurance of safety to persons without knowledge of the limited operation thereof as if there were no such limitation, in the absence of reasonable notice by appropriate signs or otherwise.

"Whether required by statute or not, the fact that the gate is open is held to be an invitation to cross and an assurance that the track can be crossed in safety." Elliott on Railroads (2d Ed.) § 1157; State v. Boston, etc., R. R. Co., 80 Me. 430, 15 Atl. 36; Pittsburg, C., C. & St. L. Ry. Co. v. Tatman (Ind. App.) 122 N. E. 73; Washington v. Birmingham Southern R. Co., supra; Montgomery v. Missouri Pac. Ry. Co., 181 Mo. 477, 79 S. W. 930; Schwarz v. Delaware, L. & W. R. Co., 211 Pa. 625, 61 Atl. 255.

"Open, they proclaim safety to the passing public; closed, they proclaim danger." Baltimore & P. R. Co. v. Landrigan, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262.

"By these signals thousands of travelers are governed every day." Hooper v. Boston & M. R. Co., 81 Me. 260, 17 Atl. 64.

An open gate "is in the nature of an invitation to cross, and of a declaration that there are no approaching trains." Penn. R. Co. v. Stegemeier, 118 Ind. 305, 20 N. E. 843, 10 Am. St. Rep. 136.

See, also, Delaware & H. Co. v. Larnard, 161 Fed. 520, 88 C. C. A. 462; Louisville & N. R. Co. v. Eckman, 137 Ky. 331, 125 S. W. 729; Carlin v. Michigan Cent. R. Co., 189 Ill. App. 23; Lake Erie & W. R. Co. v. Howarth (Ind.) 127 N. E. 804.

[2, 3] The uncontradicted evidence shows that the train was running at the speed of 45 miles an hour at the time of the accident. At defendant's request the court instructed the jury:

"That it is for the jury to determine from all of the circumstances, whether the rate at which said train was being operated was negligent."

It must be presumed in support of the verdict that the jury decided the issue of negligent speed against the defendant. This implied finding of the jury is conclusive on appeal.

[4, 5] The evidence shows that the driver of the automobile was familiar with the crossing, and probably knew during what hours the gates were operated. Wyseur, the deceased, was not a resident of Dixon, and, as stated by counsel for appellant, a reasonable inference is that he was without such knowledge. It is urged that, as a matter of law, Wyseur was guilty of contributory negligence.

"The question as to whether or not the plaintiff, while passenger or guest in an automobile, exercised ordinary care upon approaching the tracks of a railway company is a question for the jury, under proper instructions by the court." Nichols v. Pacific Electric Ry. Co., 178 Cal. 630, 174 Pac. 319.

"A passenger in a vehicle operated by another is bound to exercise ordinary care for his own safety." Thompson v. Los Angeles, etc., R. Co., 165 Cal. 748, 134 Pac. 709.

"Whether or not he exercised such care is a question of fact. Unless the evidence is all one way, this question must be submitted to the jury." Parmenter v. McDougall, 172 Cal. 306, 156 Pac. 460.

"While the quantum of care which will be reasonable may be less where the gates are provided and are relied upon by the traveler, still the gates themselves are not an assurance and a warranty such as to justify a traveler in going blindly ahead in total disregard of all ordinary precautions." Koch v. Southern California Ry. Co., 148 Cal. 677, 84 Pac. 176, 4 L. R. A. (N. S.) 52, 113 Am. St. Rep. 332, 7 Ann. Cas. 795.

To sustain the defense of contributory negligence the defendant must prove personal failure of plaintiff to exercise ordinary care." Breese v. Los Angeles Traction Co., 149 Cal. 134, 85 Pac. 153, 5 L. R. A. (N. S.) 1059.

"In the absence of evidence to the contrary,

the law presumes that he did everything that a reasonably prudent man would have done under the same circumstances for the protection of his own safety." Carpenter v. Atchison, T. & S. F. Ry. Co. (Cal. App.) 195 Pac. 1073; Crabbe v. Mammoth Channel G. Min. Co., 168 Cal. 500, 143 Pac. 714; Baltimore & P. R. Co. v. Landrigan, supra; Texas & P. R. Co. v. Gentry, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186.

In this case there is an entire absence of evidence as to what, if anything, Wyseur did for his own protection. He may have seen the approaching train and asked the driver to stop. Since the automobile was moving at such rate of speed that it could have been stopped within a few feet, he may have reasonably assumed, until too late, that the driver would stop before reaching the track. While no fixed rule has been or could be announced for the conduct of a passenger or guest under such circumstances, some of the decisions are enlightening upon the subject. In State v. Boston, etc., R. R. Co., supra, it is said:

"The plaintiff's case is fortified by another consideration. He neither drove, nor, as far as appears, had any control of the team on which he was riding. It is reasonable to suppose that the owner carried him either for hire or gratuitously as a neighborly kindness. His position was not of the same degree of responsibility to the railroad as was that of the driver. He was a comparatively passive party. Not that he had no duty to perform. He could have asked the driver to stop the team, or he could have left it. But it would be natural, even though his fears were excited, that he should defer to some extent to the experience and discretion of the driver, who was in the control of his own team, and before he had time to assert his own judgment against the driver's, or perhaps fully appreciate the situation, the inevitable event was upon him. We think this fact has considerable force in the combination of circumstances which weigh against the charge of contributory negligence."

In Ilardi v. Central Cal. T. Co., 36 Cal. App. 488, 172 Pac. 763, it is said:

"In most instances such interference by the passenger or guest where the vehicle is about to be placed in a position of danger might prove to be gross imprudence and so disconcert the driver as to cause the disastrous result which such interference was designed to avoid."

In Carpenter v. Atchison, T. & S. F. Ry. Co., supra, the court said:

"Assuming that deceased, when the automobile which he occupied as a passenger or guest, reached the point 30 feet distant from the crossing, and traveling at a speed of only 4 miles per hour, saw the train 300 feet away therefrom and approaching at a high rate of speed, we cannot say as a matter of law that his failure to interfere with the driver's operation of the car rather than to rely upon the latter's judgment in escaping the threatened danger, nor his failure to leave the car, constituted contributory negligence. The question as presented was one of fact which should have been left to the verdict of the jury."

It cannot be said as a matter of law that Wyseur was guilty of contributory negligence.

[6] The father and mother of the deceased were his only heirs. They were of the age of 70 years at the time of the accident. The expectancy of life of each of them was about 9 years. The deceased was 47 years of age, unmarried, and a mining engineer, being in receipt of a salary of $250 a month. The parents lived in the home of another son. The deceased contributed $100 a month toward their support. He visited them on an average of six times a year. Under such circumstances the verdict for $30,000 is excessive as a matter of law.

"The jury is always bound by the fundamental rule that *pecuniary* damage is the limit of recovery, and the amount allowed must bear some reasonable relation to the pecuniary loss shown by the evidence." Dickinson v. Southern Pacific Co., 172 Cal. 727, 158 Pac. 183.

The Legislature has left "the subject of determining the amount at large, with the single restriction that the damages allowed should be just under all the circumstances of the case." Redfield v. Oakland C. S. Ry. Co., 110 Cal. 277, 42 Pac. 822.

While no exact measure of damages is prescribed for the guidance of the jury, a comparison of the sum awarded with the amount which would constitute full compensation under an exact admeasurement of damages shows that the jury could not have arrived at the amount of the verdict by any rational method of computation. The evidence shows that the parents would probably have received $1,200 a year from their son but for his death. At 4 per cent. per annum they would receive an income of $1,200 a year on the amount of the verdict during the remainder of their lives, leaving the principal sum intact at the end thereof. Computing interest at the same rate, the present value of an annuity of $1,200 during their expectancy of life is $8,922. The pecuniary value of the son's comfort, society, and protection could not amount to the additional sum of $21,078. The language of the court in Dickinson v. Southern Pacific Co., supra, is applicable to the facts in this case. It was there said:

"Eliminating, as we must, any consideration of the grief and mental suffering occasioned to the survivors by the death, it is impossible to conceive how the loss of the comfort, society, and protection of the deceased could have had a money value of anything like the amount awarded by the jury."

[7, 8] The court instructed the jury that—

If they found for the plaintiff, "then you will award damages in such amount * * * as in

your judgment will fairly compensate for such injuries as you may find have been sustained."

Appellant urges:

"That the jury was not specifically instructed * * * that recovery, if any, should be limited to the pecuniary damages sustained by the mother and father."

The defendant did not request any such instruction. The instruction given fairly states the law, and if defendant desired the more specific instruction the same should have been requested. The instruction given is unlike the one held to be erroneous in Pepper v. Southern Pacific Co., 105 Cal. 389, 401, 38 Pac. 974, 977, cited by appellant. In that case the court instructed the jury:

"That the measure of damages is not alone the pecuniary loss and injury sustained by the plaintiff in the loss of his son, as just explained, but in assessing the damages you may, in addition, take into consideration the loss, if any, sustained by plaintiff in being deprived of the comfort, society, and protection of the deceased by reason of his death."

In the instant case the court did not tell the jury that anything could be allowed *in addition* to pecuniary loss.

"The rule that allowance may be made for pecuniary loss from deprivation of society, comfort, and protection of a son is apparently settled, and cannot now be disturbed." Bond v. United Railroads, 159 Cal. 270, 285, 113 Pac. 366, 372 (48 L. R. A. [N. S.] 687, Ann. Cas. 1912C, 50.

Such allowance is not to be made in addition to pecuniary loss but as a part thereof.

In order that there may be an end to the litigation, and that the parents of the deceased may be enabled, during the remainder of their lives, to derive some benefit from the sum to be awarded them, it is ordered and adjudged that if the respondent shall, within 30 days after the going down of the remittitur herein, file in the court below a written release of the judgment to the extent of $20,000, then the judgment shall stand affirmed for the sum of $10,000. If such release be not so filed within said time the judgment shall stand reversed. The appellant to recover costs of appeal.

We concur: HART, J.; BURNETT, J.

---

58 Cal. App. 665

## RODGERSON v. LE BARON. (Civ. 4247.)

(District Court of Appeal, First District, Division 2, California. Aug. 3, 1922.)

**Appeal and error ⇐1011(1)—Findings of courts on conflicting evidence not disturbed.**

Where in an action for damages from an automobile collision the evidence as to speed of the cars was conflicting, and questions of contributory negligence and the last clear chance were raised, the findings of the court, sitting without a jury, on the issues, should not be disturbed.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by T. A. Rodgerson against W. J. Le Baron. From a judgment for the plaintiff, defendant appeals. Affirmed.

William N. Graybiel, of Turlock, for appellant.

C. W. White, of Alameda, for respondent.

NOURSE, J. Plaintiff recovered judgment for $626.90 for injuries resulting from the collision of two automobiles, one driven by the defendant and the other driven by plaintiff's son. The collision occurred at the intersection of the state highway with Redwood road near the town of Hayward in Alameda county. The plaintiff, with his son driving, was going south on Redwood road, intending to cross the highway. The defendant approached on his left, going west on the highway. The right front wheel of defendant's car struck the left rear wheel of plaintiff's car at a point on the highway about six feet south and to the left of the intersection. The testimony relating to the speed of the cars contains the usual conflict.

The appeal is based upon the ground that the evidence shows that the plaintiff was guilty of contributory negligence, and that he had the last clear chance to avoid the collision. Upon both of these issues the evidence is conflicting, and the court, sitting without a jury, resolved the conflict in favor of plaintiff. Under the circumstances the judgment should not be disturbed.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

---

58 Cal. App. 634

## REUTER et al. v. GAUDREAU. (Civ. 3867.)

(District Court of Appeal, Second District, Division 2, California. July 28, 1922.)

**1. Dedication ⇐44—Evidence held to sustain a finding that no dedication had been made.**

Evidence *held* sufficient to warrant a finding that no public road over the plaintiff's land had been acquired by dedication.

**2. Easements ⇐36(3)—Evidence held to sustain a finding that no right of way acquired by prescription.**

Evidence *held* sufficient to warrant a finding that defendant had not acquired by prescription a right of way over plaintiff's land.

**3. Highways ⇐17—Finding negativing public road warranted.**

Finding that no public road over the plaintiff's land had been acquired by prescription *held* warranted.

Appeal from Superior Court, San Bernardino County; Pat R. Parker, Judge.

Action by Charles F. Reuter and another against Samuel W. Gaudreau. From a judgment for the plaintiffs, defendant appeals. Affirmed.

A. S. Maloney, of San Bernardino, for appellant.

McNabb & Hodge, of San Bernardino, for respondents.

WORKS, J. This action was commenced for the purpose of enjoining defendant from passing across the land of plaintiffs. Defendant claims the right to cross the land upon two theories: First, that there is a public road traversing the property, the road having been created by prescription or implied dedication; second, that defendant has himself acquired a prescriptive right to pass over the land if the road which is evident on the premises be not a public road. The trial court found against defendant upon each of these theories and rendered judgment for plaintiffs. Defendant appeals.

[1-3] Appellant contends that the evidence does not support the findings of the trial court to the effect that there is no public road across the land of respondents, and that appellant never acquired a prescriptive right to pass over it. The complaint was filed in October, 1920. The land of respondents was originally settled upon by one Doyle in 1905; it then having been a part of the public domain. Doyle never perfected his title to the property, having died soon after he settled upon it, apparently in the same year. The place appears to have had other occupants afterward during a part of the time, and it was homesteaded in 1913 by one Balsom, who sold it several years later to respondents. The property was fenced by Doyle at the time he went upon it, and he maintained a gate at the place where appellant claims a public road started across it and toward certain land on which appellant resided at the time this action was commenced. One McNabb, who was on the land during Doyle's residence there, testified that a chain and padlock were then on the gate, although the gate was not actually locked at the time of his visit. He said further that at that time the only evidence of a road on the place was from the gate to a barn which Doyle had erected, and that the land beyond the barn "was under virgin brush." One Meyer, a forest ranger, testified that in 1910 there was no road across the property, but that there "seemed to be some wagon tracks." Balsom testified that in 1913, when he took up the land, there was on it a "part of a road up through an old vineyard that was on the place at the time," that it ended at the further side of the vineyard, and that the country beyond was rough and brushy, with no evidence of a road through it except "a wagon track that a pipe had been taken up to bring water down." He also said that the gate at which the alleged road entered the property was usually kept closed by him. Appellant's predecessor in interest in the land upon which appellant resides beyond the land of respondents was one Brown, who settled upon it in 1914 or 1915, according to the testimony of Balsom and of other witnesses. Balsom further testified:

"Q. And was there anything said by Mr. Brown when he came on the property at that time about his passing over it to you? A. The first time I saw Mr. Brown when he came on there, he asked me if I would give him permission to go up in the canyon beyond. Q. And you gave him permission, did you? A. I gave him permission. Q. And did he ever at any time after that, during the time that you lived on the ranch, or that he lived on his ranch, did he ever make any claim of right of way across there as a matter of right? A. No, sir. Q. Did he at any time say anything about that matter after that first time? A. No, beyond any time I met him going on there he would either make some apology or say that he had my permission to go on there. Q. He did mention it at various times? A. I don't think I ever met him that he didn't mention that he was crossing my land. Q. He didn't mention that he had any rights on there? A. No."

As already remarked, appellant acquired the property of Brown directly from that individual. Appellant first crossed the land of respondents, then still held by Balsom, in July, 1915, and took up his residence on the land acquired from Brown in January, 1916. We take up again the testimony of Balsom:

"Q. And after Mr. Gaudreau acquired Mr. Brown's interest, did you have any conversation with Mr. Gaudreau about the rights over this road? A. Yes, sir; I think it was about a month after Mr. Gaudreau came there I asked him if he knew he was using my road, and he told me yes he did. Q. And did he say anything else at that time; did he tell you how he knew? A. He told me Mr. Brown had told him it was my road. Q. And did you have any other conversation with him regarding the matter at any time? A. Not at that time, not until a month or five weeks before I sold the place [to respondents]. Q. And what took place then? A. I told him again he was using my road, and asked him if he would be willing to make some regulation so he would not get the right of way over the road, and he told me yes he would be willing to make any reservation or do anything that was right. * * * Q. Did you know of the notice being posted at the entrance, near the entrance, where this road turns from the public highway to go through the property with reference to it being a private road or no trespassing? A. Yes, sir. Q. Who put that up? A. I did. Q. When? A. 1917. * * * Q. And this conversation you had with Mr. Gaudreau was with regard to making some arrangement and paying you for the right to go over? A. Yes. Q. What year was

that, Mr. Balsom? A. 1920, or the end of 1919. * * * Q. Now do you know of the public using this road as a public road at any time during the time that you lived there? A. No, sir. Q. And the only use that was made of it that you know of was the use that was made by Mr. Brown as you have indicated, and that by Mr. Gaudreau, as you have indicated? A. Yes, sir. * * * Q. Did he [appellant] ever at any time during the time that you lived on the ranch, and after you filed on the ranch and up to the time you transferred it to plaintiffs, did he ever at any time claim to you that he had a right to use that road? A. No, never."

This evidence is amply sufficient to support the findings to which objection is made.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

58 Cal. App. 655

## PAYNE v. WRIGHT. (Civ. 4220.)

(District Court of Appeal, First District, Division 2, California. Aug. 1, 1922. Hearing Denied by Supreme Court Sept. 28, 1922.)

**1. Municipal corporations ⟸706(7)—Evidence held to warrant court in refusing to direct verdict on ground of contributory negligence of person injured by automobile.**

In an action for injuries sustained by plaintiff by the backing of an automobile against her in a city street, evidence *held* sufficient to warrant the court in refusing to direct a verdict for the defendant on the ground of contributory negligence on the part of the plaintiff.

**2. Trial ⟸260(1)—Refusal of requested instructions covered by those given not error.**

Failure to give requested instructions is not error, where those given fully comprehend the theory of the defense and the substance of those requested.

Appeal from Superior Court, Los Angeles County.

Action by Anna Payne against H. Wright. From a judgment for plaintiff, defendant appeals. Affirmed.

B. P. Gibbs, of St. Paul, Minn., and E. B. Drake, of Los Angeles, for appellant.

Wheaton A. Gray and J. M. Fursee, both of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against him for $1,000, upon a verdict of a jury awarding that amount to plaintiff as damages for personal injuries sustained by being run over by an automobile owned and operated by defendant.

The plaintiff with her grandson, a child 10 years of age, was attempting to cross Main street in the city of Los Angeles, at a place in the middle of the block. There were two automobiles parked close to the curb, with sufficient space between them to permit the parking of another machine. Plaintiff stepped off the sidewalk between the two machines, which were parked. She is crippled and was walking with a crutch. She looked about her carefully for approaching vehicles before stepping off of the sidewalk, and then took the additional precaution to send her grandson ahead a few feet into the street and past the stationary automobiles, to ascertain whether or not there were any vehicles approaching. While she was standing still between the two automobiles which were parked, and awaiting her grandson's signal to advance, the automobile driven by defendant backed into the space in which she was standing and knocked her down, injuring her severely.

[1] The record contains ample testimony from which the jury might have concluded that the defendant gave no warning signal before backing into the space where plaintiff was standing; that defendant backed into such space rapidly; that plaintiff looked to her right and to her left before leaving the sidewalk; that she looked at the defendant's machine, and it was at a standstill; that she thereupon stepped into the street in an attempt to reach the opposite side; and that a moment later, defendant, without any warning signal and without looking in the direction of plaintiff, backed his automobile so rapidly into the space in which plaintiff was standing that she had no opportunity to escape in response to a warning shouted by her young grandson. The record contains the testimony of the traffic officer, who witnessed the accident, and of plaintiff's grandson, to the effect that defendant did not look around nor take any precautions before backing into the parking space; that he did not stop until the traffic officer jumped upon the running board of his automobile and told him he was crushing a woman with his car.

It is true, as pointed out by appellant, that the defendant's testimony is in conflict with some of the facts above recited in some important particulars; but with this conflict in the evidence we are not concerned upon appeal. The facts we have recited are testified to, substantially, by plaintiff, her grandson, and the traffic policeman who saw the accident, and also in most particulars by a witness who was a passenger in the automobile driven by the defendant at the time of the accident. A mere recital of the above is a sufficient answer to appellant's contention that the jury should have been instructed to find for the defendant upon the theory that the plaintiff was guilty of contributory negligence as a matter of law.

[2] The other matters urged by the appellant for a reversal of the judgment also re-

late to the refusal of the court to give certain instructions requested by the defendant. We have carefully read the instructions given by the court at the request of the defendant as well as those instructions which were refused. It does not seem necessary herein to discuss and compare these instructions in detail, for it is entirely clear that the subject-matter of the instructions refused was covered fully by the instructions given, and the theory of the defense was fully stated to the jury.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

---

58 Cal. App. 629

## HARPOLD v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 4250.)

(District Court of Appeal, First District, Division 2, California. July 26, 1922.)

**1. Justices of the peace ⟸141(5)—Service of notice of appeal jurisdictional, and cannot be waived by parties.**

A defendant's motion to dismiss an appeal from a justice's court, on the ground that a codefendant had not been served with a notice of appeal under Code Civ. Proc. § 974, is not a waiver of movant's right to personal service of such notice, for the reason that service is jurisdictional, and jurisdiction on appeal cannot be conferred or divested by stipulation of the parties.

**2. Mandamus ⟸13 — Will not lie to compel judge to entertain appeal, where notice thereof was not given.**

Code Civ. Proc. § 1085, entitling petitioner to writ of mandate "to compel the performance of an act which the law specially enjoins as a duty resulting from an office," does not entitle a party to a writ to compel a lower court to take jurisdiction of an appeal, where it does not appear from the record that petitioner has given the notice of appeal required by section 974.

**3. Appeal and error ⟸792—Imperfect appeal dismissed on court's own motion.**

Where an appellate court has not obtained jurisdiction by service of notice of appeal required by Code Civ. Proc. § 974, it will dismiss the appeal on its own motion.

**4. Appeal and error ⟸23—Question of appellate court's jurisdiction determined from record.**

The question whether jurisdiction of an appellate court has been conferred by an alleged appeal is to be determined from the record.

**5. Mandamus ⟸168(2)—Dismissal by appellate court for want of jurisdiction presumed regular.**

On application for writ of mandate to compel a judge to entertain an appeal, the action of respondent in dismissing the purported appeal for want of jurisdiction will be presumed regular, unless the record indicates otherwise.

Original application by A. D. Harpold for a mandatory writ, directed to Superior Court of the State of California in and for the City and County of San Francisco and others, to compel respondents to entertain an appeal in an action by Laura E. Mathis against petitioner and another. Writ denied.

Clifford D. Good and Jeff L. Maloy, both of San Francisco, for petitioner.

Faulkner & Faulkner, of San Francisco, for respondents.

STURTEVANT, J. This is an original application to this court, praying for a writ of mandate directing the respondent court to take jurisdiction of and hear a certain case on appeal from the justice's court.

[1] Heretofore Laura E. Mathis commenced an action in the justice's court against the petitioner and another. Thereafter such proceedings were had that on the 5th day of August, 1921, judgment was rendered against the defendants in that action; thereafter the petitioner prepared a notice of appeal purporting to appeal from said judgment, and in his petition in this case he alleges that he filed the notice of appeal and that he has annexed a copy of the notice to his petition. Such a paper appears as an exhibit, and there is nothing in the record showing that the same was served on anybody, or at all. In his petition the petitioner avers that he filed in the justice's court an undertaking on appeal, and that the same is attached to the petition. It is further alleged that the papers on appeal were thereafter transferred to the clerk of the superior court and that the proceeding was assigned to department 9 of the superior court; that Hon. Frank H. Dunne is the judge presiding in said department of said court; that on the 12th day of November, 1921, the plaintiff, Mathis, appeared in the superior court and moved to dismiss the appeal; that thereafter, March 10, 1922, the appeal was dismissed. Although the fact that the record does not show service of the notice of appeal was suggested in respondents' brief, served April 4, 1922, no showing has been made that the notice of appeal was, in fact, duly served.

This petitioner contends that in dismissing the appeal the superior court improperly divested itself of jurisdiction. To this contention the respondent replies that the superior court never acquired jurisdiction because the notice of appeal was never served. To that reply this petitioner calls attention to the fact that when the plaintiff, Mathis, moved to dismiss the appeal, she based her motion on the ground that the notice of appeal was not served upon petitioner's codefendant, T.

T. Quinn, and that by so framing her notice of motion she waived all other grounds. To this last contention the respondent replies that the due service of a notice of appeal is jurisdictional and that jurisdiction cannot be conferred nor divested by the stipulation of the parties.

[2-5] With this latter contention we agree with the respondent. The petitioner in this proceeding is seeking an order against a court and a judge thereof. He is entitled only to such writs as will operate "to compel the performance of an act which the law *specially enjoins*, as a duty resulting from an office. * * *" Code Civ. Proc. § 1085. But there is no duty on the part of the respondent court, nor is there any power resting in the respondent court, to take jurisdiction of, or to hear an appeal, except as the statute provides, and the statute governing the subject expressly provides that "the appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party." Code Civ. Proc., § 974. That language is almost identical with the wording of section 940 as that section stood as amended in 1873. "An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party, or his attorney." When that statute stood in that form it was adjudged that the service of the notice of appeal was jurisdictional. Pedlar v. Stroud, 116 Cal. 461, 48 Pac. 371. It is a rule of general application that, when an appellate court has not obtained jurisdiction of an alleged appeal, such court will dismiss such purported appeals of its own motion. 4 C. J. 589, § 2402. Whether jurisdiction has attached is determined by an inspection of the record. 4 C. J. 601. When, on March 10, 1922, the respondent court ordered the appeal dismissed, it is presumed that the respondent court was acting within its jurisdiction and was acting regularly. There is nothing in the record indicating anything to the contrary.

For these reasons the application for a writ of mandate should be denied. The alternative writ heretofore granted is discharged, and a peremptory writ is denied.

We concur: LANGDON, P. J.; NOURSE, J.

---

58 Cal. App. 649

## Ex parte MATHEWS. (Cr. 874.)

(District Court of Appeal, Second District, Division 2, California. July 31, 1922.)

**1. Municipal corporations ⟸604 — City has power to regulate keeping of goats.**

Under Const. art. 11, § 11, a city has the police power to prohibit the keeping of goats within 50 feet from a dwelling house, as reasonable men might rationally conclude that the enforcement of such a regulation would in some appreciable degree promote public welfare.

**2. Municipal corporations ⟸605—City has police power to protect inhabitants from anticipated injurious conditions.**

In the exercise of its police power a city may regulate, not only nuisances which have been declared such, but may protect the inhabitants from conditions which may reasonably be anticipated.

**3. Municipal corporations ⟸63(2)—Question of reasonableness of only that part of ordinance regulating nuisances applicable to case considered.**

Where an ordinance prohibited the keeping of goats within designated distances from a dwelling house, the distances varying in proportion to the number of goats kept, and a party kept 12 goats within 50 feet of a dwelling house in violation of the ordinance, the question as to the reasonableness of the other distances named in the ordinance will not be considered.

Application for writ of habeas corpus to be directed to the Chief of Police of the City of Pasadena to secure the release of Mrs. Frank Mathews from custody on a charge of violating an ordinance regulating the keeping of goats. Writ discharged and prisoner remanded.

J. G. Rossiter and B. M. Marble, both of Los Angeles, for petitioner.

J. H. Howard, City Atty., and Leonard L. Riccardi, City Pros. Atty., both of Pasadena, for the People.

CRAIG, J. The city of Pasadena enacted an ordinance regulating the keeping of goats. The petitioner was charged and convicted with having violated section 14 (c) of the ordinance. After sentence she petitioned this court, asking us to hold the section involved void as violative of the state Constitution. Upon the hearing in this court both sides introduced evidence principally intended to inform us upon the habits, culture, and characteristics of goats as well as concerning the flies, which some of the witnesses say accompany them.

[1] We find no conflict between the provision of the ordinance involved in the attack by the petitioner and the Code definition of a nuisance or with section 11 of article 11 of the state Constitution. There is no constitutional question involved in this proceeding which has not been, at least in principle, passed upon in this jurisdiction. The city of Pasadena possesses the police power by virtue of article 11, § 11, of the state Constitution. The city may prohibit or regulate whatever is reasonably involved in the preservation of the health or comfort of its inhabitants. Odd Fellows' Cemetery Ass'n v. San Francisco, 140 Cal. 226, 73 Pac. 987.

That the keeping of animals in a municipality is a proper subject for police regulation is too well established to be open to question. In re Linehan, 72 Cal. 114, 13 Pac. 170; Boyd v. City of Sierra Madre, 41 Cal. App. 520, 183 Pac. 230; Fischer v. St. Louis, 194 U. S. 361, 24 Sup. Ct. 673, 48 L. Ed. 1018.

[2] In the exercise of its police power the city may regulate or even prohibit, not only nuisances which have already been declared such, but may use every reasonable expedient for the preservation of the safety and comfort of the city's inhabitants to protect them from those conditions which may reasonably be anticipated to result. Boyd v. City of Sierra Madre, supra, and Ex parte Quong Wo, 161 Cal. 220, 181 Pac. 714. In the regulation of such occupations as are capable of being offensive or injurious to the public, the zoning of a city so as to forbid the carrying on in certain localities of those which are objectionable has received the sanction of many judicial decisions. Ex parte Moynier, 65 Cal. 33, 2 Pac. 728; In re Hank Kie, 69 Cal. 149, 10 Pac. 327; In re Montgomery, 163 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914A, 130; Boyd v. City of Sierra Madre, supra. Nor is the city limited to the regulation of such occupations within a particular district, but may extend its inhibitions throughout the city. In re Linehan, supra; Fischer v. St. Louis, supra. McKnight v. City of Toronto, 3 Ont. Rep. 284, is a case where the same method of zoning was upheld as the one in the Pasadena ordinance. In that case the by-law prohibited the keeping of one cow at a less distance than 40 feet or two cows at a less distance than 80 feet from any dwelling house. This enactment was viewed as reasonable and valid.

The same decision is applicable to another aspect of the case at bar. It was there contended that the by-law, because of being so general as to include the owner of cows, in that particular attempted to make that a nuisance by legislation which could not be so. The court held that, conceding the claim to be good, it would not set the section of the by-law aside because plaintiff was not being proceeded against as one who was keeping cows too near his own dwelling house. In this proceeding, the reasonableness and validity of that part of section 14 (c), which prohibits the keeping of goats nearer than 50 feet distant from a dwelling house, is not in question.

The petitioner, Mrs. Mathews, testified that she has kept on an average of 12 goats in her corral, which occupies a space 50 feet square, and that her nearest neighbor is within 50 feet of the corral. There is a sharp conflict in the statements of the witnesses concerning the odor from goats and the noise made by them. The petitioner and some of her witnesses state that the female goat makes no noise. According to F. F. Heintz, the publisher of a goat magazine, and called as a witness for the petitioner, the female goat makes no noise if in a comfortable place and one to which it has become accustomed. On the other hand, the four witnesses for the respondent, all of whom live close to the Mathews place, declare that the noise made by the goats is extremely annoying. One said it is "a terrible noise when giving birth to kids." Another, that the goats stamp, walk, jump, and bleat in the night; and another that they bleat all the time; another that they made a noise, which the witness describes as "Baa," to such an extent that she was forced to go into the house while visiting a near neighbor to the Mathews.

Concerning the smell, we have the same diversity in the testimony. Some of the witnesses for the petitioner insist that there is no smell from the female goat, except, perhaps when she perspires, and that then it is not seriously objectionable. The witness L. W. Odell, called for the petitioner, testified that he noticed an odor of the goats on the Mathews place, and that he smelled it before he went on the lot, not less than 250 feet away. Witnesses for the respondent claim the stench from the goat corrals of Mrs. Mathews and another neighbor to be "something fierce," and so bad that one was forced to keep the windows closed on the side toward Mrs. Mathews' goats; another witness stated that this odor could be smelled a distance of two blocks, which was stipulated to be about 600 feet. This statement was corroborated by a second witness.

Concerning the flies, the respondent's witnesses generally testified that the screen doors of neighbors were black with flies. On the other hand, expert witnesses of the petitioner say that in their experience goats do not especially attract flies.

It is unnecessary to quote the testimony of the various witnesses in detail or to a greater extent than we have done. It seems clear that the conflict in the evidence is direct, if anything, preponderating in favor of the respondent's contentions.

The witness Heintz says that if a goat corral is kept as required by other provisions of the ordinance there will be no offensive odors; that if made comfortable and to feel at home goats make no noise. Mrs. Mathews states in effect that her corral is kept perfectly clean and in every way as required by law, and that the goats are provided with all of the comforts which the ordinary female goat may demand, and yet apparently truthful witnesses testify that the odors are "terrible," the noise so great as to drive neighbors into their closed houses, and that the flies gather in clouds. Surely with this conflict of evidence the judiciary will not say that the municipal legislative body has acted without reason and has abused its discretion in enacting an ordinance the language of which clearly indicates that the

municipal legislators believed that the keeping of goats demanded regulation, and that the ordinance passed was appropriate and essential to the public comfort and the welfare of the citizens. It cannot be doubted that reasonable men upon a consideration of the facts in the instant case might well rationally conclude that the enforcement of the statute would tend in some appreciable degree to promote or preserve public comfort or welfare. If so, under the rule laid down in Re Miller, 162 Cal. 687, 124 Pac. 427, the law must be recognized as a legal exercise of the police power, "although other reasonable persons might take a different view." Courts would be arrogating to themselves a legitimate function of the Legislature if they should interfere with the exercise of legislative discretion in any case where it does not clearly appear that such discretion has been unreasonably exercised. Laurel Hill Cemetery v. San Francisco, 152 Cal. 464, 93 Pac. 70, 27 L. R. A. (N. S.) 260, 14 Ann. Cas. 1080.

The petitioner apparently has much reliance upon the showing made that her corral and barn are clean, and that it is possible to maintain such places with little or no danger to the safety or comfort of the community. In Boyd v. City of Sierra Madre, supra, the court made use of this language:

"Nor would it be of any consequence that it would be possible for one or more * * * corrals to be maintained without appreciable risk of peril to the health or safety of the community. * * * The fact that appellant's corral was kept in a cleanly and sanitary manner affords no reason why he should be specially exempt from the provisions of an ordinance designed to regulate a business which, as conducted by some persons at least, is fraught with peril to the community's comfort, if not its very health."

Petitioner earnestly contends that inasmuch as subdivisions (b), (c), and (d) of section 5 of the ordinance provide for the cleaning of the goat corrals, etc., and that as her experts have testified that if such directions were to be carried out no objectionable odors could result, the provision of subdivision (c) of section 14 is unnecessary to public welfare, and therefore unreasonable and unconstitutional. This argument cannot be sustained. In the first place, the other subdivisions to which reference is made only provide for the cleanliness of the corral and the use of disinfectants. No provision is contained in them for the comfort of the animals without which it is a fair conclusion from the testimony of petitioner's own expert witness that they would bleat and stamp about with their feet; while others say in effect that the noise they make is quite unbearable A chorus of 12 discordant and petulant bleats may well carry a considerable distance. No expert has informed the court concerning the carrying powers of the voices of female goats or as to their melody or whether or not they blend in harmony, but from the deleterious effects testified to have been produced we must conclude that the net result of such "strident cacophonies" would make the authors thereof as much proper subject for regulation as the burro or the cow.

In the second place, if a section of this ordinance standing alone is calculated to insure the comfort and convenience of the public and where need exists for such a safeguard that section cannot be regarded as unreasonable and an unnecessary infringement of the rights of citizens merely because another section has also through separate provisions provided another redress. If counsel's argument were to obtain and section (c) were to be declared void on account of the provisions of subdivisions (b), (c), and (d) of section 5, in another suit involving a violation of the other sections they might with equal right and reason be declared unconstitutional because of the fact that subdivision (c) is in itself a complete safeguard of the public interest, for it might well be argued that if goat corrals were kept at a distance at from 50 to 1,000 feet from any dwelling house no injury would result, even though not cleaned daily and although some odors result.

[3] Perhaps the most spirited attack upon the subdivision of the ordinance is based upon an argument that it is unreasonable on account of the fact that under it 1 or 2 goats must be kept 50 feet from any dwelling house; 3 or 4 goats 100 feet; 5 goats 500 feet; and six goats 1,000 feet; whereas, it is claimed the menace to the public does not grow in the proportion that the distances named increase as related to the number of goats kept. It is argued that the law as to the 100, 300, and 1,000 feet provisions is unreasonable and oppressive and in no way tending to protect the health, safety, or comfort of the occupants of adjoining dwelling houses. The evidence shows that the petitioner has been keeping 12 or more goats continually, and that she kept them within 50 feet of the nearest dwelling of a neighbor. It thus clearly appears that she unquestionably violated the provision of the section to the effect that 2 goats must not be kept nearer than 50 feet of a dwelling. The provisions as to 100, 300, and 1,000 feet are therefore not involved, and we are not permitted to determine whether or not they are unreasonable, etc. If petitioner had maintained her goats at a distance of 999 feet from the nearest dwelling and in consequence had been convicted of a violation of this section of the ordinance, a decision as to the reasonableness of the 1,000-foot provision would be appropriate and necessary. As the facts are, we can only determine whether or not a regulation prohibiting goats being kept closer than 50 feet to the nearest dwelling is a rea-

sonable enactment. We have no hesitation in holding that the city council might logically regard such a regulation as tending in an appreciable degree to promote the general welfare and comfort. The writ is discharged, and the prisoner remanded.

We concur: FINLAYSON, P. J.; WORKS, J.

---

58 Cal. App. 793

**Ex parte LUSHER. (Cr. 875.)**

(District Court of Appeal, Second District, Division 2, California. July 31, 1922.)

Application for writ of habeas corpus to be directed to the Chief of Police of the City of Pasadena to secure the release of Vada Lusher from custody on a charge of violating an ordinance regulating the keeping of goats. Writ discharged, and prisoner remanded.

J. G. Rossiter and B. M. Marble, both of Los Angeles, for petitioner.
J. H. Howard, City Atty., and Leonard L. Riccardi, City Pros. Atty., both of Pasadena, for the People.

CRAIG, J. The issues involved in this proceeding are generally the same as those in the application of Mrs. Frank Mathews for a writ of habeas corpus, Criminal No. 874 (Cal. App.) 209 Pac. 220, decided upon this date. Upon the hearing it was agreed that the evidence taken should apply to both cases. The reasons given for discharging the writ in that case apply here.

A problem is propounded by the petitioner, Vada Lusher, to which no reference was made in the other proceeding, but the solution of which we regard as impossible in this one. Mrs. Lusher kept four goats and two kids. It is claimed that she was convicted under the charge that she kept more than four goats. The transcript does not bear out this contention. It appears that she was charged with a misdemeanor under Ordinance No. 1940, being the one in question, "particularly section 14 (c) of said ordinance." It will be seen that this charge is general.

From the testimony of witnesses given upon the hearing, it was shown that Mrs. Lusher's corral was within 9 feet of the nearest dwelling house. It is therefore clear that the conviction must be upheld, assuming that the provision against the keeping by any person of "any goat within fifty (50) feet of any dwelling house other than that occupied by him or it" is constitutional. Hence we need not decide whether or not a kid is a goat, it being unnecessary to a decision of the case. It seems clear that the determination of so serious a question should be deferred until some other suit or proceeding in which it shall appear to be an issue directly involved in that case.

The writ is discharged, and the prisoner remanded.

We concur: FINLAYSON, P. J.; WORKS, J.

189 Cal. 477

## BILLIG v. SOUTHERN PAC. CO. et al. SAYRE v. SAME. ROBISON v. SAME. (L. A. 7144.)

(Supreme Court of California. Sept. 7, 1922. Rehearing Denied Oct. 5, 1922.)

**1. Master and servant ⟹301(4)—Servant may be transferred to another's service.**

One may be in the general service of one employer, and nevertheless, with respect to particular work, be transferred to the service of another, so as to become by agreement, or by force of circumstances, the servant of the latter, with all the legal consequences of such relation.

**2. Master and servant ⟹301(1)—Doctrine of respondeat superior only applies when relation exists.**

The doctrine of respondeat superior applies only when the relation of master and servant exists between the wrongdoer and the person sought to be charged for the result of his neglect or wrong at the very time and in respect to the very thing out of which the injury arose.

**3. Master and servant ⟹301(4)—Doctrine of respondeat superior depends on power of control.**

The application of the doctrine of respondeat superior depends on the power of control which the superior possesses, and which for the protection of third persons he is required to exercise, over his subordinates, and the doctrine applies only where the power of control exists, and not where a special employer has no voice in the selection or retention of the negligent subordinate.

**4. Appeal and error ⟹927(7)—Correctness of instruction against defendant as matter of law tested by undisputed evidence and that favorable to defendant.**

The correctness of an instruction that the negligent driver of an auto truck was as matter of law defendant's agent must be tested solely by the undisputed evidence, coupled with that favoring defendant.

**5. Master and servant ⟹301(4)—General employer may be liable for acts of employé hired out to third person.**

A general employer is not freed from responsibility for the negligent acts of an employee merely because the employee has been hired out by the employer to a third person.

**6. Master and servant ⟹301(4) — Truck driver, not controlled by third person, held truck owner's agent.**

Where, though one to whom defendant hired a truck and driver exercised authority to control the driver's conduct in loading and unloading, he never assumed the right to direct him in the operation of the truck while in transit, and defendant never relinquished such right of control, and alone had authority to discharge the driver, the driver as matter of law was defendant's agent while driving the truck.

**7. Appeal and error ⟹1057(2)—Exclusion of evidence relating only to undisputed matter held harmless.**

The exclusion of defendant's testimony as to a conversation with a truck driver, in which he told the driver to obey one to whom defendant hired the truck and driver with respect to loading and unloading trucks, was not prejudicial, where it had no bearing on the question of right of control of truck drivers while the trucks were in transit, and it was undisputed that the drivers were under the hirer's control in loading and unloading.

**8. Appeal and error ⟹1058(2)—Exclusion of questions on cross-examination subsequently answered not reversible error.**

The exclusion of questions asked a witness on cross-examination was not reversible error, where on recross-examination the questions were answered.

On Petition for Rehearing.

**9. Master and servant ⟹330(1)—General employer's control inferred, in absence of contrary evidence.**

In the absence of evidence, direct or otherwise, from which it may be inferred that a truck driver's general employer relinquished his right of control over the driver of the truck while in transit to one to whom the truck and driver were hired, it must be inferred that he retained such control.

In Bank.

Appeal from Superior Court, Los Angeles County; Louis W. Meyers, Judge.

Three separate actions, by Margaret M. Billig, a minor, by her guardian ad litem, Harvey E. Billig, by T. D. Sayre, and by Irma E. Robison, against the Southern Pacific Company and others. From a judgment for plaintiff in each action, defendant William C. Harris appeals. Affirmed.

Newlin & Ashburn and W. I. Gilbert, all of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondents.

LENNON, J. Each of the several named plaintiffs sued for and recovered judgments, in three separate actions, simultaneously tried, against the defendants Harris and Southern Pacific Company, in sums aggregating $45,000, for personal injuries suffered by the plaintiffs as a result of a collision between a gasoline motor car operated by the defendant Southern Pacific Company in which the plaintiffs were riding as passengers, and an auto truck owned by the defendant Harris. We have before us at this time only the three appeals of the defendant Harris, which, by stipulation of the parties to the appeals, are presented in a single record.

The collision in question occurred at the intersection of Long Beach boulevard and the tracks of the Southern Pacific Company in the county of Los Angeles. It is conceded

for the purpose of the appeals that the evidence adduced upon the whole case is sufficient to support the implied finding of the jury that the collision in question resulted from the joint negligence of the engineer of the gasoline motor car and the driver of the truck. The auto truck, at the time of the collision, was employed in hauling a quantity of gasoline, which one Geiger, doing business as Geiger & Gehres, had contracted with the Gilmore Petroleum Company to transport from the city of Los Angeles to the harbor at San Pedro. Geiger and the Gilmore Petroleum Company were joined as defendants in the action, but a motion for a nonsuit as to them was granted. A motion for a nonsuit as to defendant Harris was denied, and at the request of the plaintiff the trial court charged the jury:

"That Walter Pratt, the driver of the auto truck on the occasion in controversy here, was the agent of the defendant William C. Harris, sued as 'Harris Bros. Truck Company,' and any negligence, if any, on his part, is imputed to the said Harris. * * * If the negligence, if any, alone of the driver Walter Pratt was a proximate cause of the accident, and any injuries following to plaintiffs therefrom, then you will find damages alone against the defendant William C. Harris, sued as the Harris Bros. Truck Company."

It would seem from the first of these instructions that the trial court determined, as a matter of law, that Harris was the master of and solely responsible for the conduct of Pratt, the driver of the truck, at the time of the accident. It was the contention of the defendant Harris in the court below, and it is his contention here, that the evidence adduced upon that phase of the case concerning the contractual relations existing, at the time of the collision, between Geiger and Harris and Pratt, which evidence embodied the evidence bearing upon the status of Pratt's servitude at the time of the collision, was in such substantial conflict as to preclude the trial court from charging the jury, as in effect it did, that, as a matter of law, necessarily deducible from the established facts of the case, the status of Pratt at the time of the collision was that of an agent of the defendant Harris.

Briefly stated, the evidence adduced in behalf of the defendant Harris, in so far as it relates to the status of Pratt at the time and place of the collision, is as follows: Pratt and his helper were at the time of the collision the general employés of the defendant Harris. The truck, Pratt, and the helper employed in hauling the gasoline were rented by Geiger from Harris for the performance of a contract which Geiger had with the Gilmore Petroleum Company for the transportation of gasoline from Los Angeles to the harbor at San Pedro. Geiger was to receive under his contract with the Gilmore Petroleum Company the sum of $2.25 for each ton of gasoline transported from the Gilmore plant to the harbor, and Harris was to receive from Geiger, as rental for the use of the truck, driver, and helper, $1.90 per ton of gasoline hauled with his truck.

Geiger, on the other hand, while admitting the existence of a contract with the Gilmore Petroleum Company and its terms, as above stated, testified that he had entered into a subcontract with Harris for the hauling of the Gilmore Company's gasoline, and that this contract was entered into about a year before the collision in question. The subcontract, so Geiger testified, was an oral contract, which continued up to the time of the collision. The sum and substance of the subcontract, according to Geiger, was that he and Harris had agreed that Harris would handle for Geiger the transportation of any excess of the Gilmore Petroleum Company's gasoline which Geiger himself could not handle, due to his lack of facilities, at an agreed price of $1.90 per ton.

Other facts, practically undisputed, or taken here in the light most favorable to the defendant Harris, appearing in evidence, bearing upon the status of Pratt as an employé of either Geiger or Harris at the time of the collision, as gleaned from the testimony of Geiger and Harris and other witnesses, may be substantially stated as follows:

Harris was at all times engaged in a general trucking business, and so likewise was the defendant Geiger. The conduct of Geiger's business differed from that of the defendant Harris, in the fact that Geiger owned no truck or transportation facilities of his own, but operated his business of procuring and consummating contracts for hauling by means of transportation instrumentalities rented by him from the defendant Harris and other persons. Geiger was at all times actively in charge of and supervised generally, either in person or through a representative, the loading and unloading that was done pursuant to and in the performance of contracts procured by him. Geiger, at the time of the collision in question, was engaged in the performance of a written contract entered into solely between him and the Gilmore Petroleum Company, upon which he alone was obligated. Pratt, the driver of the truck, was hired and employed by Harris generally in his trucking business, and Pratt's wage of $6.50 per day, and the wages of his helper, were paid by Harris. Whether driving specially for other persons or generally for Harris, Pratt, at the conclusion of the day's work, always returned the truck to the Harris garage, and daily turned in to Harris report cards of the quantities of gasoline hauled during the day, from which Harris computed his compensation and the wages of the driver and helper employed in operating the truck. Pratt and his helper, when directed in the first instance to report to Geiger, received no instructions from Har-

ris, other than to go down to the Gilmore Petroleum Company's plant, and, upon arriving there, they were instructed by Geiger's foreman "where to load, and what to load, and how to load." Pratt exercised his own judgment as to the route to be taken by the truck employed in the delivery of the gasoline, and neither Geiger nor any one representing him ever at any time directed Pratt as to the management and operation of the truck after it was loaded and while it was in transit. Harris furnished all of the supplies and accessories necessary to the maintenance and operation of the truck, and upon one occasion went down to the Gilmore plant and had a general talk with Pratt and his helper, and on another occasion helped them load onto the truck a tank of gasoline.

Some several hours after the collision in question, Harris appeared upon the scene and cleared away the wreckage. Geiger always attended to and supervised the loading and unloading of the trucks. Upon one occasion, when Geiger complained to Harris that some of the men hired out by Harris, when loading and unloading, handled the gasoline containers too roughly, thereby causing a leakage, Geiger was told by Harris that "the men knew how to handle the stuff, and that, if they did not handle it right, to send them to the barn." And, as the result of a complaint upon another occasion by Geiger one of the helpers employed in loading another job in which a Harris truck was being used was removed from the truck by Harris. When the men of the Harris trucks were not actively engaged in the loading of gasoline assigned to their particular truck, they were required by Geiger to assist helpers, employed by him, in loading other trucks which were used in the same work, but not owned by or rented from Harris. Upon one occasion one of the helpers questioned Geiger's authority to require him to help load another truck, and he was told, upon telephoning to Harris, that he must take his orders from Geiger. When Pratt, the driver of the Harris truck, on the day of the collision, inquired of Harris whether or not he could take the load of gasoline, which was subsequently wrecked in the collision, to the garage for the night and deliver it at San Pedro in the morning, he was told to do as Geiger desired, and when Pratt applied to Geiger for instructions the latter requested him to take the gasoline to San Pedro that night. Geiger after the accident made a claim on an insurance policy for the loss of this particular gasoline while being transported "per motor truck and trailer owned or operated by the assured."

[1-3] Of course, one may be in the general service of one employer, and nevertheless, with respect to particular work, may be transferred to the service of another, so as to become by agreement, or by force of circumstances, the servant of the latter, with all the legal consequences of the new relation. In such a situation, however, it is obvious that it is necessary to ascertain who was the master at the very time of the negligent act complained of. This is so, for the doctrine of respondeat superior applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of some neglect or wrong at the very time and in respect to the very thing out of which the injury arose. In other words, the application of the doctrine of respondeat superior in any given case depends upon the power of control which the superior possesses, and which for the protection of third persons he is required to exercise, over the conduct and activities of his subordinates. Consequently the doctrine has application only in cases where the power of control exists, and such power does not exist in a situation where the special employer has no voice in the selection or retention of the negligent subordinate. Du Pratt v. Lick, 38 Cal. 691; Higham v. T. W. Waterman, 32 R. I. 578, 80 Atl. 178; Quinn v. Complete Electric Const. Co. (C. C.) 46 Fed. 506.

Whether Harris may, as a matter of law, be found to be the master of Pratt at the time of the collision, and therefore be held liable for the damage resulting to the plaintiffs from the admittedly negligent conduct of Pratt, depends upon the answer to be deduced from the evidence, hereinbefore outlined, to the question: Who, at the time and place of the collision, had authoritative control of the conduct of Pratt in his management and operation of the auto truck while in transit?

[4] The fact that the evidence is in substantial conflict concerning the character of the contract existing between Geiger and the defendant Harris is an immaterial factor in the solution of the question as to who was the master of Pratt at the time of the collision. And this is so for the reason that, whether it be found that Harris merely rented to Geiger the men and means employed in the performance of the work contracted for by Geiger, or was in the performance of the work in the capacity of an independent subcontractor, the correctness of the trial court's charge to the jury must, in the last analysis, be tested solely by the determination from the established evidence in the case—that which is undisputed, coupled with that which favors the defendant Harris—as to who, at the time and place of the collision, and with respect to the manner and method of operating and controlling the auto truck, while in transit, possessed the right, either express or implied, to exercise exclusive direction and control of the conduct of Pratt; that is to say, who was Pratt bound to obey concerning the control, management, and operation of the auto truck after it had been loaded in keeping with the desires and directions of

Geiger, and while it was in transit between the place of loading and the place of delivery? Burns v. Jackson (Cal. App.) 200 Pac. 80; Cotter v. Lindgren, 106 Cal. 602, 39 Pac. 950, 46 Am. St. Rep. 255; Boswell v. Laird, 8 Cal. 469; Standard Oil Co. v. Anderson, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480.

[5] Whatever the rule and its variations may be in other jurisdictions, it is the settled rule of law in this state, applicable to cases of the character under consideration here, that a general employer is not freed from responsibility for the negligent acts of an employé merely because the employé has been hired out by the employer to a third person, to be used by the latter in the performance of his work. Stewart v. Cal. Improvement Co., 131 Cal. 125, 63 Pac. 177, 724, 52 L. R. A. 205. The case last cited is in fact and principle strongly analogous to the case at bar. In that case it appeared that the defendant company had hired out to a municipality a steam roller, together with an engineer, one of the company's general employés, to be used in the rolling and leveling of a city street, which work was being done under the direction of the city's superintendent of streets. The plaintiff in that case suffered injuries caused by the negligent operation of the engine by the defendant company's engineer, and said company was held liable for the resultant damages, upon the theory that the facts showed, as a matter of law, that the relation of master and servant existed between the defendant company and its engineer, and that no such relation existed between the municipality and the engineer. This was held to be so primarily because of the undisputed facts that the city had merely hired from the defendant company, at a stipulated per diem, the services of the engineer and the use of the instrumentality employed in the performance of the municipality's work, and that its agent had authority only to direct and supervise the work in hand, and did not have the authority to control the engineer in his operation and management of the engine.

The court there, evidently, predicated and fixed the liability of the defendant company upon the theory that, in the absence of an agreement to the contrary, the operation of the engine was subject entirely to the skill and judgment of the engineer, who in the first instance was the selected, and at all times the paid, servant of the defendant company, employed for the purpose of operating the engine, and who could be discharged only upon the direction of the defendant company. It would appear, therefore, to be the rule in this state that, when a master hires out, under a rental agreement, the services of an employé for the operation of an instrumentality owned by the master, together with the use of the instrumentality, without relinquishing to the hirer the power to discharge such servant, to go where and perform such work as the hirer directs, the legal presumption is that, although the hirer directs the servant where to go and what to do in the performance of the work, the servant, as the operator of the instrumentality employed in the doing of the work, remains, in the absence of an agreement to the contrary, the servant of the general employer in so far as concerns the manner and method of operating the instrumentality, and the negligence of the servant must be held to be that of the owner, and not that of the hirer, of the instrumentality. Stewart v. Cal. Improvement Co., supra; Garven v. Chicago, Rock Island & Pacific Railway Co., 100 Mo. App. 617, 620, 75 S. W. 193; note to Hardy v. Shelden Co., 37 L. R. A. 71.

[6] While the evidence in the instant case shows that Geiger, under the implied terms of the claimed contract of hiring, possessed and exercised authority to control the conduct of Pratt in the work of loading and unloading, nevertheless, so the evidence shows, Geiger never assumed the right to direct and control Pratt in his operation of the truck while in transit, and there is no evidence showing, or tending to show, with respect to the operation of the truck while in transit, that the defendant relinquished unto Geiger the right to control Pratt. The fact is undisputed that Pratt was the general paid employé of the defendant Harris, and while it was shown in evidence that Geiger was employed by Harris to send to the barn inefficient helpers, who were engaged in loading and unloading, still the only inference to be deduced from the undisputed evidence is that the right to hire and discharge the men rented to Geiger by Harris rested finally in Harris, and that Harris alone discharged them. The evidence does not show that Pratt for any cause might have been discharged by Geiger and replaced by a driver of Geiger's own selection. Retaining in himself, as Harris did, the right to hire and discharge Pratt, and there being no evidence showing, or tending to show, that Harris, either expressly or impliedly, relinquished control of Pratt in the operation of the truck, there was no possible basis upon which the jury could have found that Pratt was, as a matter of fact, the servant of Geiger, and therefore the trial court was justified in charging the jury as a matter of law that, under the established facts of the case, Pratt was agent of Harris at the time of the collision. Higham v. Waterman, 80 Atl. 178, 32 R. I. 578; Morris v. Trudo, 83 Vt. 44, 74 Atl. 387, 25 L. R. A. (N. S.) 33; Fink v. Brown (Tex. Civ. App.) 183 S. W. 46, 49.

The view we have taken of the evidence relative to the status of Pratt at the time of the collision, and what we have thus far said, in effect disposes of the remaining contentions made in support of the appeal upon the question of the agency of Pratt and the responsibility of Harris for the damages re-

sulting from the admittedly negligent conduct of Pratt.

[7] Complaint is made of the ruling of the trial court refusing to permit the defendant Harris to testify as a witness in his own behalf concerning a conversation which he had with one Hilbert, a truck driver employed generally by Harris, who, with a Harris truck, had been hired by Geiger for work in the transportation of the Gilmore Petroleum Company's gasoline, relative to Geiger's "control or right to control" Hilbert. An objection to the testimony thus sought to be elicited was sustained, in part upon the ground that it was self-serving, leading, and, primarily, upon the ground that it was hearsay, and therefore incompetent. Conceding, without deciding, that the objection, as stated, was not well taken, still the trial court's ruling was without prejudice to the defendant, because it was not claimed nor shown that the testimony in question had any bearing upon the question as to who had the right to control the Harris drivers in the operation of the Harris trucks while in transit. To the contrary, it is conceded that the question objected to—

"sought to elicit * * * the instruction given by Harris to Hilbert about the necessity of obeying Geiger, when Hilbert telephoned [to Harris] to ascertain whether it was necessary for him [Hilbert] to assist in unloading Geiger's trucks as directed by Geiger."

Hilbert had previously testified that the instructions which he had received from Harris in the conversation referred to in the question which was objected to were in effect that the loading was to be done in accordance with Geiger's directions, and that the truck drivers must assist in loading whenever Geiger ordered them to do so, and it may be taken as an undisputed fact in the case that the truck drivers were required to assist in loading and unloading, and, while thus occupied, were under Geiger's control and direction; so, therefore, it is apparent that the refusal to permit Harris to testify to the same effect could not have operated to his prejudice.

[8] Complaint is also made of the ruling of the trial court in sustaining objections to a series of questions propounded to Pratt upon cross-examination, while testifying as a witness for the plaintiff, which were designed to elicit the fact "that while hauling gasoline for Geiger he [Pratt] was receiving and obeying orders only from Geiger or [Pierce] his representative." The objections to these questions were in the main rightly sustained; but, aside from any question of the correctness of the rulings, the record shows that the questions objected to were in fact subsequently answered by Pratt upon recross-examination, wherein he testified:

"I never had any instructions from anybody * * * at the Gilmore plant, except when somebody told me where the gas was that was to be transported and where it was to go. Nobody there ever told me how to drive my truck; Mr. Geiger, Mr. Gehres, Mr Pierce, nor any of the men there, ever told me anything about the driving of the truck, nor said anything to me about the way in which I did drive my truck."

The judgment is affirmed.

We concur: SHAW, C. J.; WASTE, J.; WILBUR, J.; LAWLOR, J.; SLOANE, J.; RICHARDS, Justice pro tem.

On Petition for Rehearing.

PER CURIAM. [9] The petitions for a rehearing are denied. The case of Pruitt v. Industrial Accident Commission (Cal. Sup.) 209 Pac. 31, does not conflict with the instant cases, as is contended in the petition for rehearing. In the instant cases the relationship of general employer and employee existed between Harris and Pratt prior to the contract of hire of the truck and driver by the special employer, Geiger. Pratt was employed by Harris, his wages were paid by Harris, and he could only be discharged and replaced by Harris, and daily he made reports to Harris as to the amount of work performed. This and other uncontradicted evidence tended to show that Harris exercised exclusive control over Pratt in all respects, except as to the loading and unloading of the truck. In the absence of direct evidence, or of any evidence, in the instant cases, from which it might be inferred that Harris, at the time and place of the collision, and with respect to the manner and method of operating and controlling the auto truck while in transit, had relinquished to another person his right of control over the driver of the truck, it must be inferred that he retained such control and as a consequence was liable.

On the other hand, in Pruitt v. Industrial Accident Commission, the evidence leads to the opposite conclusion. In that case Conklin was hired by Graham Bros. to haul gravel, and was paid by them. At the inception of the hiring of Conklin, and for sime time afterwards, Graham Bros. exercised exclusive control over Conklin and his operation of the truck in general. Two weeks before the accident Pruitt purchased the truck in question, but made no change in the arrangement between Conklin and Graham Bros., except to take as owner of the truck a per centage of the amount earned by Conklin. There is no evidence, either direct or inferential, that Pruitt at any time assumed any control over the truck or the driver. The inference was therefore justified in that case that Graham Bros. retained control and were exercising it at the time of the collision. Pruitt, therefore, would not be liable.

WILBUR, Acting C. J., LENNON, LAWLOR, and WASTE, JJ., and RICHARDS, Justice pro tem., concur.

58 Cal. App. 744

## ROGERS LAMB CO. v. COAST SECURITIES CO. (Civ. 3960.)

(District Court of Appeal, Second District, Division 1, California. Aug. 10, 1922.)

**1. Sales ⟸479(2)—Seller under conditional contract entitled to take possession of property when abandoned by buyer.**

In the absence of intervening rights of others, the seller under conditional contract had a right to take possession where the buyer abandoned the property by skipping out and becoming a fugitive from justice, though the time for payment had not arrived, and though contract did not provide that possession might be taken if buyer became financially involved or insolvent.

**2. Sales ⟸472(3)—Assignee of fictitious contract of conditional sale not entitled to possession as against one selling to assignor on conditional sale.**

Where ostensible contracts of conditional sale assigned to plaintiff by automobile dealer did not represent actual sales, but were fraudulently contrived to raise money, they gave plaintiff no right to possession of the automobiles described therein, as against one who had sold them to the dealer under conditional contract.

**3. Fraudulent conveyances ⟸138—Assignment of contracts if treated as sales held void as against creditors for want of delivery.**

If fictitious contracts of conditional sale assigned to plaintiff by automobile dealer to raise money be treated as sales to plaintiff, they would be void as against creditors under Civ. Code, § 3440, in the absence of any delivery of the cars sold.

**4. Evidence ⟸183(13)—Proof of contents of contracts, surrendered to one subsequently becoming fugitive from justice, admissible.**

Where the evidence showed that upon renewal of contracts of conditional sale original contracts were surrendered to buyer, who subsequently skipped out and was a fugitive from justice, proof of their contents by comparison with the renewal contracts was admissible, as presumptively the buyer had the original contracts or had destroyed them.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by the Rogers Lamb Company, a copartnership consisting of C. E. Rogers and another, against the Coast Securities Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Joseph Musgrove, of Los Angeles, and Fred O. McGirr, for appellant.

C. E. Spencer, of Los Angeles, for respondent.

JAMES, J. Plaintiff, a copartnership, brought this action to recover possession of two automobiles. The court awarded judgment to respondent, and this appeal followed.

In March, 1920, one Adams, as agent and dealer, had consigned to him a carload of automobiles. Five machines comprised the shipment. Delivery of the automobiles was conditioned upon the payment of a draft covering the purchase price, which amounted to $10,315.55. Defendant corporation arranged to finance Adams, and its representative accompanied him to a suburban bank, which held the invoice draft for collection. The check of defendant was given covering the full amount of the invoice. An agent of defendant accompanied Adams, checked the numbers of the motors, and saw the automobiles placed on the floor of Adams' salesroom. Under the arrangement made between Adams and defendant, the latter issued to Adams contracts of conditional sale separately covering each of the five machines. In these contracts defendant was named as the owner and seller and Adams as the purchaser, and it was recited that there had been an initial payment made of a stated amount. The remainder of the purchase price was required to be paid on July 23, 1920. The purchase price as stated for each machine was $1,856.50, and each initial payment to be $556.95. Under the terms of the contracts title was reserved in defendant as seller, and the buyer was forbidden to dispose of the automobiles or hypothecate or incumber them until they were fully paid for. An officer of defendant testified, however, that Adams was a dealer, had a place of business as such; that it was understood that he was to sell the machines. Early in June, 1920, Adams disappeared and could not be found. One of the plaintiff copartners testified in reference to that matter that Adams had "skipped out and become a fugitive from justice." Not having received payment for but one of the automobiles described in the contracts, defendant took possession of four machines, all of which were found on the premises last occupied by Adams, and all of which belonged to the shipment hereinbefore mentioned.

[1] Leaving aside any question as to interfering rights of the plaintiff, which will be later referred to, it is apparent that the defendant, under its contracts with Adams, had the right to take possession of the automobiles when Adams abandoned the property, notwithstanding the time had not arrived when the final payment might be required to be made. This general right would follow, even though the contracts did not contain the term which was placed therein—that such possession might be taken in the event Adams became "financially involved or insolvent." The vendor had the right to protect his property and have possession of it whenever it received notice that the vendee proposed not to proceed to fulfill his obligations, or when he repudiated his contract.

It may now be considered as to whether the plaintiff acquired rights superior to those of the defendant by reason of its dealings with Adams. It has been noted that the automobiles were received at Adams' place of business, and the purchase price paid by defendant on March 16, 1920. On the same day Adams presented to the plaintiff copartnership, which dealt in automobile paper, a contract wherein he (Adams) was named as seller and one Longacre as buyer, and which described one of the five automobiles hereinbefore referred to as the subject of a conditional sale made. On the face of this contract it appeared that the purchaser had made an initial payment of $1,085. The remainder of the purchase price ($1,500) was provided to be paid in monthly installments of $150. Plaintiff advanced to Adams $1,500 less insurance and brokerage charges on this contract, and received an assignment of it. On March 28, 1920, Adams appeared at plaintiff's office with a similar contract, in which one Degele was named as purchaser. That contract described another of the same lot of automobiles, and recited that a payment of $1,485 had been made with condition that $100 per month should thereafter be returned to the seller. An assignment of this contract was accepted by the plaintiff, and Adams received therefor the sum of $1,100 less brokerage and insurance charges. The persons named as buyers in these two contracts were in default at the time the defendant took possession of the automobiles described therein, and they continued so to be up to the time that this action was commenced and thereafter.

Had Adams made bona fide sales of the automobiles and assigned the contracts of sale to plaintiff, respondent would doubtless have been estopped from denying to plaintiff all the rights which the assignments purported to carry, including the right to take possession of the automobiles upon default being made in the matter of purchase payments. But the evidence was sufficient to support an implied finding that the contracts were not bona fide; that they did not represent actual sale transactions. One of the machines was never delivered to the purported purchaser (Degele) but remained at all times in the possession of Adams. The other was used as a demonstrator by the purported purchaser (Longacre) who had worked for Adams. Neither was registered in the name of either Longacre or Degele with the state motor department. Longacre paid no money on account. He was produced as a witness at the trial; testified that Adams had credited him for labor and some other accounts, and that he had returned the machine, after receiving it, to have the starter repaired. His testimony, together with that given by another witness who had interviewed Longacre prior to the trial, showed a situation which authorized the trial judge to discard the testimony of Longacre and draw the conclusion that that transaction was not a real one. The other purported purchaser (Degele) was not produced. He was shown to have left the country, and it was also shown that he had never used the automobile which he was represented to have purchased.

[2, 3] The rights of appellant were measured by the contract that it produced. Apparently the contracts were fraudulently contrived by Adams for the purpose of raising money. The fact that there were described two automobiles which were in the possession of Adams created no right in appellant to have those machines to secure the debt which grew out of Adams' fraud. Neither can it be said that a sale of the automobiles to appellant resulted as a distinct and separable matter from the assignment of the contracts of purchase. If so, such sale would be void as against creditors of Adams, for the latter had possession of the machines, and did not deliver them to appellant. No such delivery was claimed ever to have been made. Civ. Code, § 3440. Respondent, on the other hand, had legal title to the property, as it had paid the original purchase price and received delivery by its agent.

[4] It was not error to admit in evidence the written contracts executed by Adams in favor of the defendant. It appeared in evidence that at the end of 60 days after the machines were delivered to Adams and paid for by the defendant, renewal contracts were made which were identical with the first ones executed, except that the amounts were reduced by 10 per cent. The secretary of defendant corporation testified that the old or first contracts were given back to Adams when the renewal instruments were executed. By the testimony of plaintiff's own witness it appeared that Adams had "skipped out" and was a fugitive from justice. The objection, therefore, that the defendant should have produced the original contracts and not have been allowed to prove their contents by comparison with the renewal contracts is not well taken. Presumptively, it would be considered that Adams either had taken the first contracts with him or that he had destroyed them. No further contention is made on behalf of appellant which requires consideration.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

58 Cal. App. 607

## PEOPLE v. SMITH. (Cr. 1036.)

(District Court of Appeal, First District, Division 2, California. July 22, 1922.)

**1. Prostitution ⟸1—In prosecution of husband for leaving wife in house of prostitution, his status as husband continues until final decree of divorce.**

As respects liability of a husband, under Pen. Code, § 266g, for placing or leaving his wife in a house of prostitution, his status as husband continues, although his wife has an interlocutory decree of divorce, until final judgment is rendered.

**2. Criminal law ⟸722(2)—Prosecutor cannot read wife's complaint for divorce in prosecution for leaving wife in house of prostitution.**

In prosecution of a husband, under Pen. Code, § 266g, for leaving his wife in a house of prostitution, the district attorney could not, during argument, read to the jury allegations in the wife's petition for divorce against defendant's character, since the divorce record was evidence only of the status of the parties.

**3. Criminal law ⟸1037(1)—District attorney's improper argument not available on appeal, where not objected to on trial.**

Defendant cannot avail himself on appeal of district attorney's improper argument, where defendant failed to object thereto on trial.

Appeal from Superior Court, Alameda County; George Samuels, Judge.

Thomas Smith was convicted of leaving his wife in a house of prostitution, and he appeals. Affirmed.

Francis J. Mannix, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal by the defendant from a judgment upon a verdict of a jury finding him guilty of a violation of section 266g of the Penal Code of the state of California. Said section reads as follows:

"Every man who, by force, intimidation, threats, persuasion, promises, or any other means, places or leaves, or procures any other person or persons to place or leave, his wife in a house of prostitution, or connives at or consents to, or permits, the placing or leaving of his wife in a house of prostitution, or allows or permits her to remain therein, is guilty of a felony, and punishable by imprisonment in the state prison for not less than three nor more than ten years; and in all prosecutions under this section a wife is a competent witness against her husband."

The evidence presented at the trial is not included in the record presented to us upon this appeal, and appellant's contentions are, first, that the trial court erred in a certain instruction to the jury; and, second, that the defendant was prejudiced by certain alleged misconduct of the deputy district attorney in his closing argument to the jury.

[1] The first objection is to the following instruction:

"You are also instructed, ladies and gentlemen of the jury, that it is the final judgment that grants the divorce and restores the parties to the status of single persons. The interlocutory judgment does not have that effect. It merely declares the right that the party is entitled to a divorce, a divorce to be afterwards adjudged. It is the final judgment alone that grants the divorce, dissolves the marriage and restores the parties to the status of single persons, and permits each to marry again.

"The statute does not itself declare the marriage dissolved at the expiration of the year from the interlocutory judgment. It merely suspends for one year the power of the court to dissolve it, and, in effect, provides that it becomes dissolved only when, after the expiration of that period, the court has, by its final judgment, so declared. In the meantime, the parties remain in the relation of husband and wife."

As we have stated, the evidence is not before us, and we must assume that it shows such conduct on the part of the defendant, as to bring him within the provisions of said section of the Penal Code, provided he is the husband of Sarah Smith, the woman involved. It is admitted that Sarah Smith and defendant had been married, and that an interlocutory decree of divorce had been entered in an action brought by her to dissolve the marriage. No final decree of divorce had ever been entered, and the time at which such a decree might have been entered had not arrived when the offense charged was committed. Under such circumstances, appellant contends that Sarah Smith was not his wife, within the meaning of the section of the Penal Code involved here. The question is settled against his contention by the Supreme Court of this state in the case of Estate of Dargie, 162 Cal. 51, 53, 121 Pac. 320, 321, where it is said:

"It is the final judgment that grants the divorce. The interlocutory judgment does not have that effect. It merely declares the right: That the party is 'entitled' to a divorce, a divorce to be afterwards adjudged. By the terms of the statute, it is the final judgment alone that grants the divorce, dissolves the marriage, restores the parties to the status of single persons, and permits each to marry again. The statute does not itself declare the marriage dissolved at the expiration of the year from the interlocutory judgment. It merely suspends for one year the power of the court to dissolve it, and, in effect, provides that it becomes dissolved only when, after the expiration of that period, the court has, by its final judgment, so declared. In the meantime the parties remain in the legal relation of husband and wife."

The instruction of which complaint is made followed the language of the last-cited case and was not erroneous.

[2] The second matter urged by appellant is that the deputy district attorney was guilty of misconduct in reading to the jury the allegations of the petition for divorce which had previously been filed by Sarah Smith against the defendant, and which had resulted in the interlocutory decree mentioned. The attorney for the defendant in his argument to the jury had referred, evidently, to evidence produced by the defendant at the trial relative to his industry and good character. In reply the deputy district attorney produced the record in the divorce action, which had not been offered in evidence, and read the allegations of the complaint, which included charges of idleness and abuse. He then commented upon the fact that the defendant had failed to answer this complaint and to deny the allegations therein made. The presentation to the jury of the allegations of the complaint in the divorce action as evidence against the defendant of the facts therein recited, was clearly unwarranted. The record in that action was evidence against the defendant, in favor of third parties, only as to the status of the parties to said divorce action, and not as to the facts alleged in the pleadings therein. The estoppel of a judgment must be mutual in order to be admissible against a party to an action, In this case, the state, assuredly, would not have been bound by allegations in any of the pleadings in the divorce action, and could not use the same against the defendant. Gill v. Read, 5 R. I. 343, 73 Am. Dec. 73; Luke v. Hill, 38 L. R. A. (N. S.) 559; Coney v. Harney, 53 N. J. Law, 53, 20 Atl. 736.

[3] However, defendant cannot avail himself of this matter upon appeal, because he failed to object thereto at the trial and failed to ask the court to instruct the jury to disregard the objectionable statements. The record discloses that no objection whatever was made to the reading of these allegations to the jury, despite the fact that the deputy district attorney specifically called counsel's attention to the matter and asked him to make any objections which he might have to the court.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

---

58 Cal. App. 573

## HUTCHINSON v. UNITED STATES FIDELITY & GUARANTY CO. (Civ. 3864.)

(District Court of Appeal, Second District, Division 2, California. July 19, 1922.)

**1. Attachment ⊂⊃344—Plaintiff in proceeding on surety's undertaking need not show no property, but only sheriff's return unsatisfied.**

Code Civ. Proc. § 552, providing that if an execution be returned unsatisfied the plaintiff may prosecute any attachment undertaking given pursuant to sections 540 or 555, requires that sheriff's return show judgment remains unsatisfied, but not that plaintiff show there is no property; and nothing but fraud and collusion in making the return would alter this rule.

**2. Pleading ⊂⊃129(2)—Defendant's failure to plead sheriff's fraud in execution return of execution is admission of regular return.**

In a proceeding against an attachment surety, under Code Civ. Proc. § 552, where defendant fails in his answer to show sheriff's fraud in return upon execution return, such failure is an admission of plaintiff's allegation of a regular return.

**3. Attachment ⊂⊃344—Plaintiff in proceeding upon surety's undertaking shows he pursued his execution by showing regular issuance and return of writ.**

A proceeding against a surety, under Code Civ. Proc. § 552, upon an attachment undertaking, is supported as to regular pursuance of plaintiff's remedy by execution, where the writ was regularly issued and regularly returned by the officer.

**4. Attachment ⊂⊃347—Plaintiff's proceeding on surety's undertaking given by defendant not premature, though motion for new trial was pending in action and appeal time had not expired.**

A proceeding against a surety, under Code Civ. Proc. § 552, upon an undertaking given by defendant pursuant to section 540, after plaintiff has pursued his remedy by execution, is not premature because brought when motion for new trial was pending or time to appeal was unexpired, in the original suit.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Craig Hutchinson against the United States Fidelity & Guaranty Company. From a judgment for plaintiff, defendant appeals. Affirmed.

James M. O'Brien, of San Francisco, for appellant.

Cooper, Collings & Shreve, of Los Angeles, for respondent.

FINLAYSON, P. J. This action is upon an undertaking executed by defendant, as surety, for the release of property that had been taken under a writ of attachment in an action brought by the plaintiff here against A. Lincoln Miller and others. The undertaking, which was given pursuant to section 540 of the Code of Civil Procedure, binds defendant to pay to plaintiff, on demand, the amount of whatever judgment the latter might obtain in the action which he had brought against Miller et al. Defendant having appeared and answered, plaintiff moved for a judgment on the pleadings, claiming that defendant's answer raised no material issue. The motion was granted, and

defendant now appeals from the judgment. Insisting that its answer does present material issues, one in the form of a denial and another in the form of new matter, appellant contends that in granting plaintiff a judgment on the pleadings the lower court committed reversible error.

After averring that on January 24, 1921, he recovered a judgment for $2,024.90 against Miller et al. in the action wherein the defendant here had given the undertaking to release the attachment, plaintiff alleges in his complaint that on February 4, 1921, "execution was duly and regularly issued out of said court [the court in which the action against Miller et al. was pending], and remedy thereon regularly pursued, and on the 4th day of March, 1921, said execution was duly and regularly returned and filed in the office of the county clerk * * * wholly unsatisfied." None of these averments is denied except that defendant denies, on information and belief, that "the remedy on said execution was regularly pursued." It is appellant's contention that this denial raises a material issue, and that therefore it was error to render judgment on the pleadings. The contention lacks merit.

[1] It is provided by section 552 of the Code of Civil Procedure that—

"If the execution be returned, unsatisfied, in whole or in part, the plaintiff may prosecute any undertaking given pursuant to section five hundred and forty or section five hundred and fifty-five, or he may proceed, as in other cases, upon the return of an execution."

As we have seen, it is alleged in the complaint, and not denied in the answer, that "execution was *duly* and *regularly* issued" on February 4, 1921, and that four weeks thereafter "said execution was *duly* and *regularly* returned and filed in the office of the county clerk * * * wholly unsatisfied." The object of section 552 is to give relief to the obligee named in the undertaking whenever all the ordinary remedies have been resorted to without avail. But all such remedies have been resorted to without avail when execution has been regularly issued and regularly returned unsatisfied. When that has been done, the condition of the surety's undertaking is broken, and he becomes liable to an action. Section 552 does not demand that there shall in fact be no property. It demands no more than that execution shall be returned by the sheriff showing that the judgment remains unsatisfied in whole or in part. It is not a question of the existence of sufficient property, but of the existence of a return by the officer showing the judgment to be unsatisfied. If the sheriff was derelict in his duty, there is a complete remedy on his bond. Fraud and collusion in making the return, for the purpose of basing an action thereon against the surety, may alter the rule; but nothing short of such fraud and collusion will alter it. See Hall v. McGregor, 65 W. Va. 74, 64 S. E. 736, Clements v. Waters, 90 Ky. 96, 13 S. W. 431, and Stoors v. Kelsey, 2 Paige (N. Y.) 418.

[2] No cause of fraud or collusion appears here. If defendant has any reason to believe that plaintiff and the sheriff fraudulently colluded to make a false return, it should have set up in its answer the facts which constitute such fraud and collusion. That it has failed to do. Its admission that the execution was "duly and regularly" returned is equivalent to an admission that the return is not a "false return."

[3] Appellant refers us to the following language used by our Supreme Court in Passow & Sons v. United States F. & G. Co., 177 Cal. 34:

"The thing contemplated and required by section 552 is that the plaintiff in the attachment suit shall exhaust his remedy by execution before proceeding against the surety on the undertaking. It is therefore necessary that he shall show in his complaint upon the undertaking that the remedy by execution has been regularly pursued and that a return of the execution unsatisfied in whole or in part was regularly made before the action was begun."

Because the court said in that case that the plaintiff in such an action as this should show in his complaint that "the remedy by execution has been regularly pursued," appellant claims that something more is required than a showing that execution was regularly issued and regularly returned unsatisfied. But the remedy by execution is regularly pursued when the plaintiff causes the writ to be regularly issued and it is regularly returned by the officer. In Jones v. Green, 1 Wall. 330, 17 L. Ed. 553 (a judgment creditor's suit), Mr. Justice Field, speaking for the court, said:

"* * * The court, when its aid is invoked, looks only to the execution, and the return of the officer to whom the execution was directed. The execution shows that the remedy afforded at law has been pursued, and of course, is the highest evidence of the fact. The return shows whether the remedy has proved effectual or not, and from the embarrassments which would attend any other rule, the return is held conclusive. The court will not entertain inquiries as to the diligence of the officer in endeavoring to find property upon which to levy. If the return be false, the law furnishes to the injured party ample remedy."

See, also, William Wright Co. v. Frazer, 109 Mich. 139, 66 N. W. 954, and Hunt v. Weiner, 39 Ark. 70.

[4] Coming now to the claim that the answer pleads an affirmative defense of new matter: It is alleged in the answer that at the time of the commencement of the present action a motion for a new trial was pending in the action against Miller and others—the action wherein the defendant here

gave the undertaking which is the subject of the present action. It also is alleged that when the present action was commenced the time to appeal from the judgment in the other action had not expired. Wherefore, it is contended that this action was prematurely brought. It is conceded by appellant that this contention is directly opposed to the ruling of the District Court of Appeal in Bailey v. Ætna Indemnity Co., 5 Cal. App. 740, 91 Pac. 416. In that case it was held that the cause of action on a bond given under section 540 accrues as soon as execution against the defendant has been returned unsatisfied. It is claimed, however, that the Bailey Case, in so far as the point under consideration is concerned, is opposed to the reasoning of the Supreme Court in Cook v. Ceas, 143 Cal. 221, 77 Pac. 65. We are satisfied wth the reasoning of the court in the Bailey Case, and think that the opinion there points out clearly why it is that the Cook Case is distinguishable from such an action as this.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

---

(58 Cal. App. 643)

## SCOTT v. AUSTIN et al. (Civ. 4272.)*

(District Court of Appeal, First District, Division 1, California. July 31, 1922. Hearing Denied by Supreme Court Sept. 28, 1922.)

**1. Courts ⟸93(3)—Decision uniformly followed held a rule of property not to be departed from because of decision of United States Supreme Court.**

The rule that Civ. Code, § 172, as amended in 1891 (St. 1891, p. 425), to prohibit the husband from making a gift of community property without the wife's written consent, is unconstitutional and inoperative as to property acquired before its passage, having been uniformly followed, is a rule of property, and will not be departed from because of a contrary decision of the United States Supreme Court respecting a similar amendment of the statute of another state.

**2. Husband and wife ⟸247—Amendments as to conveyance of community property inapplicable to property acquired before 1891.**

Civ. Code, § 172, as amended in 1917 (St. 1917, p. 829), and section 172a, as added, requiring the wife to join in any conveyance of community real property, do not in any manner affect the right of the husband in property acquired prior to the amendment of section 172 in 1891 (St. 1891, p. 425).

**3. Husband and wife ⟸267(1)—Finding that conveyance of community property by husband not fraudulent held sustained by evidence.**

Under Civ. Code, § 3442, making the question of fraud in a transfer of real estate a question of fact, and providing that no transfer can be adjudged fraudulent solely because made without valuable consideration, where a husband conveyed community property acquired before the amendment of Civ. Code, § 172, in 1891 (St. 1891, p. 425) to one whose relations to him had been intimate and affectionate for many years, in consideration of the grantee's agreement to pay towards the care and support of the grantor's insane wife such amounts as might be required by the public authorities, and furnish her with necessary clothing, a finding that the conveyance was not fraudulent was sustained by the evidence.

Appeal from Superior Court, Monterey County; Pat R. Parker, Judge.

Action by Emma Scott, an insane person, by J. A. Cornett, guardian of her person and estate, against Milton W. Austin, as administrator of Horace W. Austin, deceased, substituted in place of Horace W. Austin, deceased, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

See, also, 207 Pac. 710.

Daugherty & Theile, of Salinas, and Wyckoff & Gardner, of Watsonville, for appellant.

C. F. Lacey, of Salinas, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants in an action brought by the plaintiff as the surviving wife of one John B. Scott, to recover a one-half interest in certain community lands which her said husband conveyed during his lifetime to the defendant without her consent to such conveyance. The plaintiff is an insane person, and in bringing said action is acting through the regularly appointed guardian of her person and estate. The plaintiff and said John B. Scott intermarried on May 14, 1873, and continued to be husband and wife until the death of her said husband on February 18, 1920. On April 6, 1888, the lands in question, consisting of business property on Main street in the city of Salinas, were acquired by said John B. Scott by purchase, and it is a conceded fact in the case that they are of the present value of about $20,000. On May 6, 1889, the plaintiff was adjudged insane by the superior court of Monterey county, and was committed to the state hospital at Stockton, where she has ever since been and now is, in said condition, and is incurably insane. Her present age is about 73 years. On January 31, 1920, said John B. Scott conveyed said premises to the defendant herein, Horace W. Austin, reserving to the grantor a life estate therein. The said grantor was then 76 years of age and was in failing health. He died, in fact, within a month after the deed of said conveyance. It is an admitted fact in the case that no money consideration passed from the defendant Austin to said John B. Scott for said conveyance. The only consideration claimed by



*Rehearing denied August 30, 1922.

the defendant to have existed therefor being the execution by him to said Scott of an instrument in writing at the time of the delivery of said deed, reading as follows:

"Salinas, Cal., January 30, 1920.

"In consideration of a deed of conveyance this day made to me by John B. Scott, I hereby agree that from and after the death of the said John B. Scott, I will pay towards the care and support of his wife, now confined in the asylum for the insane at Stockton, California, such amounts as, from time to time, may be fixed or required by the public authorities, and will likewise furnish her with necessary clothing.

"This obligation is to continue until the death of the said wife of John B. Scott, and is to bind my heirs, executors and administrators.

"In witness whereof, I have hereunto subscribed my name this 30th day of January, 1920.

"Horace W. Austin."

The defendant Austin, who executed the foregoing agreement, was not a relative of the Scotts, but had been for many years an employee in a drug store owned and kept by said John B. Scott in Salinas, which was of the value of about $6,000, and which was transferred to the defendant Austin by said Scott by a separate writing at or about the date of the conveyance of said lands, and for the same consideration. It is an admitted fact in the case that the amount required by the state for the care of plaintiff at the Stockton hospital is $20 per month, and that her clothing costs from $20 to $40 a year. Upon the foregoing facts the trial court made its findings and rendered its judgment in favor of the defendant Austin, holding said conveyance to have been valid as to all of said real estate. It is from such judgment that the present appeal has been taken.

[1] The first contention of the appellant herein is that since said real estate was acquired after and during the marriage by the said John B. Scott of the plaintiff herein, by purchase, the whole thereof is community property, and that since the conveyance of the same was of a date after the amendment of section 172 of the Civil Code, added thereto in the year 1891 (St. 1891, p. 425), and which provided that the husband could not make a gift of community property or convey the same without a valuable consideration unless the wife in writing consented thereto, this conveyance, amounting substantially to a gift of said property to said defendant, must be held to be void. In making this contention the appellant concedes that if the rule laid down in Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170, holding that the amendment of 1891 to section 172 of the Civil Code was unconstitutional and inoperative as to property acquired before its passage is to be upheld, the appellant's said contention cannot be sustained. The appellant insists, however, that since said decision by the Supreme Court of this state, the doctrine announced therein has been departed from by the Supreme Court of the United States in the case of Arnett v. Reade, 220 U. S. 320, 31 Sup. Ct. 425, 55 L. Ed. 477, 36 L. R. A. (N. S.) 1040, involving precisely the same question, arising in regard to a like amendment to the laws of New Mexico, in which that tribunal held that such amendment was valid and effectual in relation to community property acquired before its passage. The appellant in her opening brief insists that this decision of the Supreme Court of the United States must be held to be controlling in this case for the reason that a federal question is involved, viz. the question as to whether such amendment of section 172 of the Civil Code operates to deprive persons of property without due process of law. In her closing brief, however, the appellant concedes that the foregoing decision of the Supreme Court of the United States is not controlling, but is merely persuasive upon the courts of this state in passing upon the effect to be given to said amendments of the statutes of this state regulating the acquisition and disposition of real property within this state. In answering this contention it may be stated that the said decision of the Supreme Court of the United States can no longer be held to be even persuasive upon the courts of this state, and particularly upon this court in determining the effect of the amendment of 1891 to section 172 of the Civil Code, since the case of Spreckels v. Spreckels, supra, has been uniformly followed by the decisions of the courts of last resort in this state, until it has become and, in fact, has long been, a rule of property touching the subject to which it relates. Estate of Moffitt, 153 Cal. 360, 95 Pac. 653, 1025, 20 L. R. A. (N. S.) 207; Dargie v. Patterson, 176 Cal. 716, 169 Pac. 360; Duncan v. Duncan, 6 Cal. App. 407, 92 Pac. 310; Clavo v. Clavo, 10 Cal. App. 449, 102 Pac. 556; Jacobs v. All Persons, 12 Cal. App. 171, 106 Pac. 896; Thomas v. Fursman, 39 Cal. App. 285, 178 Pac. 870; Badover v. Guaranty, etc., Co., 186 Cal. 775, 200 Pac. 638.

[2] By the amendment made to the Civil Code in 1917 (St. 1917, p. 829), section 172 thereof was so amended as to confine its application to personal property, and section 172a was added, having relation to real estate. But these changes in the Civil Code did not in any manner affect the right of the husband in community property acquired prior to the amendment of section 172 of the Civil Code made in the year 1891, and hence did not in any manner affect the full application of the cases above cited to the facts of this case.

[3] The appellant's final contention is that the said conveyance, being without substantial consideration, and amounting practically to a gift to the grantee, must be held to have been fraudulent in so far as it purports to

convey to said grantee the community interest of the said plaintiff in said property. We find no merit in this contention. The question whether a transaction involving the transfer of real estate is fraudulent is a question of fact and not a question of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration. Civ. Code, § 3442. The trial court by its findings expressly determined that this conveyance was not made for the purpose or with the intent of defrauding the plaintiff in this action. We are of the opinion that this finding is fully sustained by the evidence in the case, which shows practically without contradiction that the plaintiff herein, has ever since the year 1889 been, and still is, hopelessly insane; that she has been during all of said time, and still is, and in all probability will be during the remainder of her life, confined in a state hospital for the insane; that during all of those years, and up to the time of his death, her husband had paid for her comfortable support and maintenance at said state hospital a sum approximating $300 a year, and at the time of the conveyance of the premises in question provided by a separate agreement with said defendants that such payments should be continued during the lifetime of his wife. The relation between the defendant and the decedent, John B. Scott, had been intimate and affectionate for many years, the defendant having begun work in the decedent's drug store when a boy, and having remained in his employ for more than 30 years, during the latter portion of which he had taken care of the decedent in his own home, where the latter died. In thus conveying to said defendant shortly before his death, and in thus providing for the maintenance of his wife during the remainder of her life, the decedent, far from evincing a fraudulent intent or purpose, manifested, in our opinion, the utmost and most commendable good faith in the disposition of this property, with the best interests of his wife in view. The mere fact that the decedent conveyed to the defendant the larger portion of the community property without other consideration than that above noted is not of itself sufficient to raise the imputation of fraud, since, under the authorities above cited, the husband possessed full power to make an absolute gift of the whole of the community property acquired prior to the amendment of section 172 of the Civil Code in 1891, when such conveyance was made in good faith, and particularly when the transfer was made for the laudable purpose manifested in the instant case. Clavo v. Clavo, supra; Jacobs v. All Persons, supra.

The judgment is affirmed.

I concur: TYLER, P. J.

58 Cal. App. 666

## MANNING v. CITY OF PASADENA.
(Civ. 4227.)

(District Court of Appeal, First District, Division 2, California. Aug. 4, 1922. Hearing Denied by Supreme Court Oct. 2, 1922.)

**Municipal corporations ⊂=729—Exercising governmental function in collecting garbage, and not liable for negligence, though selling the garbage.**

A city, in enacting an ordinance concerning the disposition of garbage, and in collecting garbage and disposing of it in a sanitary method, was acting within its police powers, and the fact that it sold the garbage after it had been collected at its incinerator, thereby recouping some of the expense of collection, did not convert the governmental function of collecting into a proprietary function, so as to render it liable for the negligence of its garbage collectors.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Carol Manning, a minor, by Alfred L. Manning, his guardian ad litem, against the City of Pasadena. From a judgment for plaintiff, defendant appeals. Reversed.

James H. Howard, City Atty., of Los Angeles, and Roscoe R. Hess, Asst. City Atty., of Pasadena, for appellant.

John L. Richardson, T. E. Parke, and Anderson & Anderson, all of Los Angeles, for respondent.

STURTEVANT, J. The plaintiff, by his guardian, brought an action against the defendant, the city of Pasadena, to recover a judgment in damages for personal injuries which the plaintiff alleged he had suffered. Judgment went for the plaintiff, and the defendant has appealed.

The appellant makes several points, including the contention that the defendant, the city of Pasadena, is not liable for acts of negligence on the part of its employees occurring in the performance of a governmental duty, and that the alleged injuries occurred under such circumstances. The respondent concedes that the defendant would not be liable if the injuries occurred in the performance of a simple governmental duty, but contends that under the facts the alleged accident occurred while the city of Pasadena was engaged in a private venture.

The city of Pasadena is a municipal corporation organized under a freeholders' charter. Prior to the accident alleged the city had adopted an ordinance, under and by virtue of which private persons were compelled to place in a receptacle the garbage of a household. It also provided that the expression "garbage," as used in the ordinance, should mean all animal and vegetable

refuse from kitchen and household waste that should have been prepared for or intended to be used as food, or should have resulted from the preparation of food, and all animal and vegetable refuse from institutions where foodstuffs intended for human consumption should be handled commercially. The ordinance prohibited private individuals from collecting and disposing of such garbage. After the enactment of the ordinance the garbage in the defendant city was gathered by the employees and agents of the city. Under the directions of the head of the department, the garbage was collected and delivered *at the municipal incinerator.* Prior to the accident in question the city had entered into a contract with A. B. Miller, under and by virtue of which the city sold at $4.10 per ton the garbage so collected by it. Under that contract the purchaser agreed to remove the garbage *from the incinerator.*

At about half past 5 on the morning of the 28th of October, 1919, while it was still dark, municipal employees had driven their truck into Center street for the purpose of collecting garbage. Near Euclid avenue they had stopped the truck on the left-hand side of Center street and facing to the east. At that time the truck had two oil lamps, one on each side of the driver, but neither of those lamps was lighted. It had one large light near the windshield, beside the driver, focused down on the street. While at the time the truck stood in that position, the plaintiff drove west on Center street, riding on a motorcycle. He did not see the truck, and collided therewith, hitting it between the middle of the radiator and outside of the north wheel. It is for the injuries sustained in that accident that this action is brought. There were three employees with the truck on the morning in question. They were engaged in collecting the garbage from the several garbage cans and hauling the same *to the incinerator.* The ordinance above mentioned was approved March 9, 1917. The contract with Miller was executed on the 15th day of January, 1918. The plaintiff offered a summary of expenditures and receipts of the refuse collection department, from which it appears that for the fiscal years 1914–1920 the revenue collected by the department during each year or fraction thereof amounted to in round figures from $4,500 to $9,100, but that the expenditures were such that a balance was raised by tax levy which varied from $319 to $11,644. The totals for the same years showed total expenditures in the sum of $68,763.62; revenues, $42,688.23; salvage and abatement expense, $1,532.79; balance raised by tax levy, $24,542.60.

Excepting as the above facts may be evidence thereof, there is no evidence in the record that the City of Pasadena was conducting a garbage business for the purpose of making a profit. However, the respondent takes the position that the foregoing facts show that the defendant city was at the time and under the circumstances delineated conducting the garbage business for a profit, and that the defendant city is liable for the negligence of its servants in the performance of the duties cast upon them in gathering together the garbage, and in this behalf respondent cites McQuillin, Municipal Corporations, §§ 2625, 2673; Chicago v. Selz, Schwab & Co., 104 Ill. App. 376, 381; Hourigan v. Norwich, 77 Conn. 358, 365, 59 Atl. 487; Judson v. Borough, 80 Conn. 384, 68 Atl. 999, 15 L. R. A. (N. S.) 91. As we understand the appellant, its position is that, without regard to what may be the rule in other states, the facts of this case do not show that at the time of the accident the city of Pasadena was engaged in the garbage business for profit, and therefore the respondent did not bring himself within any exception to the above rule that cities, as subordinate agencies of the state, are intrusted with the exercise of limited governmental powers for the benefit of the local public in the performance of which, in this state, there being no statutory provision to the contrary, they are not liable for the negligence of their officers, agents and servants through whom they act. The most that can be said in favor of the respondent's position is that the evidence before the trial court showed that in collecting the garbage the city of Pasadena did not lose every dollar it expended, but that it recouped some of its expenses by virtue of its sales. The fact that it collected some moneys to cover expenses did not ipso facto render the city liable to the same rules that would apply to private individuals. In performing the function of collecting garbage and disposing of the same in a sanitary method, and in enacting the ordinance above mentioned and enforcing its provisions, the city was acting within its police powers. In re Zhizhuzza, 147 Cal. 328, 81 Pac. 955. Conceding, without deciding, that when thereafter, at the incinerator and after the garbage had been gathered together, the city offered the same for sale and did sell the same, that therein and thereby it was performing a purely private business function, it suffices to point out that the accident in question did not arise in the performance of this last-mentioned function, but did arise in the performance of the above-mentioned function of gathering the garbage together. The fact that the city of Pasadena sold the garbage after it had been collected did not operate to convert a governmental function into a proprietary function.

The question involved in this case in this state is not an open one. Chapman v. State, 104 Cal. 690, 38 Pac. 457, 43 Am. St. Rep. 158, and Denning v. State, 123 Cal. 316, 55 Pac. 1000, seem to us to be determinative of this litigation. Both cases involved the acts of the employees of the state harbor commis-

sioners at the port of San Francisco. Those commissioners were acting under the provisions of section 2504 of the Political Code. They performed many functions. They acted as wharfingers. As such, they received and discharged freight. In handling a cargo of coal the commissioners allowed the same to break through the wharf and to be lost in San Francisco bay. Speaking of the liability of the state (104 Cal. at page 694, 38 Pac. 458 [43 Am. St. Rep. 158]), the court said:

"A wharfinger is one who for hire receives merchandise on his wharf, either for the purpose of forwarding or for delivery to the consignee on such wharf, and the matters alleged in the complaint show a contract of the latter character, and the state is bound thereby to the same extent as a private person engaged in conducting the business of a wharfinger would be under a similar contract."

The same public officers were furnished steam towboats. The boats were used during the daytime to tow, and to attend fires; at nighttime the boats were used only to attend fires. The board was authorized—

"to fix and regulate from time to time the rates of dockage, wharfage, cranage, tolls and rents, and collect such amount of revenue therefrom as will enable the commissioners to perform the duties required of them by the act. * * *"

In Denning v. State, supra, it appears that the plaintiff had been injured while placing a light at night in pursuance of his duty as a deck hand on one of the boats operated by the harbor commission. At page 322 of 123 Cal., at page 1001 of 55 Pac., the court said:

"The fact that the board is authorized or required to collect tolls and charges for dockage and wharfage to such extent 'as will enable the commissioners to discharge the duties required of them by the act' does not affect its character as a governmental agency."

And again, at the bottom of page 322 of 123 Cal., at page 1002 of 55 Pac., the court says:

"But even if it were true that in so far as the duties of the board were those of a wharfinger, and that the liabilities of the state to its employees are or should be the same as that of a private corporation engaged in the same business, it does not follow that the state is or would be liable to the plaintiff, inasmuch as he was employed in a distinct branch of the service, viz. the protection against or extinguishment of fires, which, even in the case of municipal corporations, is uniformly held to be the exercise of a purely governmental function; and there is certainly as strong ground for distinguishing between the different functions of the board as there can be for distinguishing between the different functions of municipal corporations, in the exercise of some of which the corporation is liable for negligence, whilst in others it is not."

In Melvin v. State, 121 Cal. 16, 53 Pac. 416, the facts were much more in favor of the plaintiff than are the facts in the instant case. The Legislature had provided for the creation of a state agricultural society, for fairs to be conducted and managed thereby, for the maintenance of exhibits thereat, and for the collection of admission fees at the gate. In answering the same contention which this plaintiff makes the court said:

"It does not follow, however, that the society is organized for gain. It exists for the sole purpose of promoting the public interest in the business of agriculture and kindred objects. It is an agency of the government, and in no sense an organization for pecuniary profit to the state."

Any doubt that may exist on the subject seems to be entirely removed by the case entitled Kellar v. City of Los Angeles, 179 Cal. 605, 178 Pac. 505. The city of Los Angeles had purchased and was maintaining in the San Bernardino mountains a park—

"for the purpose of giving any children of said city, at certain prescribed charges to be paid by said children to said city, a vacation, with care, board, and lodging at said camp."

The plaintiff had gone to the camp under an agreement by which, in consideration of $3.75 per week to be paid by him, he was to be received and cared for, boarded, and lodged for two consecutive weeks. While there he accidentally fell and broke his arm. The alleged negligence was the failure to provide the necessary care and attention, in view of his injury, occasioning very serious results. There, as here, it was contended that the defendant was engaged in a business enterprise. The court held otherwise. It held that the city was in the due exercise of one of its governmental powers; and regarding the recoupment of expenses the court said (179 Cal. at page 610, 178 Pac. 507):

"That a small charge is made upon those children going to and staying at the camp, for the purpose of assisting in defraying the cost of maintenance of such children while at the camp, does not change the situation."

The trial judge, acting upon the request of the plaintiff, gave instructions 10, 11, and 12, embodying the contention of the plaintiff, and it refused instructions 28 and 29, which embodied the contention of the defendant. It was prejudicial error to give the instructions which were given, and to refuse those which were refused.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

58 Cal. App. 742

## PALACE HOTEL CO. OF SAN FRANCISCO v. BOARD OF SUP'RS OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 4339.)

(District Court of Appeal, First District, Division 2, California. Aug. 10, 1922.)

**Mandamus ⟸176—Judgment creditor of municipality cannot compel levy of tax sufficient to pay judgments other than his own.**

Under Code Civ. Proc. § 1086, requiring a writ of mandate to be issued on the verified petition of the party beneficially interested. a judgment creditor of a city and county cannot compel the levy and collection of a tax sufficient to pay all judgments against the city and county, but can only compel the levy and collection of a tax sufficient to pay his own judgment.

Original application by the Palace Hotel Company of San Francisco for a writ of mandamus directed to the Board of Supervisors of the City and County of San Francisco and others. Writ issued for part of relief asked.

Drown, Leicester & Drown, of San Francisco, for petitioner.

George Lull, City Atty., and Maurice T. Dooling, Jr., Asst. City Atty., both of San Francisco, for respondents.

NOURSE, J. This is an original proceeding in mandamus to require the respondents, as members of the board of supervisors of the city and county of San Francisco, to take the appropriate proceedings for the levy and collection of a tax sufficient to pay all final judgments against the said city and county that were included in a list of final judgments filed by the county clerk with the county auditor during the current fiscal year. The respondents have appeared by general demurrer. The petition contains all the necessary averments relating to the judgment which the petitioner holds against the city and county, and, so far as that judgment is concerned, the writ of mandamus should issue. But, in so far as the petitioner seeks to obtain relief for others who hold judgments against the city and county, it fails to allege any facts bringing it within the terms of section 1086, Code of Civil Procedure, which provides that the writ of mandate "must be issued upon the verified petition of the party beneficially interested."

Let the writ issue commanding the respondents to include in the tax levy for the fiscal year ending June 30, 1923, a sum sufficient to pay the judgment held by petitioner or an aliquot part thereof as provided by the act of March 23, 1901 (Stats. 1901, p. 794).

We concur: LANGDON, P. J.; STURTEVANT, J.

58 Cal. App. 717

## ARMAS v. ARMAS. (Civ. 2418.)

(District Court of Appeal, Third District, California. Aug. 8, 1922.)

**Landlord and tenant ⟸95—Lessee held not entitled to stipulated amount from lessor on voluntary termination.**

A provision in a lease that, if lessor should convey the property during the lease, he should pay lessee $250 a year for the unexpired term, in consideration whereof lessee should surrender the property, was solely for the benefit of the lessor, and, where the lessee on sale of the property surrendered possession voluntarily and without demand, he was not entitled to any of the money stipulated.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Manuel Armas, Jr., against Frank C. Armas. Judgment for plaintiff, and defendant appeals. Reversed.

F. W. Henderson, of Merced, for appellant.

John A. Wall, of Mariposa, for respondent.

HART, J. The parties to this action (brothers), on the 26th day of December, 1919, entered into a written agreement of lease, whereby the defendant leased to the plaintiff 40 acres of land, situated in what is designated in the lease as "Rotterdam Colony," in Merced county, for the term of five years, for the total rental of $1,250, payable annually in installments of $250, the initial payment of $250 to be made, and the same was made, on the date of the execution of the lease. Among the covenants or conditions of the lease was the following:

"In the event the lessor shall sell and convey said property to any one other than the lessee during the term of this lease, he shall pay to the lessee at the rate of two hundred and fifty dollars per year for the unexpired term of the lease, in consideration whereof the lessee shall give up and surrender to the lessor, or his assigns, the real property and appurtenances covered by this lease."

The controversy here revolves around the foregoing provision of the lease.

The complaint alleges that the defendant (lessor), prior to the 22d day of September, 1920, and while said agreement of lease was in full force and effect, and while the plaintiff was, under the terms of said agreement of lease, in the possession and occupation of the lands therein described, sold and conveyed said land to a person other than the plaintiff; that the latter, on the 22d day of September, 1919, surrendered the possession of said real property and appurtenances to the defendant, and thereupon demanded of defendant "that he pay to plaintiff the sum of $250 per year for the unexpired term of said lease; that is to say, from the 22d day of

September, 1920, to the expiration of said agreement to lease, to wit, December 26, 1924, amounting in the aggregate to the sum of $1,041; that defendant has failed and refused to pay plaintiff the said sum or any part thereof."

Answering the complaint, the defendant, after certain denials, alleges that the conveyance of the property described in the lease was made subject to said agreement of lease, and that the grantee named in the deed of conveyance took said premises by said conveyance from defendant subject to said lease and to the right of the plaintiff to the possession of the premises therein described, and that at no time has the defendant or the grantee in said conveyance "demanded or required of plaintiff herein the surrender of said premises or any portion thereof."

The defendant also filed a cross-complaint by which he sought the reformation of the agreement of lease, alleging that the agreement of lease set out in the complaint was made and signed by the parties, but, "by mistake of the said parties, which was mutual, and of the person who drew said instrument, the said agreement of lease did not, nor does it, correctly contain and set forth the agreement of the parties with reference to the sale of said premises." Following these averments is the provision of the lease above quoted herein, as to which the cross-complaint proceeds:

"That said provision was inserted and made as above set forth by mistake of the person selected by plaintiff and defendant for the drafting of said instrument; that the parties hereto agreed that, in the event that the lessor should sell and convey said property to any one other than the lessee during the term of said lease with the right to the immediate possession thereof, the plaintiff would upon demand of defendant vacate said premises, surrender said lease, and that thereupon defendant would pay to plaintiff $1,000.00 for the unexpired term of said lease."

It is further alleged that said property was not sold with the right of immediate possession in the grantee or any right of possession prior to the termination of the lease; that neither defendant nor his grantee of said land ever demanded of plaintiff surrender of such possession; that the conveyance of said land was, as the answer alleges, to a person other than plaintiff subject to all the terms, covenants, and conditions of said lease; that, subsequent to the sale by defendant of said land, "without the consent of defendant and of the purchaser from him, and contrary to the wishes of each of them, plaintiff vacated said premises and abandoned said lease."

The prayer of the cross-complaint is that the said written lease be so reformed as to "speak the agreement of the parties as herein set forth, and that plaintiff take nothing by his action," etc.

The cross-complaint was met by denials.

The court found that the agreement of lease was as it was written and set out in the complaint, and, accordingly, denied the prayer for a reformation thereof; that plaintiff entered into the possession of the said premises under said agreement of lease on the 26th day of December, 1919; that defendant, prior to the 22d day of September, 1920, sold the land to a person other than the plaintiff, and that the deed of conveyance executed by defendant to the grantee of said land contained a provision that said conveyance was "subject to the lease thereon to Manuel Armas, dated December 28, 1919," but that said provision in said deed of conveyance "was without the consent or knowledge of plaintiff, and he refused to recognize it or be bound by it in any way or at all." It was further found that, after the execution by the defendant of said conveyance, to wit, on the 22d day of September, 1920, plaintiff vacated and surrendered possession of said premises, and "did then and there demand of defendant that he pay to plaintiff the sum of $250 per year for the unexpired term of said lease—that is to say, from the 22d day of September, 1920, to the expiration of said agreement, to wit, December 26, 1924, amounting to the sum of $1,041; that defendant refused to pay plaintiff said sum, or any part or portion thereof, and that the defendant is indebted to the plaintiff in the said sum of $1,041, together with interest," etc.

Judgment was awarded accordingly, and the defendant appeals therefrom under the alternative method.

Under the plea by the defendant in his cross-complaint for a reformation of the provision of the instrument, stating the contingency upon the happening of which the lessee was to surrender possession of the premises in question prior to the expiration of the term during which the lease was to run, the court allowed parol evidence upon the question of the understanding of the parties as to what they intended the lease should actually say in that particular; and, in addressing proof to that inquiry, some evidence was developed which sustains the finding of the court that the provision referred to, as written in the lease, and as construed by the plaintiff, contained the real stipulation of the parties as to the occasion on which the plaintiff would be required to surrender his leasehold interest in the premises and vacate the same. The plaintiff testified that he and the defendant together went to a scrivener in the city of Merced, stated to him the terms of the lease as they appear in the lease which was signed by the parties, and that said scrivener prepared said instrument accordingly, and that both he and plaintiff, after reading the instrument, expressed themselves as being satisfied therewith as so prepared, and subscribed their names thereto. The plaintiff in effect declared that there never

was any question as to his obligation to surrender possession of and vacate the premises at any time the defendant should sell and convey the property during the term of the lease to any person other than to himself. There was testimony by other witnesses that defendant stated in their presence, after the lease was executed, that he was satisfied with the terms of the agreement as it was written. The defendant, however, positively testified that possession was to be surrendered by the lessee in case of a sale by the lessor during the term of the lease only upon demand for possession by the lessor or his grantee.

If the parol evidence received in this case were required to be reviewed as to its relation to the question whether it was or was not sufficient to support the finding upon the issue of the reformation of the agreement; if, in other words, there was so pronounced an ambiguity as to the meaning, as intended by the parties, of said instrument in the particular as to which the controversy here has arisen as absolutely to require parol evidence to explain what was thereby actually meant or intended to be expressed—then we would perhaps feel compelled to hold, under the rule as to evidentiary conflicts, that there was sufficient support for the court's conclusion involving a construction of said provision. But, in our opinion, it was and is not necessary to resort to extrinsic aid to get at or understand the true meaning or at least the legal effect of that part of the agreement. The provision as to the sale of the premises during the term of the lease speaks plainly for itself as to its effect.

The construction given by the trial court of that provision of the lease is, in effect, that, upon a sale and conveyance of the land, as provided in the lease, the right of the plaintiff to the further possession thereof ipso facto ceased, and that he was then bound to surrender such possession at once to the purchaser or grantee, and the lessor required to pay him the sum stipulated in the lease. This construction or the effect thereof would make the provision as to sale and surrender of possession a personal covenant as between the lessor and lessee, and solely for the benefit of the latter. But, be that as it may, the language and the very nature of the provision forbid the construction to which it is subjected by the trial court.

The part of the lease referred to, it will be noted, provides that, in the event of a sale and conveyance of the premises by the defendant as therein specified, the lessor "shall pay to the lessee, at the rate of $250 per year for the unexpired term of the lease, in consideration whereof the lessee shall give up and surrender to the lessor, or his assigns, the real property and appurtenances covered by this lease." It seems to us that, upon the slightest reflection, it must become manifest that what the parties intended to say, and, upon a fair construction of the English language, what really they do and did say, by the use of that language, was that, if the lessor, upon selling the property to a party other than plaintiff while the lease was still in force, failed and refused to pay the lessee the stipulated sum, the latter would not be required to surrender possession of the premises. Or, to put the proposition in a different form of language, it is reasonably certain, if not perfectly clear from the language of the provision, that the understanding between the parties thus intended to be expressed was that the lessee should be required to surrender possession of the premises, upon a sale thereof during the term of the lease to some person other than plaintiff, only upon payment to the plaintiff of the sum stipulated to be paid upon such surrender; and necessarily this would mean, and does mean, that the plaintiff was entitled to remain in possession until such payment was made. In other words, paraphrasing said language according to what clearly appears to be the natural tenor thereof, the provision would read:

"That if a sale of the property be made to a party other than lessee during the term of the lease, the lessee agrees to relinquish his right of possession under the lease and surrender possession of the premises provided the lessor pays to the lessee the sum," etc.

This is undoubtedly the meaning and effect of the language referred to. It vested the lessee with the unquestionable right to remain in possession after a sale as specified until he was reimbursed as stipulated. With that provision in the lease, no court would sustain an action by the defendant to oust plaintiff of possession for the purpose of giving possession to a purchaser of the premises during the term of the lease without first requiring defendant or the purchaser to pay plaintiff the sum stipulated so to be paid in the case of such sale. And this proposition was faithfully recognized by the defendant on selling and conveying the premises to his grantee, one Azevedo. Said deed is dated, and presumptively was delivered (Civ. Code, § 1055), the 15th day of September, 1920, little short of nine months after the date of the execution of the lease to plaintiff, and was filed for record in the office of the county recorder of Merced county on the 4th day of October, 1920. The indenture, in the habendum clause thereof, among other things, contains the condition, as the court found, that the sale and conveyance of the premises is "subject to a lease thereon to Manuel Armas, dated December 28, (26?), 1919, and expiring December 26, 1924." Of course, by this provision or condition in said deed, the grantee of defendant was bound by the terms of the lease. He could not secure possession of the premises until the plaintiff had been, either by the grantor or the grantee, satisfied according to the terms of the provision stipulating for the sale of the property pending

the existence of the lease to some person other than himself. In other words, the plaintiff, according to the deed of conveyance, was entitled to continue in possession of the premises under his lease until demand was made by the grantor or grantee of said premises for possession and the payment to him of the sum stipulated in the lease to be paid in the event he was required to surrender such possession during the term of the lease. In truth, the legal effect of said provision in the lease is this: That the plaintiff, by the lease, was granted by the defendant a defeasible estate for years in the demised premises, carved out of the fee which remained in the lessor or (using the common-law term in such a case) the grantor. The latter could not arbitrarily but only upon complying with the condition involved in the defeasance clause of the deed defeat or destroy the estate so vested in the plaintiff. The latter's estate or interest in the fee was, until the happening of the condition for its termination, as impregnable against attack as was the estate of the defendant or his grantee in the premises in remainder. Indeed, the defendant could not convey absolutely or unconditionally the interest in the land which he had previously taken out of the fee and conveyed to the plaintiff. And it is clear that he did not attempt to do so. As we have seen, in the transaction whereby he sold and conveyed the remainder to Azevedo, he was particular to preserve, by apt words in the deed of conveyance, the estate or leasehold right of the plaintiff. There was no demand made by either the defendant or his grantee that the plaintiff surrender possession and so terminate his lease. This the plaintiff admitted. He testified that he learned of the sale of the property four days prior to the day he abandoned possession of and vacated the premises; that he thereupon called on the defendant and asked him if a sale had been made, and that the latter replied that, while a sale had not then been completed, he expected to sell and convey the premises within a short time; that thereafter, and on the 26th day of September, 1920, wholly upon his own volition, or voluntarily, or without having been asked, requested, or required to do so by either the defendant or Azevedo, the purchaser, he vacated and so surrendered possession of the premises.

But, regardless of any other considerations, the case comes squarely within the principles of the case of Diepenbrock v. Luiz, 159 Cal. 716, 115 Pac. 743, L. R. A. 1915C, 234, Ann. Cas. 1912C, 1084, and particularly within the rule as it is declared in the concurring opinion of Mr. Justice Shaw (now Chief Justice) and concurred in by two other justices. See page 722. That case involved the leasing of agricultural lands, the agreement of lease containing a provision authorizing the sale by the lessor of the leased lands during the term of the lease, upon certain conditions as to the reimbursement of the lessee for improvements, etc. The agreement is in all particulars substantially the same as the lease involved herein. Considering the provision of said lease as to the sale of the lands and the reimbursement of the lessee, Judge Shaw thus construes its legal effect:

"The provision for the termination of the lease upon a sale of the premises was solely for the benefit of the lessor. Foley v. Constantino, 43 Misc. 91, 86 N. Y. Supp. 780. He could undoubtedly waive the benefit thereof and, without terminating the lease, he could sell and convey the premises subject to the lease. The grantee, if the lessor did not act in the matter prior to the conveyance, could also waive the right and continue the lease in force. In that case the lessee would have no right to declare the lease terminated and demand payment for his improvements. The part of the provision which was for his benefit was that which gave him the right to demand payment for his improvements as a condition concurrent with the exercise by the lessor or his grantee of the option to terminate the lease. If either attempted to exercise the option, the lessor could demand payment for his improvements and the lease would not terminate until such payment was made."

See, also, cases cited in the footnotes of said case as published in L. R. A. 1915C.

As suggested, if upon no other theory the judgment herein may or should be reversed, it must thus be disposed of upon the doctrine declared in the above excerpt.

The judgment is reversed.

We concur: FINCH, P. J.; BURNETT, J.

---

58 Cal. App. 679

## PEOPLE v. WISMER. (Cr. 623.)

(District Court of Appeal, Third District, California. Aug. 4, 1922. Hearing Denied by Supreme Court Oct. 2, 1922.)

**1. Jury ⟸97(4)—Juror who expressed opinion based on evidence in similar trial in which he was a juror held disqualified.**

Under Pen. Code, § 1076, a juror, who, on his voir dire in a prosecution for criminal syndicalism, stated that he had served in a similar trial previously, and formed the opinion that the I. W. W., in which defendant was accused of being a member, was an unlawful organization, was legally ineligible for actual bias as defined by section 1073, subd. 2, and his disqualification was not cured by his asseverations that he would be able to accord defendant a fair and impartial trial.

**2. Jury ⟸110(5)—Failure to peremptorily excuse juror held not a waiver of disqualification.**

That defendant did not peremptorily excuse a juror disqualified for actual bias, after denial of his challenge for cause, did not consti-

tute satisfaction with the juror or waiver of the disqualification, where he used his peremptory challenges on other jurors equally objectionable.

**3. Criminal law ⟸1186(4)—Act providing that technical error should be disregarded does not apply to disallowance of challenge of juror for actual bias.**

Const. art. 6, § 4½, providing that errors not resulting in a miscarriage of justice should be disregarded, does not apply where error was committed in the disallowance of a challenge of a juror for actual bias, and where the error was not legally cured or waived by the challenging party.

Appeal from Superior Court, Sacramento County; C. P. Vicini, Judge.

Walter Wismer was convicted of violating the Criminal Syndicalism Act, and he appeals. Reversed and remanded.

R. W. Henderson, of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The indictment, in two separate and distinct counts, charged the defendant with the violation of certain provisions of the act of the Legislature of 1919, known as the "Criminal Syndicalism Act" (Stats. 1919, p. 281). Both counts were framed upon the fourth subdivision of section 2 of said act. The first charged that the defendant, in November, 1921, at the city of Sacramento, did willfully, unlawfully, and feloniously organize and assist in organizing an organization known as the "Industrial Workers of the World," sometimes known and referred to as "I. W. W." and the "One Big Union," being a society, group or assemblage of persons organized and assembled to advocate, teach, and aid and abet criminal syndicalism, as said crime is defined in section 1 of said act of the Legislature. In the second count, the defendant is accused of being at the time and place above mentioned, a member of said organization, having become so willfully, unlawfully, feloniously, and *knowingly*. On the conclusion of the presentation of the people's case, the defendant, through his counsel, moved a dismissal of the first count on the ground that there was no evidence to support it, and the motion was granted. The case was finally submitted to the jury on the second count, and a verdict of guilty of the crime so charged was returned. The appeal is by the defendant from the judgment of conviction.

The legal validity of the verdict is challenged on four different grounds, to wit: (1) That error was committed in the denial of challenges to certain jurors on the ground of actual bias; (2) that "practically all the literature introduced by the prosecution" for the purpose of showing the character of the organization of which the defendant is accused of becoming and being a member, knowing it to advocate, teach, and aid and abet criminal syndicalism, was permitted to be received in evidence, in the absence of proof having first or at all been made that said literature was printed, published, and distributed by and under the authority of the Industrial Workers of the World; (3) "that the court erred in refusing to permit the defendant to read to the jury the whole of the pieces of literature, portions of which had been read on behalf of the prosecution;" (4) that the verdict is contrary to the evidence, "in that there was no testimony from which it could be deduced that the defendant ever had any knowledge of the unlawful purpose of the organization."

A careful examination of the record and a like consideration of the points urged for a reversal have led us to the conclusion that points 2, 3, and 4, in the order in which they are above enumerated, are devoid of merit. The cause must be reversed, though, because of rulings disallowing challenges to certain prospective jurors.

Among the veniremen called to the jury box were seven tentative jurors who stated, upon their voir dire examination, that they had sat as jurors in a case or in cases previously heard in the superior court of Sacramento, and in which the accused were tried on indictments charging them with the identical crime charged in the indictment against the defendant here and of which he stands convicted. These jurors each declared that, as to the particular case in which they had served as jurors, they had formed the opinion that the organization of which it is alleged in this indictment that the defendant herein is a member was an unlawful organization. This opinion, each of these jurors stated, was formed from and upon the evidence adduced in the case or cases in which he (or she) had sat as a juror. Each of said jurors was challenged on the ground of actual bias as the same is defined in section 1073, subdivision 2, of the Penal Code, viz.:

"For the existence of a state of mind on the part of the juror in reference to the case, * * * which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party."

In each of these instances, the challenge was disallowed after, upon an issue thereon being made by the denial of the challenge by the people, the district attorney had further examined the jurors, and thus elicited from them the statement that they could and would free their minds from anything that they had heard at the previous trial or trials in which they had served as jurors, and involving the same issue that is involved in

this case; that they could and would try the defendant fairly and impartially, according to the evidence and the law as stated to them by the court, notwithstanding the opinion they had formed upon evidence that they had heard at the previous trial or trials that the organization of which the defendant is accused of being a member was "an unlawful organization."

The record shows that all the seven jurors, with the exception of Juror Fiege, were peremptorily excused by the defendant. The record further shows that said Fiege was not excused, but was sworn to try the defendant, and that he did try him. It is further made to appear by the record that, upon completion of the panel, the defendant had exhausted his full legal quota of peremptory challenges. In fact, the record shows this: That, after the panel had been completed—that is, after 12 jurors were in the box after the allowance of challenges, peremptory and for cause—the following occurred:

"The court, addressing counsel for the defendant: You are satisfied with the jury, Mr. Henderson? Mr. Henderson: Our peremptories are exhausted, your honor. Are there any more, Mr. Clerk? I would want to be absolutely sure. Clerk: Yes; I will call these names."

The clerk thereupon read to court and counsel the names of 10 persons (of whom 6 were among the 7 who had served as jurors in a trial previously had upon an indictment charging the accused with the offense for which the defendant was on trial) who had been peremptorily excused by the defendant.

Thus it is plainly made to appear by the record that the defendant exhausted the number of peremptory challenges to which he is entitled under the law (Pen. Code. § 1070), with Juror Fiege, who had sat in a similar trial previously, and had stated that therein he had formed the opinion that the Industrial Workers of the World constituted "an unlawful organization," and who was unavailingly challenged by defendant for actual bias, among those sworn to try the defendant.

[1] It is clear that Fiege was not legally eligible to serve as a juror in this case, and that the defendant, having exhausted his peremptory challenges, was compelled to accept said Fiege as one of the jurors to try the question of his (defendant's) guilt or innocence. Nor was Fiege's disqualification such as that it could be cured by his asseverations that he could and would in the trial of the defendant remove from his mind any impressions or opinion he may have obtained from hearing a previous trial of precisely a similar nature and that he would be able to accord to the accused a perfectly fair and impartial trial. He doubtless honestly believed that he could so try the defendant, and it may be that he could. But the law does not so view such a situation and hence in effect declares that a defendant in a criminal case or a party litigant in a civil case is not required to take the chance that a person thus forming an opinion as to the merits of the case will give to him that fair and impartial trial which the law intends and contemplates that he shall have.

Section 1076 of the Penal Code, in part, provides:

"* * * In a challenge for actual bias, the cause stated in the second subdivision of section ten hundred and seventy-three must be alleged; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, or common notoriety; provided it appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him."

The above provision involves a departure from the common-law rule, as far as it goes, and, to render a person who has formed an opinion as to the merits of a case eligible to serve as a juror therein, it must be shown that such opinion has been formed upon information received from one or more of the three sources named in said section; so, where a juror has formed an opinion on the merits of the case which has originated or been generated from any other than any of the three sources named in said section, he is disqualified from sitting in the case as a juror, and he cannot, as he may in the cases specified in section 1076, qualify himself as a juror howsoever emphatic may be his declaration that he can and will disrobe his mind of such opinion and give to the defendant a fair trial and so return a verdict strictly in accord with the evidence and the law as it is stated by the court. People v. Wells, 100 Cal. 229, 34 Pac. 718; People v. Miller, 125 Cal. 44, 46, 57 Pac. 770, 771; People v. Helm, 152 Cal. 532, 536, 93 Pac. 99; People v. Riggins, 159 Cal. 113, 112 Pac. 862.

In the Wells Case, in which a juror stated that he had an opinion on the merits of the case, it is said:

"At common law a juror who entered the box with an opinion as to the guilt or innocence of the accused was ipso facto disqualified from acting in the case, but section 1076 of the Penal Code of this state * * * creates an innovation upon this principle, and declares an exception to the common-law rule. But in order that a juror disqualified at common law, by reason of having previously formed an opinion as to the guilt or innocence of the accused, may come within this provision of the statute it must appear affirmatively to the court from the evidence before it that such opinion is formed from public rumors, or statements of public journals, or common notoriety; and it must further appear to the court by the juror's declaration under oath that, notwithstanding such opinion, he can and will act fairly and im-

partially upon the matters to be submitted to him."

But the court added that—

Where the opinion of the juror was founded upon information or matters coming from a source other than any of those designated in section 1076 of the Penal Code, "that fact of itself is a disqualification under the law, and it is a disqualification even though the juror should declare to the court under oath that, notwithstanding such opinion he would and could act fairly and impartially upon the matters to be submitted to him. The juror," proceeds the court in that case, "would not only be disqualified at common law, but disqualified under the Penal Code, for he has not brought himself within the provisions of section 1076, as those provisions require an affirmative showing to the court that his opinion is based upon public rumor, common notoriety, or statements from public journals."

In People v. Miller, supra, the juror stated that he had an opinion upon the question of the defendant's guilt or innocence based upon statements made to him by persons with whom he had been acquainted for many years, and whom he believed told him the truth about the case, and that he believed them. He stated, however, that he could and would act fairly and impartially in trying the case and obey the instructions of the court. The challenge by defendant for actual bias was denied by the trial court, and on appeal, in considering the assignment based upon that ruling, the Supreme Court said:

"The juror went into the box with an opinion that the defendant was guilty. Such condition of the juror's mind was an absolute disqualification at common law. Under the Penal Code of this state, a single exception is * * * declared in section 1076. This juror was clearly disqualified, unless he came within the provisions of the aforesaid section,"

—and it was held, as obviously no other conclusion could be declared under the facts, that the juror did not come within the exception provided in section 1076, and that he was therefore disqualified beyond any power to qualify him under the law.

In People v. Helm, supra, the court, in discussing the subject in hand, said:

"If it is not made to appear that the juror's opinion is based entirely upon one or all of the three sources of information above named [in section 1076]; if it is shown that his belief has its origin in any other source than one of the three enumerated, he is at once as thoroughly disqualified under our Code as he would have been at common law."

Besides the above cases, see People v. Riggins, 159 Cal. 113, 112 Pac. 862, and the cases therein cited to the point under discussion at page 119 of 159 Cal., 112 Pac. 862.

In all the above cases the opinion of the juror was based upon information derived from the statements of parties not under oath, or made under circumstances in which no duty rested upon the jurors to test and determine their verity. In this case, the jurors referred to, having acted as jurors in a previous trial in which the identical offense charged here constituted the groundwork of the prosecution, founded their opinions as to the character of the organization of which the indictment charges the defendant with being a member upon sworn testimony, the truth or falsity of which they were required to determine. And the opinion of the said jurors so formed was upon one of the essential elements of the crime charged against the accused. Juror Fiege, who was forced upon the defendant as one of the arbiters of his fate by the ruling denying the defendant's objection to him as a juror in the case on the ground of actual bias, stated that, at a previous trial of a similar offense, he formed the opinion that the organization known as the Industrial Workers of the World was an unlawful organization or assemblage or society of persons. In other words, the rational deduction from the statement of said juror was that he had previously formed the opinion upon sworn testimony that the organization of which the accused was charged with *knowingly* becoming and being a member, was an organization which advocated, taught, and aided and abetted the commission of the crime of criminal syndicalism, as defined by the statute of 1919, supra. And, since the two principal witnesses called by the people to prove the claimed criminal character of said organization, both former members thereof, testified that they had given similar testimony in previous trials of the same charge against others, in the superior court of Sacramento county, it may be that the opinion formed and entertained by Fiege and the other six jurors who stated that they had sat in previous trials of precisely the same issue, was upon the testimony of those very witnesses.

Clearly, a trial by jurors whose minds, when entering the jury box, were in the condition in reference to that element of the case that the minds of Fiege and the other six were in cannot be said to be characterized by that absolute fairness to which the law intends and declares that all persons, whatever may be their position in life, according to the social scale or standard, are entitled. There was one other element only to be established to make out a case against the accused, and that was the fact that he was a member of said organization at the time mentioned in the indictment, and this element was removed from the case as an issue by the admission of the defendant, extrajudicially and also before the jury, that he was at the times referred to in the indictment a member of said organization. And thus this case itself furnishes a forcible

illustration of the singular wisdom and justness of the law in hedging the great and fundamental right of trial by jury with such restrictive safeguards as will insure to every person prosecuted for a public crime a trial by a jury composed of persons whose minds are not, from the beginning, infected with the slightest predilection for a particular result in the case and who, therefore, can give to him as well as to the people the benefit of their unbiased and unprejudiced judgment on the matters submitted to them.

[2] The Attorney General states in his brief that it does not appear from the record but that the defendant was satisfied with the jury as it was constituted. We do not know of any other more effectual way in which a party to an action could express his dissatisfaction with a jury or a particular juror than by challenging such jury or juror for cause or peremptorily. Indeed, this is the only way pointed out by the Code by which such dissatisfaction may be made known to the court. And the record here plainly shows, as we have pointed out, that the defendant did thus express his dissatisfaction with Juror Fiege, but that he was required to accept said juror as one of his triers because his right to peremptorily excuse tentative jurors had been exhausted. It is no reply to say that the defendant could have used one of his peremptories upon Fiege instead of upon one of the veniremen that had not formed an opinion upon one of the essential ingredients of the offense charged upon sworn testimony in a previous trial of a like offense. The record discloses that there were certain of the prospective jurors who had formed opinions upon the merits of the case from information coming from a different source from that of sworn testimony, and against some of these sitting in judgment upon him the defendant objected at the expense of the loss of some of his peremptory challenges. And it is to be assumed that he preferred to take a chance for a fair trial by Fiege than to take such a chance with some of the jurors peremptorily excused by him who had not heard testimony as to the character of the organization in question at a previous trial; and this he had the right to do without being required to sacrifice or surrender his right to complain of the act of the court resulting in the forcing upon him of an objectionable juror. The fact that he did not peremptorily excuse Fiege, when he might have done so at the expense of having some other juror on the panel equally as objectionable to him, although not because of having served on a jury at a previous trial for a similar offense, is not to be construed as the expression by him of satisfaction with Fiege or the jury as impaneled or as a waiver by him of Fiege's disqualification. The difficulty with the whole situation was that the defendant was compelled through erroneous rulings on his challenges for cause, to use six of his peremptory challenges, with the result that, having finally exhausted all such challenges allowed him by law, a disqualified juror was forced upon him.

[3] Section 4½ of article 6 of the Constitution has no application to the situation presented here. The right of trial by jury is fundamental—a right which came to us from the common law and as such guaranteed by the Constitution—and inseparably connected therewith (indeed, it is of the very essence thereof) is the right to a trial by a jury consisting of unbiased and unprejudiced persons. Hence, where, as here, it unquestionably appears that error has been committed in the disallowance of a challenge of a juror for actual bias, and the record discloses nothing indicating that the error was legally cured or in effect waived by the challenging party, the case cannot be saved from the fate of a reversal by an appeal to the terms of said section of the Constitution. This provision was not inserted in the organic law with the purpose of impairing the fundamental rights of the citizen or in any measure hampering the exercise or enjoyment thereof. Indeed, those rights cannot be destroyed or impaired so long as our present system of government exists.

It may be that the result of this decision will subject the people to great inconvenience in the prosecution of cases coming under the Criminal Syndicalism Law, especially as to cases founded on subdivision 4 of the second section of said act, in that, where there are many such cases in a county, the entire body of the people as citizens possessing the general qualifications for jury service might ultimately become disqualified from sitting as jurors in such a case by reason of having served as jurors in cases of like nature previously tried. If such shall be the result of this decision, it is to be greatly deprecated. But such a plea, which is nothing more than argumentum ab inconvenienti, can never be allowed except in those cases only where the law which is being construed is, by reason of the ambiguity of its language, of doubtful meaning, in which case it is permissible, if necessary, to give it a construction which, while not involving a departure from its general purpose, will with greater certainty make its application conform to public convenience or result in bringing about a more effectual achievement of the real ends of its enactment. In the present case, however, we are confronted with no such condition. The law relating to the right of trial by jury is not in such dubious language or doubtful or equivocal phrases as that its real meaning is enveloped in obscurity. The Code sections are merely regulatory of the exercise of the right of trial by jury as that right is guaranteed by the Constitution, and involve

only a reaffirmation or restatement of the common-law rules with respect to that subject. Those rules are framed in simple and readily understandable language. Moreover, in thousands of decisions of the courts of last resort they have as often been declared to mean precisely what their simple language plainly implies. Therefore the inconvenience which may follow from their application according to their obvious tenor and intent cannot support an argument addressed to a construction which would impart to them a meaning different from that attributed to them here. We may, in this connection, add that section 1076 of the Penal Code, although in a measure in derogation of the common-law rule, was not intended to deny to litigants a trial by jury composed of persons without bias or prejudice as to the merits of the case or the parties to the issue to be tried.

The conclusion is that the defendant was, as a matter of law, denied the fair and impartial trial to which he is entitled, and the judgment is therefore reversed, and the cause remanded.

We concur: FINCH, P. J.; BURNETT, J.

---

58 Cal. App. 738

## BRITTENBAKER v. BUCK et al.
(Civ. 4294.)

(District Court of Appeal, First District, Division 2, California. Aug. 9, 1922.)

**Religious societies ⇐18—Grant to church trustees held gift to church, vesting legal title in trustees, as depositary of title.**

A grant without consideration "unto B., M., and P. as trustees for the F. Church," a voluntary unincorporated society, where the instrument contains no specific language indicating a trust, vests legal title in the trustees as the only depositary of title, and is a gift to the church, and not a trust.

Appeal from Superior Court, Monterey County; Pat R. Parker, Judge.

Action by Franc C. Brittenbaker, as administratrix of the estate of Anna Salyer, deceased, against F. L. Buck and others, as trustees for the First Methodist Episcopal Church of Pacific Grove, Cal. From a judgment against plaintiff, she appeals. Affirmed.

E. G. Ryker, of Oakland, S. W. Mack, of Monterey, and C. L. Lacey, of Salinas, for appellant.

Wyckoff & Gardner, of Watsonville, for respondents.

LANGDON, P. J. This appeal is by the plaintiff from a judgment against her as administratrix of the estate of Anna Salyer, deceased, and in favor of the defendants, as trustees for the First Methodist Episcopal Church of Pacific Grove, California.

The complaint alleges that on January 30, 1918, plaintiff's intestate was the owner of certain real property in the city of Pacific Grove, Monterey county, Cal., which property is specifically described in the complaint; that on said date said Anna Salyer executed a deed of said property to the defendants. Said Anna Salyer died on the 18th day of November, 1919; plaintiff was duly appointed administratrix of her estate. Subsequently this action was brought by plaintiff, and was framed in three counts. The first court was based upon the alleged mental incompetency of plaintiff's intestate at the time of the execution of the deed in question. The second count was based upon the ground of alleged undue influence, and plaintiff prayed that the deed be declared null and void. The third count is in the form of a suit to quiet title, and proceeds upon the theory that because of the form of the deed no title was conveyed to the grantees.

Upon appeal none of the evidence introduced in the trial court in support of the first two counts is before us, and appellant states that she has abandoned her position in relation thereto. This leaves for our consideration only the question of the sufficiency of the deed in question to convey title to the defendants.

It was stipulated that the deed was executed without consideration. It reads as follows:

"This indenture, made the 30th day of January, A. D. 1918, by and between Anna Salyer, of the city of Pacific Grove, county of Monterey, state of California, grantor, and F. L. Buck, C. L. Moyes, J. K. Paul, J. T. Elliott, J. H. Williams, James Harper, H. G. Jorgensen, J. O. Leek, and E. B. De Forrest, as trustees for the First Methodist Episcopal Church of Pacific Grove, Cal., an association, grantees, witnesseth: That the said Anna Salyer does hereby give, grant and convey unto F. L. Buck, C. J. Moyes, J. K. Paul, J. T. Elliott, J. J. Williams, James Harper, H. G. Jorgensen, J. O. Leek and E. B. De Forrest, as trustees for the First Methodist Episcopal Church of Pacific Grove, California, an association, and their successors in office duly appointed according to the discipline of the Methodist Episcopal Church, forever, subject to the exceptions and reservations hereinafter mentioned, all that lot, piece or parcel of land situate, lying and being in the city of Pacific Grove, county of Monterey, state of California, and particularly described as follows, to wit: [Here follows a description of the land and certain reservations in favor of the grantor personally, which are not material to our present inquiry.]"

Appellant's contention is that by this deed the grantor attempted to create a voluntary trust in favor of the First Methodist Church,

but that said trust fails because the instrument does not indicate with reasonable certainty the purpose of the trust (section 2221, Civ. Code), and that the title to the property remains in the heirs of the grantor.

Reliance is placed upon the case of Union Trust & Savings Bank of Pasadena, Executor, etc., v. Ishkanian, 45 Cal. App. 347, 187 Pac. 757. In that case the property in question was granted to "H. P. Faris, as treasurer of the Prohibition National Committee, or his successor," and it was held that the deed clearly indicated an intention on the part of the grantor to create a trust in favor of the Prohibition National Committee. It was held on appeal that parol evidence was properly received to explain the intentions of the parties as to whether the conveyance was a deed absolute or in trust. It did not appear that the treasurer of the Prohibition National Committee was the person chosen by said committee to hold the legal title to its property.

In the present case we must conclude, in support of the judgment, that the trial court concluded that it was not the intention of the grantor in the deed to create a trust thereby. We have not before us all the evidence offered on that subject in the trial court. However, the deed itself was offered in evidence, and is in the record presented to us, as is also the testimony of H. G. Jorgensen, one of the defendants herein, that the First Methodist Episcopal Church of Pacific Grove is an unincorporated religious association; that said Jorgensen and the other defendants herein constitute the board of trustees of that association, and did constitute such board at the time the deed in question was executed. He identified a book containing the constitution and laws of the Methodist Episcopal Church, which volume was offered in evidence and contains provisions relative to the election of trustees to hold the church property, their qualifications, etc. It is further provided that—

"The board or boards of trustees in any charge shall hold all church property, using so much of the proceeds as may be needful to pay debts or to make repairs and shall be amenable to the quarterly conference. They shall invest all trust funds coming under their control in conformity with the laws of the state and shall deposit trust funds in savings banks or invest them only in securities which are lawful for savings banks."

There are additional provisions regarding the management and control of church property, title to which is vested in the trustees.

In the light of these facts, and apart from any other evidence upon the subject which may have been before the trial court, we think that court was warranted in concluding that there was no intention on the part of the grantor to create an express trust. It seems clear that she intended to give the property to the Methodist Episcopal Church. That institution was unincorporated, and had not the legal capacity to take title to the property. It was necessary, therefore, that legal title be given to its board of trustees. If the property in question had been purchased by the church for a valuable consideration, free from all limitations or trusts, the deed, necessarily, would have been made in the same manner. A valid grant may be made to trustees for an unincorporated society, and such title will pass in perpetuity. Ruddick v. Albertson, 154 Cal. 640, 644, 98 Pac. 1045. The designation of the grantees in the deed as "trustees" was for the purpose of identifying the body of individuals that was to take title to the property, and not for the purpose of creating a trust. That question was discussed in the case of Clark v. Brown (Tex. Civ. App.) 108 S. W. 421, 431, 433, where it was said:

"In the case before us the property was sold and conveyed to certain named trustees for the use and benefit of the Cumberland Presbyterian Church at Jefferson. The designation of the beneficiaries by the terms employed was for the purpose of identifying the body of individuals or organization that was to take, and not as indicating a purpose of the grantors to dedicate it to any particular form of religious worship. The congregation for whose benefit the conveyances were made took the property unincumbered by any conditions or trusts, so far as the grantors were concerned. The only conditions imposed grew out of the relations of the beneficiaries among themselves and such as were implied in their compact of association. * * * Members of voluntary unincorporated associations can hold property in no other way than through the medium of trustees, acting as depositaries of the legal title, and this equitable interest entitles each beneficiary to the same voice in the management and control of the property as if he were a joint owner and holder of the legal title."

In view of our conclusion that the conveyance in question does not create an express or voluntary trust, it becomes unnecessary for us to discuss the question raised in the briefs relative to the degree of certainty necessary in prescribing the terms of express trusts for charitable and other purposes.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

58 Cal. App. 637

## PEOPLE v. SHARP. (Cr. 896.)

(District Court of Appeal, Second District, Division 1, California. July 28, 1922.)

**1. Indictment and information ⟸129(2)—Separate crimes connected together may be charged in one indictment and information.**

Under Pen. Code, § 954, providing for the charging of different offenses in one indictment or information, the crimes of burglary and robbery may be charged in separate counts in one information where both offenses arise out of the same transaction.

**2. Burglary ⟸41(1)—Evidence held to warrant conviction.**

In a prosecution for burglary, evidence that defendant obtained entrance to a house upon the pretense of using the telephone to call assistance because his automobile was disabled, and upon entering was followed by a masked and armed accomplice, and that both men then locked the landlady in the bathroom and searched the house for valuables, was sufficient to warrant conviction.

**3. Robbery ⟸24(1)—Evidence held sufficient to warrant conviction.**

In a prosecution for robbery, evidence that defendant obtained entrance to a house upon pretense of using the telephone to call assistance because his automobile was disabled, and upon entering was followed by a masked and armed accomplice, and that both men, by force and fear, took rings from the person of the landlady, was sufficient to warrant conviction.

**4. Criminal law ⟸1172(11)—Failure of judge to indorse all instructions held not prejudicial error.**

The failure of the trial judge to indorse every instruction, as required by Pen. Code, § 1127, was not prejudicial error where the only instructions not indorsed were those given, and those modified and refused were indorsed with the judge's decision thereon, and where the instructions were not taken to the jury room, under provision of section 1137, and where defendant was present and knew what instructions were given, refused, and modified.

**5. Criminal law ⟸775(6)—Instruction that evidence as to alibi should be closely scrutinized held not erroneous.**

An instruction that the defense of alibi was capable of being, and that it had been occasionally successfully fabricated, and that, when false, its detection might be a matter of great difficulty, and that the testimony offered in support of the defense should be closely scrutinized, was not erroneous.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Walter Sharp was convicted of burglary and robbery, and from the conviction and an order denying a new trial, he appeals. Affirmed.

Paul Nourse, Fred H. Thompson, and Hale Day, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was charged by the information filed by the district attorney, and in separate counts thereof, with the crimes of burglary and robbery, both alleged to have been committed on the same day. The jury returned separate verdicts finding the defendant guilty of both charges. The court in its judgment declared the conviction to have been of both crimes, and ordered that the defendant be imprisoned "for the term prescribed by law." There was a motion for a new trial, which was denied. The appeal was then taken from the judgment and from the order made denying the motion.

[1-3] Appellant makes several contentions as grounds for reversal of the judgment and order. He contends, first, that under the facts defendant should not have been convicted of two crimes. Section 954, Penal Code, permits prosecuting officers to include in the indictment or information separate and different charges "connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes or offenses, under separate counts." By the authority of the provisions of that section the separate offenses described in the information were properly pleaded, and under the facts as the evidence for the prosecution showed them to be the conviction of both offenses must be sustained.

It was established by the testimony offered for the prosecution that on the evening of the 19th of December, 1921, the defendant, at about 8 or 8:30 p. m., appeared at the door at the home of Mrs. Alice Smith in Glendale, Los Angeles county, and asked permission to use Mrs. Smith's telephone, saying that his automobile had become disabled, and he wished to summon assistance. Reluctantly Mrs. Smith allowed him to enter the house. Defendant, upon entering was followed immediately by an accomplice, who wore a mask and carried a gun. With the gun menacing her, Mrs. Smith was compelled to allow one of the men to remove a diamond ring valued at about $1,500 and four other rings from her fingers. She was then compelled to enter a bathroom, and the door was locked behind her. The two men proceeded to make a search of the house for valuables, obtaining some money and other things, after which they departed. The circumstances attending the entry of the defendant to the house of Mrs. Smith were sufficient to show the intent to commit larceny, as was charged in the information. The crime of burglary was completely made out upon such an entrance being shown to have been effected, re-

gardless of whether any property had been secured. In addition to such acts the defendant, by means of force and fear, took from the person of the complainant her rings. This was an act of robbery, and there would appear no reason why it might not be charged separate from the burglary, and a separate conviction had thereon. If it be conceded, for the sake of argument only, that the acts described were so connected together as to amount to but one offense, it may not be said that the judgment was prejudicially erroneous. If the conviction should have been for one offense alone, that conviction might properly have been for the crime of robbery. Under the law a person convicted of robbery may be sentenced to imprisonment for life. The form of judgment as now authorized to be pronounced under the "indeterminate sentence law" (it was sufficiently expressed by the judgment herein) is in legal contemplation a judgment for the maximum period authorized by the statute; hence here, had the conviction been for the crime of robbery alone, the sentence imposed would not have been for a less time than that which was fixed.

[4] Defendant makes claim to two errors as affecting the instructions given by the court to the jury. He asserts, first, that the trial judge failed to obey the law (section 1127, Pen. Code) and indorse upon each charge presented a statement as to whether it had been given, refused, or modified, and, if modified, what the modification consisted of. The clerk certified that the record contained among other things, "instructions refused and given." The first seven or eight pages of these instructions cover various general propositions as to reasonable doubt and definitions of the crimes charged in the information, together with the general advice ordinarily given as to the duty of jurors, rules for determining credibility of witnesses, etc. These instructions bear no indorsement over the judge's signature, except that one was marked as having been given as modified. Immediately following are a number of instructions, apparently offered by the defendant, all of which are indorsed: "Refused, except as given in instructions of court. Charles Monroe, Judge." It is fairly apparent that all of the instructions not specially indorsed, as has been stated, were given by the court. Appellant's counsel makes no contention to the contrary, but insists that the bare failure of the trial judge to particularly indorse each instruction was error prejudicial to the appellant. It is not shown that the instructions were carried to the jury room, or that the jury was in any way mislead by the absence of specific indorsements upon the documents. The law does not provide that instructions in a criminal case must be transmitted to the jury while it deliberates upon a verdict. Section 1137, Penal Code, provides that the jury "may" take "the written instructions given." If such had been the fact, it would be incumbent upon appellant to show that the jury received the written instructions and used them in its deliberations before any claim could be made of misleading or confusing effect arising from the failure of the judge to properly indorse the same. Appellant concededly was advised as to what the instructions were, as given and refused; he was present with his counsel at the time the charge was delivered, and, observing any omission on the part of the trial judge to indorse the proper statements upon the instructions, could have made application to have that done at the time, or thereafter, when the record was prepared. The existence of the indorsements or the lack thereof could have in no way influenced the verdict of the jury, and appellant is not here claiming that he was not advised or is unable to ascertain which of the instructions set forth in the record were actually given. The Attorney General concedes that all of the unindorsed instructions were in fact given.

[5] Appellant offered evidence by his own testimony and that of his sister, brother-in-law and a drug clerk tending to show that he could not have been at the house of Mrs. Smith at "about" the time claimed. This testimony so given did not exclude the possibility of defendant having had the opportunity to be present at the place charged, and at the time shown, but we may assume that it would have justified the jury in so finding, and thus give full effect to the argument of counsel in referring to an instruction on the question of alibi as given by the court. The particular part of the instruction objected to is that which advised the jury that such a defense was capable of being and that it had been "occasionally successfully fabricated," and that, when false, its detection might be a matter of great difficulty, advising the jury further that testimony offered for the purpose of establishing that defense should be closely scrutinized. The case of People v. Smith (Cal. Sup.) 207 Pac. 518, is cited as holding that such an instruction is erroneous. Our Supreme Court, in People v. Lee Gam, 69 Cal. 552, 11 Pac. 183, held an instruction in substance like that referred to to be without error. Later, in the case of People v. Levine, 85 Cal. 39, 22 Pac 969, 24 Pac. 631, and People v. Lattimore, 86 Cal. 403, 24 Pac. 1091, the court disapproved of the instruction, but in none of those cases held the error to be sufficient to require a reversal of the judgment—this because, upon a consideration of the entire charge of the court, it appeared that the jury could not have been misled. In People v. Smith, supra, the case of People v. Roberts, 122 Cal. 377, 55 Pac.

137, is referred to as holding a similar instruction to be reversible error. An examination of the latter decision will show that the case was reversed not because the instruction advised the jury to especially scrutinize evidence offered to sustain the defense of an alibi, but rather because the instruction there in effect required the jury to find that there was a "preponderance" of evidence in favor of the defense of alibi before such defense could be considered in the case; the law, of course, being that a reasonable doubt only is required to be raised in order to entitle the defendant to an acquittal. In this case it may be said, as was stated by the court in People v. Lattimore, supra:

"The charge of the court, taken as a whole, was so full and fair to the defendant that we cannot see that any injury resulted to the defendant from this unnecessary instruction in regard to the scrutinizing of the evidence given in support of the defense of alibi."

Appellant complains further of alleged prejudicial conduct on the part of the trial judge in asking leading questions of the defendant, which, it is argued, indicated to the jury a state of mind on the part of the judge adverse to the defendant. The record shows that the judge occasionally during the examination of defendant asked questions, but it was his right so to do, and, considering all of those interrogatories, it cannot be said that they indicated an unfair attitude of mind, or that the asking of them would have the effect of influencing the jury unduly. This is not a case where the jury was called upon to balance with exceedingly close judgment the evidence offered on the part of the prosecution and defense. The case against the defendant was made out upon abundant evidence. He was clearly identified by the complainant and was arrested soon after the commission of the crimes while endeavoring to sell the diamond ring which had been taken from Mrs. Smith's finger at the time of the robbery. It was shown by his own admission that he had, at a prior time, been convicted of the crime of burglary in the state of Texas, that he had been convicted of the crime of burglary in the state of California, and that he was on parole from the state prison when the crimes herein charged were committed. An alleged error referring to the exhibition of a photograph in court calls for no particular discussion. Whether the jury saw the picture does not appear; if it did not, then no error resulted.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

58 Cal. App. 704

## PEOPLE v. HAHN. (Cr. 630.)

(District Court of Appeal, Third District, California. Aug. 5, 1922. Rehearing Denied Sept. 2, 1922.)

**1. Robbery ⟸24(3)—Evidence of identity held sufficient to support conviction.**

On a trial for robbery, evidence of identity *held* sufficient to support a verdict of guilty.

**2. Criminal law ⟸785(16)—Instruction as to distrusting witness testifying falsely held sufficient.**

An instruction that a witness willfully false in one part of his testimony is to be distrusted in others, and that, if the jury finds that a witness has deliberately and willfully testified falsely as to any material matter, and are convinced that he has stated what was untrue, not as a result of mistake or inadvertence, but willfully and with design to deceive, they may treat all of his testimony with distrust, is a sufficient instruction on the subject, and gives defendant no cause for complaint.

**3. Criminal law ⟸782(10), 1172(2)—Instruction as to considering evidence in conformity with legal rules, and as to effect of number of witnesses, of no assistance, but not harmful.**

Instruction in language of Code Civ. Proc. § 2061, that the jury's power of judging the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence, and that they are not bound to decide in conformity with declarations of any number of witnesses not producing conviction against a less number, or against a presumption or other evidence satisfying their minds, is not harmful, though of no great assistance.

**4. Criminal law ⟸46, 1172(6)—Instruction as to mental capacity held correct, and not prejudicial, though unnecessary.**

An instruction that in every crime there must exist a union or joint operation of act and intent or criminal negligence, that the intent is manifested by the circumstances and the sound mind and discretion of the person accused, and that all persons are sound mind who are neither idiots, lunatics, nor affected with insanity, embodies a correct legal principle, and is not prejudicial though there is no claim or evidence to the contrary.

**5. Criminal law ⟸829(9, 18)—Refusal of charges as to burden of proof and reasonable doubt covered by those given not error.**

The refusal of instructions as to burden of proof and reasonable doubt which were amply and clearly covered by charges given was not error.

**6. Criminal law ⟸811(4)—Refusal to single out defendant's failure to flee and charge thereon not error.**

While defendant's conduct in making no effort to flee after offense was committed was proper subject for argument, the court properly refused to single it out and charge thereon,

and, instead, properly charged that it was the jury's duty to carefully and candidly consider the entire evidence and to consider it in the light most favorable to defendant if reasonable and proper, and that if, after considering all the evidence, they had a reasonable doubt of defendant's commission of the offense charged, they should acquit.

**7. Criminal law ⟸806(1)—Court not required to repeat instructions already given.**

Where a requested instruction had already been given upon request of the people, the court was not required to repeat it.

**8. Criminal law ⟸782(4)—Instruction as to proof of identity properly refused because uncertain, and because requiring determination of issue from testimony of one witness.**

Instruction that one of the material facts was the identification of defendant by the complaining witness, and that in determining such fact the jury must construe the testimony in the most favorable light toward the defendant, and, unless satisfied to a moral certainty and beyond all reasonable doubt that he had been fully identified by the complaining witness, it was the jury's duty to acquit, was properly refused as "fully identified," was uncertain and meaningless, and the instruction should have required that the identity be established from the whole case rather than the testimony of one witness, especially where the general instructions fully covered the subject.

**9. Criminal law ⟸776(5)—Instruction as to evidence of good character held sufficient.**

Instruction that defendant had given proof of his previous good character for honesty and integrity, that good character when proven was a fact in the case, and a circumstance tending in greater or less degree to establish innocence, and was not to be put aside to ascertain if the other facts and circumstances by themselves established guilt beyond a reasonable doubt, and that, if defendant proved good character, this might be sufficient to create or generate a reasonable doubt, though such doubt would not otherwise have existed, was a sufficient charge on the subject.

**10. Criminal law ⟸719(1), 1171(1)—Without evidence of character of resort, disparagement of reputation proved by its habitués held improper, but not prejudicial.**

A remark in argument that reputation as to honesty and integrity established by habitués of "the Mecca" was one not appealing to the jury or any respectable people was improper where there was no evidence of the character of the resort mentioned, but not ground for reversal where the evidence of guilt was strong and convincing.

**11. Criminal law ⟸728(5)—Objection to argument waived when court not requested to instruct jury to disregard it.**

Defendant waived his objection to an improper remark in the argument by not requesting the court to instruct the jury to disregard it.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Charles Hahn, whose true name is Charles Scheckmaster, was convicted of robbery, and he appeals from the judgment and order denying a new trial. Affirmed.

J. S. Daly, of Sacramento, for appellant.
U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was convicted of robbery, and he appeals from the judgment and order denying his motion for a new trial.

[1] One point is that the evidence was insufficient, particularly as to the identification of the defendant by the prosecuting witness to support the verdict. How utterly insubstantial is this claim may be seen from the following testimony. John Gibson, the prosecuting witness, testified:

"I was going home; I was going up Fourth street to go to bed, and I met that big fellow there, and two young fellows, and that fellow. Q. When you say that big fellow, you are referring to the defendant, Scheckmaster? A. Scheckmaster, yes; and I saw all three of them standing near the corner, and I passed by, and, as soon as I passed their corner, two of them jumped in front of me, and this big fellow threw his arm around me. Q. Where did he put his arm around you? A. Like this (indicating); and these other fellows went through my pockets. Q. What, if anything, did they take off of you at that time? A. $50.50 * * * Q. Now, Mr. Gibson, are you sure that the defendant Scheckmaster was the man that held you at the time and in the manner you have described? A. Yes, sir."

He further testified that he saw the defendant and one Hilger, who had been convicted of the same charge by a jury, together that afternoon.

Police Officer J. F. Pierini testified:

That he was on the scene shortly after the holdup; that "I saw two fellows running towards Fourth street, and this fellow Hilger ran towards me. Q. How far away from you were they at that time? A. Well, I couldn't observe the distance, because they were running. I had hold of Hilger taking him over to Jack Gibson who was sitting in the doorway. * * * There was one big man and the others were not very big; about the size of Hilger. Q. But one of them was a large fellow? A. Yes, sir. Q. And, in reference to this defendant, comparatively, was he about the same build? A. About the same. Q. Of course, as I understand you, you did not see his face, and you do not attempt to say that he is actually the defendant? A. No; I arrested the defendant on Jack Gibson's description. * * * I searched Hilger, and took Gibson up and asked him who the fellows were, and he gave me a description of the man that strong-armed him; gave me the description of a man wearing corduroy pants, a blue shirt, and a sweater underneath, and having a dark coat, slouch hat, and a Jewish looking fellow, Roman nose, wearing glasses."

It is indeed rather remarkable that such detailed description of the defendant could be given by the victim, but it would have been even more remarkable if, in view of the foregoing testimony, the jury had failed to convict the defendant.

The other objections relate principally to the action of the court in the matter of instructions, and we find therein no substantial merit.

[2] The requested instruction as to the discredit of a witness who has testified falsely, in a material part of his testimony was covered as follows:

"A witness willfully false in one part of his or her testimony is to be distrusted in others; that is to say, if you find that a witness has deliberately and willfully testified falsely as to any material matter, and the jury are convinced that such witness has stated what was untrue, not as the result of mistake or inadvertence, but willfully and with design to deceive, you may treat all of his or her testimony with distrust."

Of course, it is entirely useless to give such instruction, as the average man does not need to be told that he should distrust a deliberate liar, but, at any rate, appellant has no cause for complaint in that respect.

[3] Appellant thinks the court committed error in giving this instruction:

"Your power of judging of the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence. You are not bound to decide in conformity with declarations of any number of witnesses, which do not produce conviction in your minds, against a less number or against a presumption or other evidence satisfying your minds."

The Legislature has prescribed that this instruction shall be given (section 2061, Code Civ. Proc.), and, while it may be of no assistance to the jury, involving, as it does, a mere legal platitude, it assuredly can do no harm. It is given in nearly every case, and this is the first time that we have known such action to be criticized.

[4] It may be that there was no necessity for giving this instruction:

"In every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence. The intent or intention with which an act is committed is manifested by the circumstances connected with the offense, and the sound mind and discretion of the person accused. All persons are of sound mind who are neither idiots, lunatics, nor affected with insanity."

It embodies, at any rate, a correct legal principle, and if, as argued by appellant, there was no claim or evidence to the contrary, it is manifest that the instruction could have resulted in no prejudice.

[5] The instructions as to the burden of proof and of reasonable doubt, proposed by defendant, were amply and clearly covered by the charge of the court.

[6] There was no error in the refusal of the proposed instruction in reference to the conduct of the defendant in making no effort to flee after the offense was committed. It was a subject for legitimate argument by counsel before the jury, but the court was not called upon to single out a particular circumstance in evidence, but pursued the proper course in directing the jury that—

"In arriving at your verdict, it is your duty to carefully and candidly consider the entire evidence in the case," and "it is the duty of the jury to consider the evidence in the light most favorable to the defendant if it is reasonable and probable, and if the jury, after considering all the evidence, have a reasonable doubt as to whether the defendant committed the offense charged in the information it is their duty to acquit."

[7] The instruction proposed by defendant, beginning, "The defendant in this case is entitled to the independent judgment of every juror who has been selected to try him," was given on request of the people and, manifestly, the court could not be expected to repeat it.

Appellant has no ground for complaint because his proposed instruction as to the testimony of the defendant was refused, since it was covered by this direction:

"The jury has no right to disregard the testimony of the defendant on the ground that he is the defendant and stands charged with the commission of a crime. The law presumes the defendant to be innocent until he has been proven guilty; the jury should fairly and impartially consider his testimony together with all the other evidence in the case."

[8] The refusal to give this proposed instruction:

"You are instructed that one of the material facts in this case is the identification of the defendant in the robbery by the complaining witness, John Gibson, and you are further instructed that, in determining the testimony upon that fact, you must construe it in the most favorable light toward the defendant, and, unless you are satisfied to a moral certainty and beyond all reasonable doubt that the defendant has been fully identified by the complaining witness, John Gibson, then it is your duty to find the defendant not guilty"

—was entirely justified for the reasons stated by the trial judge, as follows:

"First. There is a general instruction given to consider testimony most favorably to defendant. Second. The jury are instructed elsewhere that before defendant can be convicted it must be shown that he committed the crime. Third. The term 'fully identified' as used is uncertain and meaningless. Fourth. The general instructions amply cover the ground. Fifth. The proper instruction would be that if from the whole case rather than from the tes-

timony of one witness the identity has not been established."

[9] Appellant's complaint of the refusal to give the proper instruction as to evidence of good character is completely answered by quoting the following, which was given:

"The defendant has given proof of his previous good characer for honesty and integrity. The good character of the defendant, when proven, is itself a fact in the case. It is a circumstance tending in a greater or less degree, to establish his innocence, and it is not to be put aside by the jury, in order to ascertain if the other facts and circumstances, considered by themselves, do not establish his guilt beyond a reasonable doubt. If the defendant be proved of good character for honesty and integrity such good character may be sufficient to create or generate a reasonable doubt of his guilt, although no such doubt would have existed but for such good character."

[10, 11] In this connection appellant justly criticizes the assistant district attorney in stating to the jury in his closing argument:

"Now the reputation of a man, I submit to you, as to honesty and integrity, that is established by the habitués of the Mecca, is one which I am sure would not appeal to this jury, or any 12 respectable people in Sacramento."

There was no evidence offered as to the present character of this resort, which it seems, was formerly the "Casino" of rather unsavory reputation, and the prosecutor should have omitted the innuendo. However, the court was not requested to instruct the jury to disregard it, and thus appellant waived his objection to it. In fact, in view of the strong and convincing evidence of the guilt of the defendant, an error of such trivial importance should not be treated seriously.

The judgment and order are affirmed.

We concur: FINCH, P. J.; HART, J.

189 Cal. 491

## In re VAUGHAN. (Cr. 2403.)

(Supreme Court of California. Sept. 12, 1922. Rehearing Denied Oct. 9, 1922.)

**1. Attorney and client ⟸53(2)—Evidence in disbarment proceeding held to support charges.**

Evidence in disbarment proceeding *held* sufficient to sustain charges that accused made a false affidavit to obtain a continuance, and used bonds recovered from a third person on behalf of a client to secure a personal loan.

**2. Witnesses ⟸293½—Defendant not entitled to decline to testify in disbarment proceeding.**

While a disbarment proceeding is a quasi criminal action, it is not such a criminal prosecution as entitles defendant to decline to testify on the ground that he cannot be compelled to be a witness against himself under Const. art. 1, § 13, though he may decline to answer questions tending to incriminate him.

**3. Attorney and client ⟸49—Purpose of disbarment proceeding stated.**

The purpose of a disbarment proceeding is to determine the fitness of an officer of the court to continue in that capacity, and not to punish accused.

**4. Attorney and client ⟸54—Refusal to wait longer for depositions held not error.**

In disbarment proceeding, where accused was given ample time to prepare depositions and notice of the day on which they would be required, and though the time was extended they were not received within the extended time, the court did not err in refusing to wait longer for them, especially where the only matter thereby shown not already in evidence was immaterial.

**5. Health ⟸24—Duty of one quarantined to stay inside, whether house guarded or not.**

It was the duty of one whose house was quarantined to stay inside, whether the house was being guarded or not.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Proceeding to disbar Arthur C. Vaughan, attorney and counselor at law. From a judgment of disbarment, respondent appeals. Affirmed.

John L. Richardson, T. E. Parke, Davis, Rush & McDonald, S. W. Thompson, Samuel R. Blake, William B. Beirne, and Arthur C. Vaughan, all of Los Angeles, for appellant.

R. P. Jennings, of Los Angeles, for respondent.

LAWLOR, J. This proceeding was instituted in the superior court of Los Angeles county by the Los Angeles Bar Association to secure the disbarment of Arthur C. Vaughan, an attorney, who was charged with violating his oath as attorney and with the commission of acts involving moral turpitude, dishonesty, and corruption. The cause having been heard, it was adjudged that accused be disbarred, his name be stricken from the roll of attorneys, and that he be permanently deprived of the right to practice as an attorney or counselor in the courts of this state. From that judgment this appeal is taken.

Three separate offenses were charged in the accusation. It was alleged that in 1916 one H. P. Proctor employed appellant to take an appeal in a case entitled Riva v. Rabe et al., to which action Proctor was a party; that Proctor paid appellant, at the latter's request, $120, for the specific purpose of being used as expenses in preparing and printing the transcript and briefs on appeal; that appellant for a long time represented to Proctor that he was attending to the matter of the appeal, but that he did not do so; that he converted the $120 wholly to his own use, knowing he had no right to do so, and that he failed and refused to return the money to Proctor, although the transcript and briefs were never filed. As a second act of misconduct it was alleged that for the purpose of obtaining an extension of time to file a supersedeas bond in the case of Gordon v. Hillman (Cal. App.) 191 Pac. 62, then pending before this court, appellant made and filed an affidavit in this court, wherein he stated he made the affidavit on behalf of his client because "said C. D. Hillman is confined to his residence, and is not permitted to leave because of the quarantine existing," and with which affidavit he inclosed a letter from the health department, wherein it was said the residence of C. D. Hillman had been under quarantine, and that Hillman had not been permitted to leave the house; that these statements were untrue, and that appellant well knew that Hillman had not been confined to his home, but that he had been in court on one of the days the alleged quarantine had been in effect, and that the affidavit had been filed with the purpose of misleading and deceiving this court. The allegations of the third count were to the effect that during the year 1916 appellant was employed by one Edna A. Brown to procure from one Peck certain bonds which had been deposited with Peck by their owner, one E. S. Crocker, as security for a contract Edna A. Brown had with Peck; that appellant recovered the bonds from Peck; that, knowing the bonds were the property of Crocker, and that Edna A. Brown was obligated to return them to him, appellant delivered them to one Orvill Lathrop as security for a personal loan of $600, which sum was obtained for his own use.

In his answer appellant alleged he had conducted the case of Riva v. Rabe to Proctor's

satisfaction, and had prepared the brief and transcript, although the taking of the appeal was delayed; that he had offered to turn over the case, together with the money paid him, to other counsel, and denied he had converted the money to his own use, or had failed or refused to return it to Proctor. Answering the second count, he denied he intended to deceive this court by filing the affidavit, admitted he knew Hillman was in court on one occasion during the quarantine, and alleged that Hillman told him he got away through the rear of his premises, but did not know whether he would be able to get out again; that he was later informed Hillman was confined to his home, and had requested him to get an extension of time to file the bond; that he procured the letter from the board of health, saying Hillman would not be permitted to leave during the quarantine, and that the affidavit was made in good faith. With reference to the third count, appellant denied the allegations of the accusation, and alleged that he had turned the bonds over to Lathrop with Edna A. Brown's consent to raise money to apply on an attorney's fee which she owed him.

1. Appellant contends the evidence is insufficient, under all three counts, to warrant a judgment of disbarment. In its judgment the court recited that it appeared appellant was guilty of each of the acts charged against him, and that each of the acts did involve moral turpitude and dishonesty on his part. It is evident from this statement that the court regarded each of the acts charged as sufficient to constitute a cause of disbarment, and that its judgment was not dependent on proof of the three charges as a whole.

With reference to the first charge, it appears that the appeal on behalf of Proctor was not instituted until after this action was commenced. Appellant denied he appropriated the $120, and testified that such of it as was not used in prosecuting the appeal he kept in specie in a box at his home, and that he still had about $50 of it there at the time this cause was heard. Respondent offered no affirmative testimony to disprove this statement, but apparently relied on the cross-examination of appellant to discredit his story. It must be assumed from the judgment of disbarment that the trial court did not believe appellant's account of the disposition of the money, but concluded that it had been converted to his own use. However this may be, there can be no doubt of the sufficiency of the evidence to sustain the other two charges.

[1] The evidence under the second count shows that for a few days preceding January 24, 1919, appellant and his client, C. D. Hillman, had been in San Francisco appearing before this court in the matter of giving a supersedeas bond, which was continued until February 4, and that they had returned to Los Angeles by January 26. It was admitted Hillman was in court with appellant in Los Angeles on January 27. On February 1 appellant filed the affidavit in question with this court, in which he stated that Hillman's house was quarantined, and that Hillman was unable to attend to the matter of the bond; that appellant made the affidavit on Hillman's behalf because Hillman was "confined to his residence, and is not permitted to leave because of the quarantine existing." Attached to and made a part of the affidavit was a letter from the health department, stating that Hillman's house had been under quarantine since January 21, and that Hillman "has not been permitted to leave the premises." The plain purport of the affidavit and letter is that Hillman was at all times confined to his premises, and could not get away, either to attend to the securing of the bond or the making of the affidavit. Inasmuch as Hillman was in court with appellant at least once during the time referred to, the affidavit is manifestly false. The request for an extension of time was therefore based on an untruth, and the effect of the affidavit could only have been to mislead this court. It follows there is no merit in appellant's contention that the court erred in refusing to dismiss the case as to this count or in impliedly finding that the allegations of the accusation with reference to it were true.

The testimony of Edna A. Brown, given by deposition, and that of E. S. Crocker, is sufficient to support the implied finding that appellant committed the act charged in the third count. E. S. Crocker testified, among other things, that he delivered the bonds to Peck. Edna A. Brown testified that she employed appellant to procure the return of the bonds for her; that he informed her that he had recovered them; that when she went to get them "I asked Mr. Vaughan for the bonds, and he said that he had pledged them at the bank for a few days; that he needed some money badly, and got some at the bank —about $200 or $250. I was quite astonished and said: 'Why, Mr. Vaughan, why did you do that?' for I never authorized Mr. Vaughan to pledge the bonds for his or anybody's use. He said as long as he was my attorney he thought it would be all right"; that she told him the bonds belonged to E. S. Crocker, she thought at the time she asked him to get them back from Peck, and that she had demanded them from appellant several times. Appellant testified that he borrowed $600 on the bonds. This evidence is sufficient to justify the trial court in concluding that the allegations of the accusation with reference to this count are true, and it must be assumed the trial court rejected as untrue appellant's explanations of his acts, which were the same as those alleged in the answer.

[2, 3] 2. It is insisted by appellant that the court erred in allowing him to be called to the stand and compelled to testify over his

objection. He contends the disbarment proceedings are in the nature of a criminal action, and that the accused in such a case should be accorded the same right to refuse to testify as is a defendant charged with the commission of a crime. This position cannot be maintained. Although it has been held that an accusation is in the nature of a criminal charge (Matter of Haymond, 121 Cal. 385, 53 Pac. 899) and that a proceeding on such a charge is a quasi-criminal action (In re McCowan, 177 Cal. 93, 170 Pac. 1100) "this court has uniformly treated disbarment proceedings as peculiar to themselves, and governed exclusively by the Code sections specifically covering them." Matter of Danford, 157 Cal. 425, 108 Pac. 322. The purpose of such a proceeding is to determine the fitness of an officer of the court to continue in that capacity, and it has been said the disbarment of attorneys is not intended for the punishment of the individual, but for the protection of the courts and the legal profession. Ex parte Finley, 97 S. C. 37, 81 S. E. 279. The proceeding differs from a criminal action in several ways. Thus it is provided in section 297 of the Code of Civil Procedure that if the accused "refuse to answer the accusation, the court shall proceed to judgment of removal or suspension." "The rule in criminal cases that the failure of the accused to testify in his own behalf shall not be considered against him does not apply to proceedings for disbarment of an attorney, and such failure may be considered in weighing the evidence offered against him." 6 C. J. 608. In the case of In re Wellcome, 23 Mont. 450, 59 Pac. 445, the court said:

"It is urged by counsel that the failure on the part of the accused to be sworn in his own behalf may not be used to his prejudice. Counsel say that this is, to all intents and purposes, a criminal investigation, and that the rule laid down on this subject in section 2442 of the Penal Code should be applied. The answer to this is that 'this is not a criminal prosecution, nor an aid to a criminal investigation, but is to ascertain if the accused is worthy of the confidence, and is possessed of that good moral character, which is a condition precedent to the privilege of practicing law and continuing in the practice thereof.' In re Wellcome, 23 Mont. 213, 58 Pac. 47. This is a special proceeding of a civil nature, and the rules applicable to criminal cases do not apply. In re Wellcome, 23 Mont. 259, 58 Pac. 711; In re Randel, 158 N. Y. 216, 52 N. E. 1106. If the accused is not guilty, nothing would have been easier than for him to deny all knowledge of the charges laid at his door. His having failed to testify in his own defense, when he should do so, and deny the statements of Whiteside and Clark, not only justifies, but irresistibly impels, this court, upon the evidence before it, which is credible, to the conclusion that he is guilty."

In our opinion, in view of these considerations, this is not such a criminal prosecution against appellant as would entitle him to decline to testify on the ground that he cannot be compelled "to be a witness against himself" (Const. Cal., art. 1, § 13), but he may be called and examined for the information of the court, without, of course, infringing his right to decline to answer questions propounded to him on the ground that his testimony would tend to incriminate him.

[4, 5] 3. It is insisted the court committed error in refusing to continue the case until the depositions of C. D. Hillman and his wife concerning the matters charged in the second count of the accusation could be obtained. The record shows the taking of these depositions was discussed by the parties in court at the opening of the trial on December 16, 1920, and that it was stipulated the case would be held open for their reception until December 23. Several times during the course of the trial the depositions were mentioned, and counsel for appellant was reminded by the court that they would be due on that date. The depositions were not procured by December 23, and appellant was given until 4:30 p. m. of December 28 to present them to the court. They were not presented by noon of December 29, and although it was shown they were in the mail from San Francisco to Los Angeles, the court, due partly to the pressure of its business, declined to continue the action further for their introduction. The court remarked that from the statement of counsel for appellant as to what he proposed to prove by them that the only matter to be contained in the depositions which was not already in evidence was a statement that Hillman's house was watched during the quarantine, so that he could not get out. The statement of the trial judge indicated that in rendering the decision he was considering the matters already in evidence which would have been contained in the depositions. As to those matters which were not in evidence, it would have made no difference whether the house was watched or not, for, as remarked by the trial judge, if it was quarantined it was Hillman's duty to stay inside without being guarded. The important factor was that, while giving the quarantine as an excuse for being unable to confer with his client, appellant did communicate with him and appeared in court with him, and therefore there could have been no prejudice in the ruling. Appellant was given ample time to prepare the depositions and notice of the day on which they would be required, and in view of these circumstances it cannot be said the court erred in refusing to wait longer for them.

4. Appellant assigns error to the admission of certain evidence tending to prove the allegations of the first count, and the refusal of the court to dismiss the accusation as to that count. But in view of our conclusion as to the sufficiency of the evidence on the three

counts, it is unnecessary to discuss this point.

The judgment is affirmed.

We concur: SHAW, C. J.; WASTE, J.; LENNON, J.; RICHARDS, Justice pro tem.; MYERS, Justice pro tem.

---

189 Cal. 498

## In re CONNICK'S ESTATE. (S. F. 9949.)

(Supreme Court of California. Sept. 12, 1922.)

**Executors and administrators ⟹17(7)—Death of nominator prior to appointment destroyed nominee's right to administer.**

Under Code Civ. Proc. §§ 1365, 1379, authorizing the surviving husband or wife, or such other person as is entitled to administer, to appoint an administrator, a person other than the surviving husband or wife has no right to appoint a nominee, unless nominator is himself competent to serve as determined by state of facts at time of appointment; hence the death of a nominator other than the surviving husband or wife before the appointment destroys nominee's right to administer.

In Bank.

Appeal from Superior Court Humboldt County; Denver Sevier, Judge.

In the matter of the estate of Catherine Matilda Connick, deceased. From an order denying the petition of Achsa J. Connick to be appointed administratrix and granting the petition of Henry A. Hansen, Public Administrator of Humboldt County, petitioner Achsa J. Connick appeals. Affirmed.

J. H. G. Weaver, of Eureka, for appellant.

Jas. W. Henderson, of Eureka, for respondent.

RICHARDS, Justice pro tem. This appeal is from an order of the superior court denying the petition of one Achsa J. Connick to be appointed administratrix of the estate of Catherine Matilda Connick, deceased, and granting the petition of Henry A. Hansen, public administrator of the county of Humboldt, to be appointed administrator of said estate. The facts as shown by the record are undisputed, and are briefly these: Catherine Matilda Connick died on December 24, 1905, leaving as her sole heir at law her son, Amos H. Connick. On November 9, 1920, Amos H. Connick, being himself competent to be appointed administrator of his mother's estate, executed a request to the court in writing for the appointment of H. G. Gross, C. H. Palmtag, and Achsa J. Connick to act as administrators of said estate, waiving therein his own right to act as such administrator. On April 6, 1921, said Amos H. Connick died. Thereafter H. G. Gross and C. H. Palmtag each executed their waiver in writing of their right to administer said estate under said requested appointment, and requested the court to appoint Achsa J. Connick as the sole administratrix of the estate of said Catherine Matilda Connick, deceased. On April 9, 1921, said Achsa J. Connick filed her petition to be appointed administratrix of said estate, alleging therein that she was a niece of said Catherine Matilda Connick, deceased, and as such was entitled to letters of administration therein. On April 14, 1921, Henry A. Hansen, public administrator of the county in which the proceedings for the administration of said estate were pending, filed his written opposition to the petition of said Achsa J. Connick for letters of administration of said estate, alleging that said Achsa J. Connick was not an heir of said deceased, and that there was no heir of said deceased now residing in the state of California. He, therefore, made application to be appointed the administrator of said estate as the only person qualified to become such, and prayed that his said application be granted, and that letters of administration be issued to him. These opposing petitions were set for hearing for April 24, 1921, but on that day Achsa J. Connick obtained an order continuing the hearing thereon until May 2, 1921. On April 29, 1921, said Achsa J. Connick for the first time filed the document wherein Amos H. Connick requested the court to appoint her as the administratrix of said estate and had waived his own right to administer thereon. On May 2, 1921, the hearing upon both petitions came on before the court, upon and after which the order was made denying the petition of Achsa J. Connick to be appointed administratrix of said estate, and granting the petition of said Henry A. Hansen for letters of administration therein. It is from this order that Achsa J. Connick has taken and prosecutes this appeal.

The sole question presented upon this appeal is as to the prior right of the appellant to be appointed administratrix of said estate; she insists that she had that right by virtue of the written request for her appointment executed by Amos H. Connick, the sole heir of said decedent, a short time prior to his death. She insists that her right to such appointment became absolute upon the death of said Amos H. Connick and was unaffected thereby, and hence that the trial court should have granted her said application. We are unable to agree with this contention. The privilege of seeking appointment as administrator of the estate of a deceased person, which is predicated upon the written request of the surviving husband or wife of the decedent or of such other person as is entitled to administer, is entirely of statutory origin,

and arises by virtue of sections 1365 and 1379 of the Code of Civil Procedure. The first of these sections confers upon the surviving husband or wife the right of requesting the appointment of some competent person, and it has been held that this right inheres in the surviving husband or wife, even though they are not themselves competent to receive the appointment. Estate of Cotter, 54 Cal. 215; Estate of Stevenson, 72 Cal. 164, 13 Pac. 404; Estate of Dorris, 93 Cal. 611; Estate of Myers, 9 Cal. App. 694, 100 Pac. 712. These cases do not, however, hold, as is insisted by the appellant, that the nominee of a surviving husband or wife has the absolute right to be appointed by virtue thereof, but, on the contrary, it has been held that the nomination of a surviving husband or wife can be retracted or revoked by the nominor at any time before the hearing upon the application based thereon. Estate of Shiels, 120 Cal. 347, 52 Pac. 808; Estate of Lowe, 178 Cal. 111, 172 Pac. 583. A similar right of retraction of the nomination of a person for appointment as administrator, conferred under the terms of section 1379 of the Code of Civil Procedure, was also recognized in the early case of Estate of Kirtlan, 16 Cal. 165, the limitation in each class of cases being that the nominor, whether husband or wife of the decedent or other person entitled to administer, may be estopped to withdraw such nomination where the nominee has gone to the trouble and expense of seeking the appointment on the faith of the nomination. Estate of Kirtlan, supra; Estate of Lowe, supra. The only real difference between the two sections of the Code of Civil Procedure above referred to is that by virtue of section 1365 a surviving husband or wife, though themselves incompetent to serve, may confer upon some competent person the right to be appointed, while by section 1379 only the nominee of one who is himself competent to serve can be considered by the court. Estate of Bedell, 97 Cal. 339, 32 Pac. 323. The effect of these decisions is not only to destroy that portion of appellant's contention that the nominee of a person other than the surviving husband or wife entitled to administer gains thereby an absolute and irrevocable right to seek such administration which cannot be affected by the subsequent change in the status of the nominor; but it would also seem to follow logically therefrom that the right of such nominee to receive the appointment as administrator must be determined by the state of facts existing at the time such appointment is to be made, and if at such time the nominor has either rightfully withdrawn his nomination or has become himself for any reason incompetent or no longer entitled to be appointed such administrator, the right of his nominee to receive such appointment must also be held to have ceased. It follows that the trial court was correct in its refusal to appoint the appellant herein as administratrix of said estate and in the making of its order appointing the public administrator to serve as the administrator thereof.

Order affirmed.

We concur: SHAW, C. J.; WASTE, J.; LENNON, J.; LAWLOR, J.; MYERS, Justice pro tem.

---

189 Cal. 509

## TRANS-PACIFIC TRADING CO. v. PATSY FROCK & ROMPER CO. et al.
## (L. A. 7105.)

(Supreme Court of California. Sept. 13, 1922.)

**1. Judgment ⟸98—When all defendants served, clerk may enter one's default, but cannot enter judgment.**

Under Code Civ. Proc. § 585, subd. 1, and section 414, where in an action against several defendants all have been served and are before the court, the clerk has authority to enter default of one of the defendants, but not to enter judgment on such default.

**2. Judgment ⟸238—Action against corporation and stockholders within statute as to entry of judgment against some defendants.**

In action against corporation for breach of contract and against the stockholders on their liability as such, the liability being several, Code Civ. Proc. § 579, authorizing judgment against one or more defendants, leaving the action to proceed against the others applies.

**3. Judgment ⟸271—Discretion as to entering judgment against some defendants must be exercised by court and not by clerk.**

Under Code Civ. Proc. § 579, providing that when a several judgment is proper the court in its discretion may render judgment against one or more defendants, leaving the action to proceed against the others, the discretion is a judicial one, to be exercised by the court and not by the clerk.

**4. Judgment ⟸18(2)—Not void if court has jurisdiction and complaint apprises defendant of nature of demand.**

A judgment is not void if the court has jurisdiction of the parties and the subject-matter, whether or not the complaint states a cause of action, so long as it apprises defendant of the nature of plaintiff's demand.

**5. Sales ⟸377—Complaint held sufficient to give court jurisdiction.**

In action against corporation for breach of contract of sale and against the stockholders on their liability as such, complaint *held* sufficient to give the court jurisdiction, though not alleging the market value at place of delivery; that title had passed to defendants, or that plaintiff had a lien; that the goods were in existence or in plaintiff's possession; that the contract was a sale, and not an agreement to sell or the value of the goods in the nearest market.

---

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

In Bank.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by the Trans-Pacific Trading Company against the Patsy Frock & Romper Company and others. From a default judgment and an order denying a motion to set aside the default and judgment, defendant William I. Zidell appeals. Reversed, with directions.

Meserve & Meserve, of Los Angeles, for appellant.

J. Marion Wright, of Los Angeles, for respondent.

LAWLOR, J. Wm. I. Zidell, one of the defendants, appeals from a judgment entered against him on his default, and from an order denying his motion to set aside the default and judgment.

Respondent, the Trans-Pacific Trading Company, commenced this action on December 1, 1920, alleging in its complaint that the Patsy Frock & Romper Company and itself were duly organized corporations; that defendant Patsy Frock & Romper Company and appellant executed a written order directed to respondent, by which the defendants agreed to buy 330 bolts of Japanese cotton crepe for a total sum of $5,940; that on April 21, 1920, respondent accepted the order; that it delivered to defendants and received payment for 164 bolts of the crepe; that thereafter, on April 27, 1920, without cause or reason therefor, defendants notified respondent that they would not accept or receive any more of the crepe; that on November 17, 1920, after giving defendants reasonable notice, and giving the notice required by law, respondent sold the balance of the crepe in open market at the best price obtainable, for the sum of $996; that the expense of the resale was $55; that the difference between the resale price and the contract price was $1,992. It was alleged that appellant owned 500 shares, defendant Florence Westover 250 shares, and defendant S. B. Lafferty 250 shares of the total of 1,000 shares of the capital stock of the defendant Patsy Frock & Romper Company, and that there was due and owing from them $996, $498, and $498, respectively.

For a second cause of action respondent alleged that on May 12, 1920, the defendant Patsy Frock & Romper Company and appellant ordered 500 bolts of Japanese cotton crepe at a total price of $8,200; that respondent on May 13, 1920, accepted the order; that defendants refused to accept any of the crepe, which was sold, at an expense of $55, for $3,000, or $5,200 below the contract price; and that there was due and owing from appellant $2,600, from defendant Florence Westover $1,300, and from defendant S. B. Lafferty $1,300. Judgment was prayed against the corporation for $7,192; against appellant Wm. I. Zidell and defendants Florence Westover and S. B. Lafferty for $3,596, $1,798, and $1,798, respectively.

Appellant failed to appear and answer the complaint, and on December 21, 1920, his default was entered by the clerk. Pursuant thereto the clerk, on July 22, 1921, entered judgment against him as prayed. On August 11, 1921, more than six months after the entry of the default, appellant moved to set aside the default and judgment on the grounds that the complaint did not state a cause of action, and that no authority existed for the entry of the default and judgment by the clerk. The motion also asked for relief under section 473 of the Code of Civil Procedure.

In support of his motion appellant filed affidavits of himself and of Edwin A. Meserve, his attorney, which were to the effect that appellant's failure to appear in the action was due to a misunderstanding between appellant and the said Edwin A. Meserve, appellant supposing that the said Edwin A. Meserve was appearing for him, and the said Edwin A. Meserve believing he had been retained by defendant S. B. Lafferty to represent all the defendants except appellant, who, he believed, was represented by other counsel. On August 26, 1921, the motion was denied, and this appeal is from that order and the judgment.

[1] Respondent's entire argument is addressed to the question of whether or not the judgment is void because the complaint failed to state a cause of action. Appellant, however, also contends that the clerk was without power to enter the default and judgment against appellant.

Section 585, subdivision 1, of the Code of Civil Procedure, is as follows:

"In an action arising upon contract for the recovery of money or damages only, if the defendant has been personally served and no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount demanded in the complaint, including the costs, against the defendant, or against one or more of several defendants in the cases provided for in section four hundred and fourteen."

Section 414 provides that—

"When the action is against two or more defendants jointly or severally liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants."

In Crossman v. Vivienda Water Co., 136 Cal. 571, 69 Pac. 220, the same point, that under section 414 the clerk could not enter the judgment because all the parties had

been served with summons and were before the court was presented, but not decided. It is clear that no authority is vested in the clerk by the sections above quoted to enter a judgment when all the defendants have been served and are before the court, even though a joint and several judgment would be proper. Section 414 is expressly limited to cases where some only of the defendants have been served with summons. In Junkans v. Bergin, 64 Cal. 203, 30 Pac. 627, the court declared:

"The clerk is a minister or servant of the law, to act in that state of the case in which the law orders him to act. Then only is his action valid."

And in Stearns v. Aguirre, 7 Cal. 443, 449, it was said:

"If a judgment is pronounced by a court having jurisdiction, no matter how irregular it may be, it must stand until set aside, or reversed on appeal; but when entered by a mere ministerial officer, without authority of law, it is wholly void."

However, it is apparent that the words of limitation—"in the cases provided for in section four hundred and fourteen"—relate only to the provision for entry of the judgment by the clerk, and not to the entry of the default. The clerk is directed to enter the default of a defendant in all cases of the class mentioned in subdivision 1 of section 585, but to enter judgment only in the cases provided in section 414. That this is the meaning of the section is shown by the statement of this court in Alpers v. Schammel, 75 Cal. 590, 593, 17 Pac. 708, 709, wherein two of three defendants were served and appeared, but where there was no evidence that the third had been served. A verdict was rendered against all three, concerning which it was said:

"This verdict could only regularly have been against the defendants who appeared and answered. It could not have been against Bolte if he was served, and had lived until the trial, unless he had answered. *If he was served and failed to answer, then his default should regularly have been entered.*" (Italics ours.)

It follows that the act of the clerk in entering the default was proper, but that he acted in excess of his powers in entering the judgment.

[2, 3] In the case at bar all the defendants had been served, and the complaint prayed judgment against appellant and his codefendants, except the corporation, for the amount of their liability as stockholders. The liability of the defendants and appellant as stockholders being several (Brown v. Merrill, 107 Cal. 446, 40 Pac. 557, 48 Am. St. Rep. 145), the case falls under section 579 of the Code of Civil Procedure, which provides:

"In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper."

Under this section the discretion vested is a judicial one, to be exercised by the court, and not the clerk. The court erred in refusing to exercise this discretion and vacate the judgment entered by the clerk against appellant. If the trial court sees fit to render another judgment of like effect, its action will be valid unless it involves an abuse of discretion. If it refuses to do so, the case can proceed to trial upon the issues tendered by the answers of the other defendants, and at its conclusion a judgment may be rendered settling the rights and obligations of all the parties, including those of appellant.

[4, 5] 2. Appellant's second point is that the judgment is void because the complaint does not state a cause of action, in that there is no allegation as to what was the market value of the goods in question at the place of delivery; that title to them had passed to appellant and his codefendants, or that in consequence thereof respondent had a lien on the goods in his possession for the purchase price; that the goods were in existence or in respondent's possession; that the contract between the parties was a sale and not an agreement to sell, or as to what the value of the goods was in the market nearest the place where the goods should have been delivered. It was said in Christerson v. French, 180 Cal. 523, 182 Pac. 27:

"The respondent contends further that the judgment is void because the complaint fails to state a cause of action. It is well established that a judgment is not void if the court has jurisdiction of the parties and of the subject-matter, irrespective of whether or not the complaint states a cause of action so long as it apprises the defendant of the nature of the plaintiff's demand. [Citing cases.] We think the complaint herein sufficiently states a cause of action to inform the defendant of the nature of the claim against him and to give the court jurisdiction of the cause."

It appears from the description we have already given of the complaint that it was ample to give the court jurisdiction of the cause.

The order is reversed, and the trial court is directed to vacate the judgment entered by the clerk, the default to stand.

We concur: SHAW, C. J.; LENNON, J.; WASTE, J.; SLOANE, J.; MYERS, Justice pro tem.; RICHARDS, Justice pro tem.

189 Cal. 489

## MURPHY v. KOFORD, Superior Court Judge. (S. F. 10106.)

(Supreme Court of California. Sept. 11, 1922.)

**Appeal and error ⊂=465(2)—Appellant entitled to have stay bond fixed, though appeal was frivolous.**

Under Code Civ. Proc. § 945, appellant was entitled to have the trial court fix a stay bond for an appeal from an order granting a writ of execution for the sale of described realty, even though the appeal was vexatious and frivolous and the order would necessarily be sustained.

In Bank.

Application for writ of mandate by Ella M. Murphy against Joseph S. Koford, as Judge of the Superior Court for the County of Alameda, Cal. Writ granted.

Hayes, Oliphant & Dukette, of Oakland, for petitioner.

Keyes & Erskine and Haven, Athearn, Chandler & Farmer, all of San Francisco, for respondent.

SHAW, C. J. The petitioner asks for a writ of mandate to compel the superior court to fix a bond on appeal from an order of the court below declaring that the defendant in the action was entitled to a writ of execution upon a previous judgment for the sale of the property therein described. The order was made on the 30th day of September, 1921.

The judgment upon which the order was made was dated September 28, 1920, and declared that the defendant would be entitled to a writ of execution for the sale of the property described, unless the plaintiff, within 90 days from the date on which defendant offered her a deed, duly signed and acknowledged, for said property, should tender to the defendant the sum of $4,485, with interest thereon after said tender. On December 31, 1920, a deed was tendered her by said defendant, and the time for payment was extended to July 15, 1921, by stipulation. On that day the plaintiff appeared at the office of Haven, Athearn, Chandler & Farmer, and tendered said amount to Fred G. Athearn, one of the attorneys for the said defendant. Athearn, at that time, did not have charge of the matter, and was ignorant of the details of the said transaction. On that account he said he would neither accept nor refuse the tender. He did, however, tender the deed which had been previously tendered by said defendant to Ella M. Murphy, and it was rejected because of alleged defects therein. From the said order of September 30, 1921, she has appealed, and now applies to this court, as aforesaid, for an order fixing the amount of bond to be executed on behalf of said plaintiff, which the court below refused.

It cannot be said that the order of September 30, 1921, does not require the sale of real property. It expressly directs that a writ of execution issue to the sheriff, commanding him to sell the real property described in the previous judgment, to satisfy the sum of $4,485, with interest thereon from December 31, 1920. It required a finding, and the finding was made, that the defendant had tendered a deed on that date to the plaintiff. Hence the provisions of section 945 of the Code of Civil Procedure apply to the case, and the plaintiff is entitled to a stay of execution on giving the required undertaking.

The only objection that is made to the application is that the appeal is vexatious and frivolous because it is without merit, and the order would necessarily be sustained. This is not sufficient. The statute gives a party a right of appeal, and authorizes a stay of execution on the filing of the undertaking. This is without regard to the merits of the appeal. A stay may be had as well on a frivolous appeal as on any other. We are not at liberty to add to the statutory requirements.

Let a writ issue as prayed for.

We concur: LENNON, J.; LAWLOR, J.; WASTE, J.; RICHARDS, Justice pro tem.; MYERS, Justice pro tem.

---

189 Cal. 546

## INDUSTRIAL LOAN & INVESTMENT CO. OF SAN FRANCISCO v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 10381.)

(Supreme Court of California. Sept. 15, 1922.)

**Exemptions ⊂=92—Party cannot by contractual stipulation waive prospective exemption.**

A provision in a note that all of the parties waive their rights of exemption as to debt does not disentitle the party against whom the judgment thereon had been rendered to a salary exemption, under Code Civ. Proc. § 690, as a debtor cannot in advance waive the privilege of claiming an exemption.

In Bank.

Application for writ of prohibition by the Industrial Loan & Investment Company of San Francisco, to be directed to the Superior Court of California in and for the City and County of San Francisco and Judge James M. Troutt. Writ denied.

William Sea, Jr., of San Francisco, for petitioner.

Cameron H. King, of San Francisco, for respondents.

SHAW, C. J. The petitioner recovered a judgment in the superior court of the city and county of San Francisco against Cameron H. King for a certain sum of money. On the 28th day of August, 1922, he filed a transcript of said judgment and an affidavit of his attorney setting forth that money was due and unpaid thereon, and that the transcript and affidavit were so filed for the purpose of holding up the salary of said King as an employee of the said city and county for payment by warrant of said auditor for the month of July, 1922, and applying the same on said judgment; that said King threatens that he will make an affidavit to the judge claiming said salary, under section 690, subdivision 10, of the Code of Civil Procedure, as exempt from execution, and said judge threatens that if said affidavit is presented he will sign an order releasing the said salary warrant of said King for the month of August, 1922. Wherefore he asks a writ of prohibition to prevent the judge from signing such an order.

Petitioner avers that the defendant in signing the note upon which the judgment was founded waived the exemption laws by inserting the following clause in said note:

"The parties to this instrument, whether maker, indorser, surety or guarantor, each for himself, hereby severally waive as to this debt, or any renewal thereof all right of exemption under the Constitution and laws of California or of any other state, as to personal property."

He claims that by virtue of this clause in the contract defendant has waived all exemption provided by the statute. In making this claim he is relying on the decisions of this court in Keybers v. McComber, 67 Cal. 400, 7 Pac. 838; Borland v. O'Neal, 22 Cal. 506, and Stanton v. French, 83 Cal. 194, 23 Pac. 355.

Each of these cases involve a claim made by the debtor, or some one in his behalf, at the very time of the levy. In each of them it is said that the exemption of property is a personal privilege which the debtor may waive, and that a failure to claim the exemption at the time it is levied on by the officers is a waiver of such privilege. But this rule does not apply to stipulations in an executory contract such as that sued on here. As to such cases the rule is that the debtor cannot waive the privilege of claiming the exemption in advance. This rule is based on the theory that exemption laws are made for the benefit of the debtor and his family, and that it is against public policy for him to waive any benefits of the law in advance of the time when it is necessary for him to do so. If it were not for this rule, it is said, creditors would insist on inserting the clause waiving exemption laws in every executory contract. These would usually be made at a time when the debtor was in need of money, and would be enforceable at some time in the future when, perhaps, he or his family would require the exemption. By doing so he would waive practically all the benefits of the exemption law. We approve of this doctrine, and hold that such a waiver cannot be enforced. This rule has been followed by all the states except Pennsylvania. See cases cited in note to paragraph 192, 25 Corpus Juris, page 111.

The writ of prohibition is denied.

We concur: LENNON, J.; WASTE, J.; WILBUR, J.; RICHARDS, Justice pro tem.

---

189 Cal. 502

## BULLARD v. BULLARD. (S. F. 9835.)

(Supreme Court of California. Sept. 13, 1922.)

**1. Divorce ⟸101—Allegation in cross-complaint as to plaintiff's residence essential when divorce granted thereunder.**

Assuming that Civ. Code, § 128, prohibiting a divorce unless plaintiff has been a resident of the state one year, of the county three months, etc., is satisfied where a divorce is granted defendant on his cross-complaint, if plaintiff has been a resident for the required times, an allegation in the cross-complaint, showing such residence, is essential.

**2. Pleading ⟸402, 435—Failure of cross-complaint for divorce to allege facts concerning plaintiff's residence not cured by other pleadings or findings.**

The failure of a cross-complaint for divorce to allege that plaintiff has been a resident of the state one year and of the county three months, as required by Civ. Code, § 128, cannot be cured or helped by allegations or admissions in the other pleadings, nor aided by the findings.

**3. Divorce ⟸127(3)—Plaintiff's uncorroborated testimony insufficient to support finding as to her residence.**

Under Civ. Code, § 128, prohibiting divorces unless plaintiff has been a resident of the state one year, etc., plaintiff's uncorroborated testimony as to her residence is legally insufficient to sustain a finding.

**4. Divorce ⟸62(1)—Provision that cross-complainant need not have been resident does not apply to cross-complaint for divorce in suit for separate maintenance.**

The proviso of Civ. Code, § 128, added in 1911 (St. 1911, p. 686), that cross-complainant in action for divorce need not be or have been a resident of the state or county, does not apply to a cross-complaint for divorce in an action for separate maintenance, in which there is no residence requirement, since this would permit a divorce between spouses, neither of whom was a resident.

**5. Divorce ⟸62(1)—Failure of cross-complaint for divorce to allege facts concerning plaintiff's residence not waived.**

The failure of a cross-complaint for divorce in suit for separate maintenance to allege that

plaintiff had been a resident of the state one year, etc., as required by Civ. Code, § 128, goes to the very foundation of defendant's right to a divorce, and is not waived by the omission to call it to the trial judge's attention.

**6. Divorce ⊜62(1)—Failure to allege facts concerning plaintiff's residence in cross-complaint does not affect jurisdiction.**

Failure of nonresident's cross-complaint for divorce to allege facts as to plaintiff's residence required by Civ. Code, § 128, does not deprive the court of jurisdiction, but renders it erroneous for the court in the exercise of jurisdiction to grant a divorce.

**7. Divorce ⊜62(1)—Right to file cross-complaint not conclusive of right to divorce.**

That under Code Civ. Proc. § 442, nonresident defendant may file cross-complaint for divorce in suit for separate maintenance is not conclusive that he is entitled to the relief sought.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Minnie Grace Bullard against Harry Bullard. From a decree for defendant, plaintiff appeals. Reversed.

Joseph A. Brown, of San Francisco (F. H. Dam, of San Francisco, of counsel), for appellant.

Walter E. Dorn and L. W. Lovey, both of San Francisco, for respondent.

MYERS, Justice pro tem. Appellant commenced this action, for separate maintenance without divorce, in the superior court of the city and county of San Francisco, where she resided. Defendant, a resident of Alameda county, filed a cross-complaint for divorce on the ground of extreme cruelty. The trial court denied plaintiff any relief, and awarded the defendant an interlocutory decree of divorce on his cross-complaint, from which the plaintiff appeals.

Appellant urges, with much force and reason, that the acts of alleged cruelty relied on (consisting solely in the use of offensive language on five occasions) could not possibly, under the circumstances as disclosed by the evidence, have inflicted grievous mental suffering upon the respondent, and that therefore the finding of the trial court upon this issue is without support in the evidence. But, inasmuch as this judgment must be reversed on another ground wihch is determinative against any right of recovery upon the cross-complaint herein, it is unnecessary to here determine the question thus raised.

[1-3] The defendant, to whom the decree of divorce was awarded upon his cross-complaint, was at no time a resident of the city and county of San Francisco, in which the action was commenced and tried. Section 128 of the Civil Code provides that—

"A divorce must not be granted unless the plaintiff has been a resident of the state one year, and of the county in which the action is brought three months, next preceding the commencement of the action."

There is much reason for concluding that in construing this section, as applied to a case wherein the action is for separate maintenance with a cross-action for divorce, the word "plaintiff" should be construed to mean "cross-complainant." But it is not necessary here to so hold. If we should assume, in accordance with defendant's contention, that the requirements of this section would be satisfied in such a case if the original plaintiff were a resident of the state and county for the prescribed period, we are met by the fact that there is no allegation of such a situation in defendant's cross-complaint. The only allegation as to residence in the cross-complaint is an allegation that the *defendant* was a resident of the county of Alameda, state of California. There is no allegation as to the *plaintiff's* residence. An allegation of the residence required by statute is necessary to state a cause of action for divorce, and is equally essential in a cross-complaint for divorce. Coulthurst v. Coulthurst, 58 Cal. 239, 240. The absence of such allegation in a cross-complaint cannot be cured or helped by any allegations or admissions contained in any of the other pleadings. Dunham v. McDonald, 34 Cal. App. 744, 749, 168 Pac. 1063. Neither can it be aided by the findings in this respect. Collins v. Bartlett, 44 Cal. 371, 381. Furthermore, assuming the sufficiency of the finding as to plaintiff's residence, it is supported only by the uncorroborated testimony of the plaintiff herself, and this is legally insufficient to sustain it. Flynn v. Flynn, 171 Cal. 746, 748, 154 Pac. 837.

[4] It was urged upon the oral argument that the objection here under consideration is met by the proviso which was added in 1911 (St. 1911, p. 686) to section 128, Civil Code, providing that—

A "cross-complainant in an action for divorce need not be or have been a resident of the state or of the county in which the action is brought or pending in order to entitle such cross-complainant to a divorce in said action."

To the point that this proviso does not apply here because this is not "an action for divorce," but an action for separate maintenance, the suggestion is made that this is a "cross-action for divorce," and should therefore be held to be within the application of the proviso. Such a construction, aside from the fact that it would be some-

what strained, would do violence to the apparent intent and purpose of the Legislature, and ought not to be adopted. That purpose was "to prevent a fraudulent use of the courts of this state by temporary residents to obtain the divorces here which they could not obtain in the states where they properly resided." Hiner v. Hiner, 153 Cal. 254, 260, 94 Pac. 1044, 1047. Inasmuch as there is no residence requirement in an action for separate maintenance (Hiner v. Hiner, supra), such a construction of the statute would make possible the procuring of a divorce in the courts of this state between two spouses, neither of whom had ever been a resident here. All that would be required would be that the nonresident wife should commence an action here for separate maintenance had the nonresident husband file a cross-complaint therein for divorce.

[5] We must hold that the granting of the decree of divorce to the defendant herein, who was a nonresident of the county in which the action was commenced and tried, was in violation of the mandatory provisions of this section. It should be noted that this point was not called to the attention of the learned judge at the trial below. But as it it one which goes to the very foundation of the defendant's right to recover it cannot be held to have been waived by such omission.

[6, 7] The point as presented in appellant's brief was to the effect that "the court was without jurisdiction to grant the defendant a divorce," because of the matters stated above. To this the respondent makes answer that by the filing of the complaint for separate maintenance and the service of summons upon the defendant the court acquired jurisdiction of the parties and the subject-matter, which it thereafter retained for all purposes of the action. Both of these arguments misconceive the real nature of the objection. It is not a question of the lack of jurisdiction, as was pointed out by this court in Estate of McNeil, 155 Cal. 333, 100 Pac. 1086, but of error in the exercise of jurisdiction. The court undoubtedly had jurisdiction in this case, but erred in deciding that the defendant was entitled to a decree of divorce. In response to the contention that defendant had a right to file the cross-complaint herein, which was expressly granted to him by section 442 of the Code of Civil Procedure, applicable alike to resident and nonresident defendants, it may be conceded that he had such right. But it does not follow that he was entitled to the relief therein sought.

The judgment is reversed.

We concur: SHAW, C. J.; LENNON, J.; WASTE, J; LAWLOR, J.; RICHARDS, Justice pro tem.

189 Cal. 531

## PEOPLE ex rel. LAWYERS' INSTITUTE OF SAN DIEGO v. MERCHANTS' PROTECTIVE CORPORATION. (L. A. 7119.)

(Supreme Court of California. Sept. 15, 1922.)

**1. Corporations ⟸377½, New, vol. 21 Key-No. Series—Not authorized to practice law.**

Civ. Code, § 286, providing that private corporations may be formed for any purposes for which individuals may lawfully associate themselves, does not authorize the organization of a corporation to practice law, as individuals cannot practice law without a special license.

**2. Corporations ⟸372—Where statement of powers ambiguous, corporation's interpretation of charter considered.**

Where the statement of the powers in a charter are ambiguous, the court is entitled to consider the interpretation which the corporation has put upon its charter.

**3. Corporations ⟸377½, New, vol. 21 Key-No. Series—Corporation furnishing legal services to members "engaged in practice of law."**

Where a corporation charged a yearly membership fee for dispensing legal advice and services of the sort usually furnished by attorneys to their clients, and part of this membership fee was paid to attorneys for rendering services as agents and representatives of the corporation, the corporation was engaged in the practice of law, in view of Const. art. 6, § 22, and Code Civ. Proc. §§ 171, 281, and 1209, subd. 13.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Practice of Law.]

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Proceeding in the nature of quo warranto by the People of the State of California on the relation of the Lawyers' Institute of San Diego, against the Merchants' Protective Corporation. From a judgment revoking defendant's charter, defendant appeals. Affirmed.

James MacIntosh and Joseph P. Sproul, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Leon French, Deputy Atty. Gen., for the People.

Harrison G. Sloane, of San Diego, for relator.

RICHARDS, Justice pro tem. This appeal is from a judgment in the plaintiff's favor after order overruling defendant's general and special demurrer to the plaintiff's complaint, the defendant having failed to answer within the time allowed by said order. The proceeding is in the nature of quo warranto wherein the state, on the relation of the Lawyers' Institute of San Diego, puts in issue the right of defendant to engage in the

practice of law, not having or being able to acquire a license so to do. The plaintiff alleged that on or about May 27, 1915, the said defendant, a corporation duly organized and existing under the laws of the state of Indiana, caused a copy of its articles of incorporation and amendments thereto to be filed with the secretary of state of the state of California; that the purposes of said corporation, as set forth in said articles of incorporation, are "for the purpose of furnishing its members legal services," etc., and, as set forth in the amendment to its said articles of incorporation, are "to combine a large number of persons, firms, and corporations into a central organization who shall pay a stipulated price for the services of the organization and its employees; to appoint attorneys to look after the collection of the accounts and bills receivable and render such other professional services as are needed and required by the various members and subscribers thereto." The complaint further alleges that said defendant corporation "has engaged in, without lawful authority, grant, license, or franchise, the business of practicing law in the state of California and in particular in the county of San Diego, state of California; that it has retained and employed attorneys at law duly admitted to practice in the state of California * * * as its agents and representatives in rendering legal service to patrons of said corporations." The complaint proceeds to set forth in haec verba the agreement of employment between said defendant and said attorneys and also the membership agreement of its patrons under and in pursuance of which said corporation has rendered legal services to various of its patrons through the said attorneys at law, its agents and representatives, as follows:

"By giving to said patrons legal advice and consultation on business, personal or private matters; by defending its patrons in actions brought against them in police courts or justices' courts; by giving to said patrons legal advice and information upon new state laws and ordinances."

Finally, the complaint alleges upon information and belief:

"That the sole business and occupation heretofore or now carried on by said defendant in the state of California is the practice of law in the manner hereinbefore designated."

The plaintiff prays judgment that the defendant be excluded from engaging in the practice of law in the state of California and from the exercise of all corporate rights, privileges, and franchises therein. Defendant having failed to answer after its demurrer was overruled, its default was duly entered, and thereafter the court proceeded to take evidence in said matter, and, having done so, found that all the allegations of the plaintiff's petition were true. It therefore by its judgment granted the relief prayed for in said complaint. The appeal is from such judgment.

[1] The appellant's first contention upon this appeal is that the acts complained of in this proceeding were done by it under its lawful franchise from the state of California granted to it under general law; that section 286 of the Civil Code defines the purposes for which private corporations in this state may be formed as follows:

"Private corporations may be formed for any purpose for which individuals may lawfully associate themselves."

The appellant argues that, since individuals may lawfully associate themselves for the practice of law, it may also do so in its corporate capacity, under the specific terms of the foregoing section of the Civil Code. The vice of this contention consists in its assumption that individuals may generally, and as a matter of right, associate themselves together for the practice of the law; but this assumption is fallacious, since, under the laws of California, individuals may not, either singly or in association, engage in the practice of the law without having a special license so to do, and hence the individuals forming this corporation could not, under the section of the Code relied upon, gain any other or further right by the act of incorporation than that lawfully possessed by them, either singly or in the aggregate, without incorporation. Its contention in this respect is therefore without merit.

[2] The appellant's next contention is that its charter is the sole source to which the court could look for its powers in this proceeding, and that by the terms of its said charter, as embraced in the articles of incorporation and the amendments thereto, it did not purport to be formed for the purpose of engaging in the practice of law. That the articles of incorporation of defendant as originally framed, in stating that "the object of this company shall be for the purpose of furnishing to its members legal services," were sufficiently broad to embrace within its said terms the doing of all those acts which, as we shall see hereafter, constitute "the practice of law," would seem to be perfectly clear; and, if it be claimed by the appellant that this broad statement of its purposes has been modified by the later amendment of its articles, which embrace, among other enumerated powers, that of appointing attorneys to "render such other professional services as are needed and required by the various members and subscribers thereto," the utmost that can be said of this amendment is that it merely renders doubtful the otherwise broad and clear statements of its corporate purposes and powers. In such a case the court would be entitled to look to the acts of the defendant under its charter as originally framed and as thus amended, and to determine

therefrom what its own interpretation of its charter and powers might be. This would be particularly true with respect to the agreements and engagements which the defendant entered into with its members and patrons and with such attorneys as it employed to handle their legal affairs. These were set forth fully in the complaint, and the reading of them leaves little doubt that the construction which the corporation placed upon its own power under its original and amended articles of incorporation was such as to bring it fully within the description of those engaging in the practice of law as hereinafter defined.

[3] The phrase "practicing law," or its equivalent, "the practice of law," has long had a sufficiently definite meaning throughout this country to be given a place in both constitutional and statutory law without further definition. The Constitution of this state employs it in section 22 of article 6 thereof, declaring that—

"No judge of a court of record shall practice law in any court of this state during his continuance in office."

By section 281 of the Code of Civil Procedure it is provided that—

"If any person shall practice law in any court, except a justice's court or police court, without having received a license as attorney and counselor, he shall be guilty of a contempt of court."

Section 171 of the same Code extends this prohibition to county clerks. They are therein forbidden to practice law in any court of this state or to act as attorney, agent or solicitor in the presentation of claims before any department of the state or general government or in the courts of the United States during their continuance in office. Section 1209, subd. 13, of the same Code, relating to contempts, declares that "practicing law" or advertising or holding one's self out as practicing or as entitled to practice, etc., without having received a license as attorney and counselor, issued under the laws of this state, constitutes contempt of court.

While these provisions have particular relation to the practice of the law in courts of justice, the term has not been generally thus confined. In the case of Eley v. Miller, 7 Ind. App. 529, 34 N. E. 836, which involved the violation of a statute prohibiting county auditors from practicing law, the court said:

"As the term is generally understood, the practice of the law is the doing or performing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be depending in a court."

In the case of People v. Alfani, 227 N. Y. 334, 125 N. E. 671, wherein the defendant was charged with violating section 270 of the Penal Code of New York, prohibiting persons from practicing as attorneys at law without being licensed and admitted so to do, the court, in an elaborate and well-reasoned opinion, in which numerous cases from all parts of the country are reviewed, has this to say:

"It is common knowledge for which the above authorities were hardly necessary, that a large, if not the greater, part of the work of the bar today is out of court or office work. Counsel and advice, the drawing of agreements, the organization of corporations and preparing papers connected therewith, the drafting of legal documents of all kinds, including wills, are activities which have long been classed as law practice. The Legislature is presumed to have used the words as persons generally would understand them, and not being technical or scientific terms 'to practice as an attorney at law' means to do the work, as a business, which is commonly and usually done by lawyers here in this country."

Other cases to the same effect are: In re Lizotte, 32 R. I. 386, 79 Atl. 960, 35 L. R. A. (N. S.) 794; Meisel & Co. v. Nat. Jewelers, etc., 90 Misc. Rep. 19, 152 N. Y. Supp. 913; People v. Title Guarantee & Trust Co., 180 App. Div. 648, 168 N. Y. Supp. 278; Matter of Rothschild, 140 App. Div. 583, 125 N. Y. Supp. 629; In re Duncan, 83 S. C. 186, 65 S. E. 211, 24 L. R. A. (N. S.) 750, 18 Ann. Cas. 657; People v. People's Trust Co., 180 App. Div. 494, 167 N. Y. Supp. 767; Thornton on Attorneys at Law, § 69.

A most recent case expressing the same views is that of State ex rel. Lundin v. Merchants' Protective Ass'n, 105 Wash. 12, 177 Pac. 694. This was a quo warranto case in which this identical appellant was the defendant and in which this precise issue was involved, and the same defenses herein insisted upon were urged. The Supreme Court of Washington, speaking of this defendant, said:

"If it is doing the things that it assumes to do in its articles, it is giving legal advice and counsel, and prosecuting without fee, other than the membership fee, the suits of its subscribers in the police and justice courts, and it is advising them upon all state laws and city ordinances, and will, if need be, prosecute criminally those who have offended against its membership. This is a practice of the law"—citing the cases above cited.

The final contention of the appellant herein is that it is not engaged in the practice of the law, for the reason that its articles declare, and its contracts with its membership agree, that it will furnish to its members legal services through the appointment of attorneys to look after the collection of accounts and bills receivable "and render such other professional service as may be needed

and required by the various members and subscribers thereto," and that thus it is merely an agency for the bringing of attorneys and clients together, and is not itself engaged in practicing law.

That this statement of the objects and purposes of the defendant's incorporation is much too narrow is shown by the certificate which it issues to its membership and by the agreement which it makes with its attorneys. In the first of these it certifies that its members are entitled "to legal advice and consultation on all such personal or private matters without charge, at the office of the attorneys whose names appear on this certificate and who are retained by and at the expense of this corporation." It further certifies that members will receive "free legal advice and information upon all the new state laws and ordinances of this city." It thus appears that the relation of attorney and client thus to be created is not that relation between the listed attorneys and the membership of the corporation, but is that relation between the said attorneys and the corporation itself. They are its retained and paid attorneys. Like every other corporation it must act through the agency of natural persons, and these attorneys are its agents and their acts are its acts, and it, through them, is the actual and responsible actor and adviser of its membership in the various legal matters the aforesaid certificate of membership relates. This interpretation of the defendant's agreement with its membership is enforced by the contract which it makes with its attorneys. The opening clause of said contract designates the corporation as the first party and the attorney or attorneys as the second party and proceeds as follows:

"Whereas the parties hereto are mutually desirous of entering into an agreement whereby the second parties are to represent the first party as its attorneys in the city of San Diego," etc. "Now, therefore, it is mutually agreed by and between the parties hereto that the second parties shall act as attorneys and are hereby retained by said first party as its attorney to render all those certain services to persons, partnerships or corporations in the city and county of San Diego, California, holding membership or memberships in the said the Merchants' Protective Corporation as said services are set forth and specifically mentioned in the certificate of membership issued by said first party to its members," etc.

The complaint herein alleges, and the court finds, that the method of compensation provided to be paid by the defendant to its said attorneys was as follows: A membership fee of $10 per year was paid to it by its members. Of this sum $2 for each member was paid to the said attorneys for their services "as agent and representative" of the corporation in the business of each of its said patrons for the period of one year; the remaining $8 of said fee was retained by said corporation.

This brings us to the final question, which is as to whether such a corporation thus organized, thus employing attorneys as its agents and representatives, and thus dispensing legal advice, counsel, information, and services of the sort usually and generally furnished by regularly admitted and licensed attorneys and counselors to their clients in the practice of their profession, is engaged in the practice of law. The authorities, which are practically unanimous, furnish but one answer to this question, and that answer is well expressed in the case of State ex rel. Lundin v. Merchants' Protective Ass'n, supra, wherein the Supreme Court of Washington, quoting from Ruling Case Law, says:

"The practice of the law is not a business that is open to a commercial corporation. 'Since, as has been seen, the practice of law is not a lawful business, except for members of the bar who have complied with all the conditions required by statute and the rules of the courts, and as these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in. As it cannot practice law directly, it cannot do so indirectly, by employing competent lawyers to practice for it, as that would be an evasion which the law will not tolerate.'" 2 R. C. L. 946; In re Co-op. Law Co., 198 N. Y. 479, 92 N. E. 15, 32 L. R. A. (N. S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879.

The essential element underlying the relation of attorney and client is that of trust and confidence of the highest degree growing out of the employment and entering into the performance of every duty which the attorney owes to his client in the course of such employment. It is the existence of this essential element as the basis of said relation which has called into being the various statutory regulations governing the admission of attorneys and counselors at law and which embody certain requirements of character, integrity, and learning as the prerequisites of such admission to the right and privilege of practicing law. It is the possession or reputation for the possession of these personal qualifications which constitutes, as a rule, the main inducement for the formation of the personal and confidential relation of attorney and client. The intervention of a corporation between the membership it secures and the attorneys it employs, which corporation can in and of itself possess none of these qualifications, obviously leaves out of view the necessity for their existence. The essential relation of trust and confidence between attorney and client cannot be said to arise where the attorney is employed, not by the client, but by some corporation which has undertaken to furnish its members with legal advice, counsel, and professional services. The attorney in such a case owes his first allegiance to his immediate employ-

er, the corporation, and owes, at most, but an incidental, secondary, and divided loyalty to the clientèle of the corporation. This phase of the question was very fully considered in the case of In re Co-operative Law Co., 198 N. Y. 479, 92 N. E. 15, 32 L. R. A. (N. S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879, wherein the court says:

"The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent and it cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, for he would be subject to the directions of the corporation and not to the directions of the client. There would be neither contract nor privity between him and the client, and he would not owe even the duty of counsel to the actual litigant. The corporation would control the litigation, the money earned would belong to the corporation and the attorney would be responsible to the corporation only. His master would not be the client but the corporation, conducted it may be wholly by laymen, organized simply to make money and not to aid in the administration of justice which is the highest function of an attorney and counselor at law. The corporation might not have a lawyer among its stockholders, directors or officers. Its members might be without character, learning or standing. There would be no remedy by attachment or disbarment to protect the public from imposition or fraud, no stimulus to good conduct from the traditions of an ancient and honorable profession, and no guide except the sordid purpose to earn money for stockholders. The bar, which is an institution of the highest usefulness and standing, would be degraded if even its humblest member became subject to the orders of a money-making corporation engaged not in conducting litigation for itself, but in the business of conducting litigation for others. The degradation of the bar is an injury to the state."

We are satisfied that the foregoing principles should be determinative of the case before us. The appellant herein, both in its articles of incorporation and in its agreements with its membership, is assuming to do those things in the way of furnishing legal advice, counsel and services which are usually done by attorneys and counselors in the ordinary practice of the legal profession. In so doing it has attempted to enter a domain which as a corporation it may not lawfully invade. The appellant is a creature of the state, and hence the state possesses the right through the medium of this writ to prevent the unlawful exercise of its chartered powers. This the trial court has by its judgment properly done.

The judgment is affirmed

We concur: SHAW, C. J.; WASTE, J.; LAWLOR, J.; LENNON, J.; MYERS, Justice pro tem.

189 Cal. 514

## CAPUCCIO v. CAIRE et al. (L. A. 6845.)

(Supreme Court of California. Sept. 14, 1922. Rehearing Denied Oct. 14, 1922.)

**1. Appeal and error ⊂=113(1)—Order refusing to vacate decree held not appealable.**

Since an order refusing to vacate a decree is in substance an order denying a new trial, an appeal therefrom is not permissible.

**2. Partition ⊂=19—Stockholders of defunct corporation held to have right of possession necessary to maintain suit.**

Where a charter of a corporation has been forfeited for nonpayment of license taxes, and all claims and demands against the defunct corporation had been satisfied, the stockholders, as the legal or equitable owners of their respective interests in the real estate of the defunct corporation, are entitled to possession thereof, and may maintain a suit for partition under Code Civ. Proc. § 752.

**3. Corporations ⊂=619—Limitation as to invalidation of acts of trustees of dissolved corporation inapplicable to partition suit among stockholders.**

Code Civ. Proc. § 341, subd. 3, as added by St. 1917, p. 381, requiring actions to set aside any action by trustees of a dissolved corporation to be brought within six months, does not apply to an action for partition of real property belonging to the former stockholders, regardless of any attempted revivor of the corporation by the former directors.

**4. Abatement and revival ⊂=17—Objection of other action pending must be specifically pleaded.**

An objection to an action because of the pendency of another action at the time of its institution is in the nature of a plea in abatement, which, being dilatory, must be specially pleaded.

**5. Partition ⊂=27—Suit by stockholders for accounting held not bar to subsequent action by a stockholder in partition of realty.**

A suit in equity for an accounting and to determine the rights and interests of the stockholders of a dissolved corporation is not an action the pendency of which will bar another suit by a stockholder for the partition of real estate formerly belonging to the corporation, the two actions not involving the same cause of action, the same remedy, nor the same parties.

Myers, Justice pro tem., dissenting.

In Bank.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Aglae S. Capuccio against Arthur J. Caire and others. Judgment for plaintiff, and defendants other than Edmund A. Rossi appeal. Affirmed.

J. F. Bluxome and Frank P. Deering, both of San Francisco, for appellants.

D. Freidenrich and Ambrose Gherini, both of San Francisco, and Orrin K. McMurray, of Berkeley, for respondent.

RICHARDS, Justice pro tem. This action was instituted by the plaintiff for the partition of the lands of Santa Cruz Island, situate off the coast of the county of Santa Barbara, and consisting of about 58,800 acres of land, of which the plaintiff alleged that she and the defendants were tenants in common. The facts as set forth in the complaint and as found by the trial court may be briefly summarized as follows: Prior to the year 1911 the said Santa Cruz Island was owned and possessed by a corporation known as the "Santa Cruz Island Company," the capital stock of which was divided into 100 shares, of which the plaintiff herein was the owner and holder of 7 shares, and of which remaining shares the defendants herein were the several owners and holders in various proportions. The license tax of said corporation due to the state of California for the year 1911 was not paid, as a result of which the charter of said corporation was forfeited to the state of California on the 30th day of November, 1911. At the date of said forfeiture the plaintiff, Aglae S. Capuccio, and the defendants, Arthur J. Caire, Fred F. Caire, Albina C. S. Caire, and Delphine A. Caire, constituted and were the directors of said corporation, and, under the provisions of the law then obtaining with relation to the properties and affairs of corporations whose charters had been forfeited, became the trustees of said defunct corporation for the purpose of liquidation of its affairs; at the time of the forfeiture of the charter of said corporation there was no provision of law for the revivor or rehabilitation of corporations whose charters had been thus forfeited, but by the amendment of the statute in 1913 (Stats. 1913, p. 680) a method was provided for the revivor of the charters of corporations which had theretofore been or which might thereafter be forfeited; and in accordance with the method thus provided the said trustees of said corporation undertook to meet and take the necessary steps for the revivor of said corporation. Four of the five trustees, owning 79 of the 100 shares of the stock in the corporation were present at such meeting, and acted unanimously in taking the requisite steps to revive the corporate charter, but the plaintiff herein was not present at such meeting, and did not consent thereto, and it is not claimed that by any act or omission on her part she has ever consented to the revivor of said corporation or to any other of the subsequent acts of said revived corporation or of the trustees or directors thereof in attempting to deal with the property owned by said corporation at the date of the forfeiture of its said charter. Immediately after the attempted revivor of said corporation the trustees who had sought to accomplish the same turned over all of the assets of the theretofore defunct corporation in their hands, including the real estate in question herein, to the revived corporation, and the latter has ever since been in the possession and use thereof. In the month of January, 1917, a meeting was called of the trustees of the formerly defunct corporation, at which a resolution was attempted to be adopted, confirming the title of the revived corporation to the real estate in question and authorizing a conveyance thereof by said trustees to said corporation; and, in accordance with said resolution, the four of said trustees who had been present and adopted the same joined in a conveyance purporting to convey the whole of said real estate to said revived corporation. The plaintiff herein, however, although notified of such meeting, did not attend the same, nor join in the execution of said conveyance, but, on the contrary, expressly protested against the action taken at said meeting and the execution of said conveyance pursuant thereto.

In the meantime there had been several actions instituted and proceedings taken which have an important bearing upon the present litigation. In the year 1912 one Edmund A. Rossi, to whom had been transferred the interest of his mother, Amelia A. Rossi, in said corporation and the properties thereof, commenced an action in the superior court of the city and county of San Francisco against the former directors and then trustees of said corporation to obtain a judgment, directing the distribution of certain moneys in the hands of said trustees among the stockholders of the defunct corporation, and also directing the sale of the real estate and personal property thereof, and the like distribution of the proceeds among said stockholders in the proportions of their several interests in said defunct corporation. The plaintiff herein was joined with the other trustees of said corporation as a defendant in said action, but, upon being brought into court, joined interests with the plaintiff therein as against her cotrustees. Upon the issues framed in said action the trial court made and entered an interlocutory judgment, declaring that the charter of the corporation had been forfeited on November 30, 1911; that the then directors thereof had thereby become trustees of said defunct corporation and its stockholders charged with the duty of liquidating its affairs and distributing among its stockholders their respective interests in its property after the payment of its debts. This decree directed the trustees to apply the money on hand to the settlement of the claims of creditors, and to render an account of the same. While this was in process of being accomplished the plaintiff in that action applied to the court for, and was granted, an order requiring the

trustees to distribute to the plaintiff and other stockholders the surplus funds in their hands, and also to sell the real estate and personal property of the corporation in their possession, at public auction, and similarly distribute the proceeds arising from said sales. An appeal to this court was taken from this latter order and also from the order of the trial court refusing to vacate its interlocutory judgment and grant a new trial. Upon the determination of these appeals this court held that the title to the properties of a corporation prior to its dissolution through the forfeiture of its charter was wholly vested in the corporation, and that the directors of such corporation did not, by virtue of their office, hold or possess any title to, or any interest in, the property of the corporation; that the statute providing for the forfeiture of the charters of corporations, while it provided that the former directors thereof should become trustees of the corporation and its stockholders, did not purport to invest such trustees with any title to the property formerly belonging to such corporation, but merely with the temporary right of possession thereof for the purpose of settling its corporate affairs; and that the title to the property of such corporation belonged, upon the forfeiture of its charter, to the persons who were its stockholders when it ceased to be a corporation, citing Havemeyer v. Superior Court, 84 Cal. 362, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192.

This court, however, further held that it was not a necessary part of the statutory duty of the trustees to find a buyer for, or to sell the lands of the corporation, otherwise than might be necessary to settle its corporate affairs, and that if they had money enough on hand to pay all debts and expenses, and if all other corporate affairs were disposed of, it would be no breach of their duty to deliver the possession of the land to the stockholders as tenants in common according to their interests therein; and that in the case before it the evidence did not sufficiently show any such breach of duty on the part of the trustees of said corporation in the course of the liquidation of its affairs as would serve to justify the making of the orders appealed from; it accordingly reversed the case. Rossi v. Caire, 174 Cal. 74, 161 Pac. 1161.

The decision of the above-entitled cause was handed down by this court on December 16, 1916. Thereafter, and on August 28, 1917, the said Edmund A. Rossi commenced another action in the superior court of the city and county of San Francisco against the same defendants as trustees of said corporation, and also individually, to obtain an accounting and distribution, according to their respective interests, to the stockholders of said corporation of the property owned by the corporation at the time of the forfeiture of its charter and of the proceeds thereof in the hands of the defendants as such trustees. The plaintiff in the present action was also made a defendant in that action both individually and as such trustee, and, upon appearing therein, joined with the plaintiff in seeking a like relief. The other defendants interposed a plea of the statute of limitations, alleging the action to be barred by subdivision 3 of section 341 of the Code of Civil Procedure as amended July 27, 1917 (St. 1917, p. 381), and which, as thus amended, provided that an action "to set aside or invalidate any action taken or performed by a majority of the trustees of any corporation heretofore or hereafter dissolved by operation of law, including the revivor of any such corporation," would be barred unless brought within six months. This court declined to give application of the foregoing code amendment to that case, for the reason that a reasonable time had not elapsed between the adoption of said amendment and the institution of that action. The defendants, other than the plaintiff herein, interposed as a further defense to said action the facts above set forth showing the attempted rehabilitation of the corporation under the act of 1913, averring that the corporation had been restored to life thereby, and had since been functioning as a corporation, and that the entire interests of the former stockholders had been thereby vested in said revived corporation. The trial court adopted this view, and denied both the plaintiff in that action and the plaintiff in this action, who was a defendant therein, the relief which they each had sought. They united in prosecuting an appeal to this court, and thus the question as to the rights of a stockholder in and to his share of the properties of a defunct corporation, who had not consented to its revivor, was squarely presented for determination. Dealing with the precise facts presented in the present case, this court said:

"It is plain, in view of our decisions, that upon the death of this corporation without any existing provision of law for its rehabilitation, the corporation could no longer have any interest in the property, and those who were its stockholders at the time of its death were immediately vested with the right to have its affairs settled by the trustees designated by the statute for that purpose and the property remaining after such settlement distributed among them according to their respective interests. Such former stockholders immediately became the beneficiaries of a statutory trust created solely for that purpose. The former stockholders either had the equitable title to the property of the former corporation, subject to a charge in favor of the creditors to be enforced by the former directors as trustees for that purpose; or they had a legal title in such property subject to a power in the trustees to dispose of so much thereof as was necessary to pay the creditors."

The court then proceeded with a discussion of the effect of the subsequent legislation providing for the revivor of corporations whose charters had been forfeited prior to the enactment of such legislation, holding that the Legislature, under the warranty of the constitutional provision relating to the remission of forfeitures, had power to enact such retroactive legislation. The court then proceeds to say:

"We are forced to the conclusion, however, that so construing the rehabilitation provision here involved, its enforcement against a nonconsenting former stockholder who diligently asserted his rights, would be an impairment of a vested right in property prohibited by both state and federal Constitutions. In this regard the very able argument of learned counsel for respondents to our minds fails to give sufficient force to certain facts which, in view of our decisions, must be conceded, and which appear to us to make the question a very simple one. We are not dealing here with an unenforced penalty. The judgment of death pronounced by the law on this corporation had been carried into effect. The corporation was dead, and had died without any existing provision of law for its revivification. Taking for the purpose of this decision, the view most favorable to respondent, the legal title to the property of the former corporation had wholly vested in the trustees designated by the statute for the purposes of the trust declared by the statute, which were solely the liquidation of the affairs of the corporation and the distribution of the property remaining among the former stockholders. Subject to the expenses of the trustees and the payment of creditors, the former stockholders were the sole beneficiaries and the absolute owners in equity of the property. Under all the definitions this was certainly a vested property right. It cannot matter why such penalty of forfeiture of charter was imposed and enforced, or what the obligation to each other of the former stockholders would have been had such penalty not been enforced. The status with relation to the property had been created, and the terms of the trust upon which it was held defined. We do not see how it can be held that the rights of former stockholders under the trust defined by the statute, the right subject to the payment of the former corporation debts and expense of liquidation, to have the property distributed among them, was not a vested property right secure against impairment by subsequent act of the Legislature."

The court, in accordance with these views, reversed the judgment and order of the trial court, and remanded the cause for further proceedings therein. Rossi v. Caire, 186 Cal. 544, 199 Pac. 1042.

While the above-entitled action was pending in the trial court or on appeal the plaintiff herein commenced the present action for partition of the lands and premises of said corporation known as Santa Cruz Island. In her complaint herein she set forth at length the facts hereinbefore recited, relating to the forfeiture and subsequently attempted revivor of said corporation. She further expressly averred that the trustees of said defunct corporation, upon its attempted revivor, had divested themselves as trustees of all of its properties and effects, and had transferred the entire possession and control thereof to said revived corporation, which had, ever since said acts, been in the full possession and control thereof.

The plaintiff further averred that—

"All debts of said dissolved corporation and all claims and demands against it have long since been paid, satisfied and discharged."

The defendants upon their appearance did not deny these averments, but, on the contrary, expressly affirmed the same in their pleadings, alleging that their transfer of the possession and ownership of all of the property and effects of said former defunct corporation to the revived corporation was so far complete as to invest the latter with the full title to all of said properties and effects to the exclusion of the plaintiff and all of the other stockholders from all ownership and interest therein, other than as stockholders of and in the revived corporation.

The defendants did not deny the plaintiff's averment that all of the debts, claims, and demands against said corporation had been paid and satisfied, but contented themselves with the averment that there were certain unsatisfied and outstanding credits belonging to said corporation. The defendants further pleaded, by way of both demurrer and answer, that plaintiff's alleged cause of action was barred by the provisions of subdivision 3 of section 341 of the Code of Civil Procedure. Upon the issues as thus presented the trial court made its findings of fact and conclusions of law, wherein it found that the charter of said corporation had become forfeited as alleged in the plaintiff's complaint, and that the trustees thereof, as alleged by plaintiff, had taken steps for the revivor of said corporation provided for in the subsequent acts of the Legislature permitting such revivor as specifically set forth in the defendants' answer, but that the plaintiff, as one of the trustees thereof and also as a stockholder therein, had never consented to such revivor. The court further found that immediately after the issuance by the Secretary of State of the certificate showing the rehabilitation of the corporate existence of said corporation as a result of such action on the part of a portion of its trustees on August 28, 1913, the four trustees who had taken such steps resulting in the issuance of such certificate had delivered all of the assets of the corporation and the possession of all of its properties to said revived corporation, which had ever since been in the use and possession thereof. The court further found that no action had ever been commenced to set aside or invalidate the revival of said corporation, nor to invalidate or set aside the action tak-

en by the said majority of the said trustees of said corporation. The court further found that out of the assets of the property of said corporation other than its real estate, all debts of the said corporation had been paid. Finally the court found that by the forfeiture of the charter of said corporation the stockholders thereof had become tenants in common of the real property thereof subject to the payment of its debts, and that at the time of the commencement of this action the plaintiff herein and the defendant Edmund A. Rossi herein were cotenants in the ownership of said property with the other defendants herein, and held and possessed the same as such tenants in common in the respective proportions of their former interests and holdings as stockholders of said corporation prior to the forfeiture of its charter; and that the real property in question herein was susceptible of partition among the parties respectively entitled thereto as such tenants in common, and that such partition should be made among them according to their said several interests therein.

[1] As conclusions of law from the foregoing findings of fact the trial court repeated its finding as to the respective rights, interests, and ownerships of the said parties as tenants in common of said property, and directed the entry of an interlocutory decree for the partition thereof among them according to their respective interests therein. From the interlocutory decree accordingly entered the appellants herein have prosecuted this appeal. They have also appealed from an order subsequently made and entered by the trial court, refusing to vacate and set aside said decree, but since said order is in substance an order denying a new trial, the appeal therefrom is not permissible, and is therefore dismissed.

[2] The first contention of the appellants herein is that on the 16th of May, 1918, the date of the commencement of this action, the plaintiff herein was neither in possession, nor had the right of possession, of the real property described in her complaint, or of any portion thereof, and hence could not maintain this action under the express terms of section 752 of the Code of Civil Procedure as it read at the date of the commencement of the action. The appellants cite, in support of their said contentions, the cases of Jameson v. Hayward, 106 Cal. 682, 39 Pac. 1078, 46 Am. St. Rep. 268, and Geary v. Espinosa (Cal. App.) 196 Pac. 90. As to the first of these cases it may be said that the construction which had long theretofore been placed on the language of section 752 of the Code of Civil Procedure was fully recognized and adopted, to the effect that a party entitled to the present possession of an undivided interest in real estate, though not in the actual possession thereof, was entitled to commence and maintain an action in partition. Jameson v. Hayward, supra, pages 686, 687, and cases cited. As to the second of the cases above cited, it simply reaffirms the doctrine and construction enunciated in the former case. The question, then, is whether at the time of the institution of the present action the plaintiff was either in possession or had the right of present possession of the premises sought to be partitioned, or of any portion thereof. This question must, we think, be answered in the affirmative as to the plaintiff's present right of possession of her interest in said premises at the time of the institution of this action. In the case of Rossi v. Caire, 174 Cal. 74, 161 Pac. 1161, it was, as we have seen, definitely decided that upon the dissolution of a corporation through forfeiture of its charter under then existing laws, the corporation became no longer capable of holding title or the possession of property, and that its former property belonged to the persons who were its stockholders at the time it ceased to be a corporation, subject only to the right of possession in its trustees for the purpose of settling the corporate affairs; and that if such trustees "had money to pay all debts and expenses, and other corporate affairs were disposed of, they might deliver the possession of the land to the stockholders as tenants in common to do with it what they pleased."

In the second case of Rossi v. Caire, 186 Cal. 544, 199 Pac. 1042, much discussion was indulged in in the briefs of the respondents upon that appeal as to the correctness of the statement in the former case that upon the forfeiture of its charter the title to the property of the corporation vested in the stockholders subject to the claims of creditors and the expenses of liquidation and to the right of possession in the trustees for the purposes of such liquidation; it being claimed by the respondents that the title to the property vested in such trustees. The court declined to discuss or decide this controversy in that case, but, assuming, purely for the purpose of the decision, that the position of the respondents was well grounded in this regard, held that it would nevertheless remain true that the former directors would hold the title simply as trustees for the purpose of their statutory trust with the former stockholders as the sole beneficiaries, subject to the claims of creditors. The court in this connection said:

"The former stockholders either had the equitable title to the property of the former corporation subject to a charge in favor of the creditors to be enforced by the former directors or trustees for that purpose, or they had the legal title to such property subject to a power in the trustees to dispose of so much thereof as was necessary to pay the creditors"

—but the court went much farther in the decision of that case in its determination of

matters germane to the matter before us, since the court therein held that, under the law as it then existed, providing for the forfeiture of the charters of corporations for the nonpayment of their license taxes, but not providing for their subsequent revivor, the rights of the stockholders, whether legal or equitable, in the property of such defunct corporations was a vested right which could not be injuriously affected by any attempt at the revivor of such corporations under the terms of later legislation undertaken without their consent. These matters having been thus determined, it would necessarily follow that the vested right of these nonconsenting stockholders to their interest in the property of this corporation would not only have been unaffected by any action on the part of any number of the trustees of said corporation looking to its revivor or to the delivery of possession of any or all of the property of the defunct to the revived corporation, but that such vested right, whether legal or equitable, to the ownership and to the possession of their said interests in such property would become absolute when the statutory trust of the former directors or trustees of the dead corporation had been fulfilled and when there no longer existed any debts, claims, or demands against said corporation which would require the further possession or right of disposition thereof in the trustees in order to their satisfaction; in the instant case it affirmatively apepars that at the time of the institution of this action all claims and demands against the defunct corporation had long since been satisfied and discharged out of the money or personal property thereof in the hands of its trustees, and that as to the real property in question here there no longer existed any right or duty in said trustees under or by virtue of their statutory trust affecting said real property, and hence that these respondents, as the legal or equitable owners of their respective interests in said real property, were entitled to the possession thereof. They were therefore entitled to institute and maintain this action for the partition of said real property as between themselves and the other co-owners thereof. Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64; Luco v. De Toro, 91 Cal. 422, 18 Pac. 866, 27 Pac. 1082; Varni v. Devoto, 10 Cal. App. 304, 101 Pac. 934. This conclusion is in no wise affected by the fact that the appellants herein had undertaken as early as 1913 to turn over the possession of the properties of the former corporation to the recently revived corporation, or by the fact that in the year 1917 they had also undertaken to convey the real property which is the subject of the present action to the revived corporation. Neither of said acts on the part of said appellants, assuming that they had any validity, could have done more than to invest the corporation, which they had sought to revive, with whatever rights they possessed or had power to deal with, but not with any vested right which the respondents had then become and have since remained invested with. The effect, if any, upon the status of the parties to the present action would only be that of placing the said revived corporation in the shoes of the appellants as co-owners with the respondents in the property in question. We think, however, that on the dissolution of the corporation the legal title to the corporate real estate became vested in the several stockholders according to their then interests in the stock.

[3] The appellants' next contention is that this action is barred by the provisions of subdivision 3 of section 341 of the Code of Civil Procedure, requiring certain actions to be brought within six months. Said subdivision of said section reads as follows:

"To set aside or invalidate any action taken or performed by a majority of the trustees of any corporation heretofore or hereafter dissolved by operation of law, including the revivor of any such corporation."

The difficulty with this contention is that the present action is not such an action as is contemplated by the aforesaid amendment to the Code of Civil Procedure. It is an action for the partition of certain real property of which the plaintiff became the legal or equitable owner of an undivided interest in the year 1911, and of which interest she had remained invested up to the time of the institution of this action. As to such interest she was entirely unaffected by any action undertaken by the appellants herein as trustees of the former corporation from which her said interest had been derived, since she had never consented to such action. Rossi v. Caire, supra. There had, therefore, been no action taken or performed by the appellants as trustees of said former corporation, whether looking to the revivor of said corporation or the possession, control, or ownership of its properties, which was valid as affecting her interests, or which it required any action or proceeding on her part to have set aside. Not being required or obliged to bring any such action or proceeding she could not be barred from the institution or maintenance of her action for partition because she had not done so; she was simply in the position of any other owner of an undivided interest in real property seeking to have the said property divided between herself and her co-owners thereof through the medium of an action for partition, and her equal right to maintain such an action could not be taken away by any statute purporting to require her to seek to have set aside or invalidated some proceeding on the part of other persons to which she had in no manner consented and by which her vested property rights were in

no wise affected, and in the legality or illegality of which she had no concern.

[4] The final contention of the appellants is that the plaintiff ought not to have been permitted to maintain the present action by reason of the pendency of another action at the time of its institution, to which she was a party and to which the appellants herein and also her corespondent Rossi herein were also parties, and which, according to the appellants' contention, involved the same properties and the same cause of action as are involved in the present action. The appellants refer to the second case of Rossi v. Caire, supra, which appears to have been pending in the superior court of the city and county of San Francisco at the time of the commencement of the present action. It may be noted upon the threshold of this contention that such an objection or defense against the institution and maintenance of the present action would be in the nature of a plea in abatement, which, being a dilatory plea, must, under well-settled rules of procedure, be specially pleaded. The transcript before us contains nothing to indicate that such a plea was ever presented by the defendants in this action to the trial court in any pleading. Not having been so presented it would have been waived under well-settled rules regarding dilatory pleas.

[5] The appellants, however, assert in their brief that they did in fact apply to the superior court of the county of Santa Barbara, in which the present action was begun and was pending, for leave to file a supplemental answer setting up this defense in January, 1920, about a year and a half after the commencement of the present action, and when it was about to proceed to trial upon the pleadings and issues long since presented; and that the court denied their said motion. We cannot say, upon such a meager and quite irregular suggestion, that it was an abuse of discretion for the trial court to have refused to permit the making of such a belated defense; but, aside from this, it does not appear from the state of the record before us in the cases of Rossi v. Caire, supra, and of the present appeal, that such a defense was ever available to these appellants. The action of Rossi v. Caire, instituted in the city and county of San Francisco on August 28, 1917, by a plaintiff other than this plaintiff was not an action for partition of the real property involved in the present suit. Had it been such an action, it could not have been maintained in a county other than that in which said property was situated. Code Civ. Proc. § 392. It did not purport to seek a partition of real estate, but was simply a suit in equity, involving both real and personal property and requiring an accounting and determination of the rights and interests of the parties to said action therein; one of the essential parties to the present action, namely, Santa Cruz Island Company, which the appellants claim has succeeded to all of the rights and interests of the respondents and also of all of the other parties to the present action, was not a party to the action in Rossi v. Caire, supra, and hence could not be bound by any judgment rendered therein. Enough has been said to show that these two actions did not involve the same cause of action, the same properties, the same remedies, or the same parties, and hence that the pending of the one would not have been a sufficient defense against the institution and maintenance of the other.

We perceive no errors in the record upon this appeal. The judgment is affirmed.

We concur: SHAW, C. J.; LENNON, J.; WASTE, J.; LAWLOR, J.

MYERS, Justice pro tem. I dissent. I dissent from the judgment and from that portion of the opinion which holds that the action is not barred by the statute of limitations. Code Civ. Proc. § 341, subd. 3.

I agree with the opinion that the right of the plaintiff to maintain this action in partition is necessarily predicated on her present right to the possession of the property involved. Her claim of present right to possession is in turn necessarily predicated upon the claim that the "action taken or performed by a majority of the trustees," in August, 1913, whereby they surrendered the possession of the property to the revived corporation, was *invalid*. Therefore I think that this action is one to "invalidate the action taken by a majority of the trustees," and comes within the terms of the statute. The plaintiff recognized this, and in her complaint she alleges the *invalidity* of this transfer. She also recognized that this statute is applicable, and sought to avoid it by alleging that this transfer was *fraudulently* made; but the trial court found against her on that issue. She also sought to avoid the statute by alleging that she had no knowledge of this transfer until April, 1918, but the trial court made no finding on this issue. The trial court expressly found that the said transfer was made by the trustees "in violation of their duties as trustees." This was in effect, a finding that said transfer was *invalid*.

With respect to the question of the applicability of this statute of limitations, the case of Rossi v. Caire, 186 Cal. 544, 199 Pac. 1042, is precisely analogous to the instant case. That was an action against the director trustees for an accounting and distribution of the assets. In order to maintain that action it was necessary to hold that the plaintiff was entitled to the present possession of those assets (just as it is necessary here to hold that the plaintiff is entitled to the present possession of the real property). That action was

therefore an indirect attack upon the *validity* of the transfer made by the trustees in August, 1913, just as this action is an indirect attack upon the validity of the same action taken and performed by the same trustees.

The decision of this court in that case holds that this statute is applicable to that case, but holds also that the plaintiff therein was relieved from the operation of the statute because of the fact that he commenced his action within a reasonable time (one month) after the taking effect of the statute. Applying the same rule to this case wherein the action was not commenced until 10 months after the statute took effect, we should hold that it is barred.

The effect of this decision, together with the two which preceded it in the Rossi Cases, is that all corporations which forfeited their charters prior to 1913, and thereafter revived them, became thereby divested of all their property and assets. As a matter of substantive law, they could reacquire such title only by means of conveyances from all of their stockholders. In the case of corporations having a large number of stockholders this would be a practical impossibility. I presume that it was to meet this very situation that this statute of limitations was enacted, to operate as a statute of repose and to afford a practical means by which the property of a revived corporation would, in effect, become revested in it, after the lapse of six months, unless some action should be instituted in the meantime. The strict and narrow construction adopted in the main opinion has the effect of nullifying the statute to the extent that it might afford a practical remedy for the unfortunate situation above referred to.

This court has frequently declared that "statutes of limitation are vital to the welfare of society, and are favored in the law." It seems to me proper that this one, at least, should be liberally construed with a view to make effective the evident purpose thereof.

---

189 Cal. 507

## ROSSI v. CAIRE et al. (S. F. 10233.)

(Supreme Court of California. Sept. 13, 1922.)

**Appeal and error ⊂=69(1)—In corporation dissolution proceedings interlocutory judgment, declaring plaintiff to be stockholder and directing accounting, not appealable.**

Under Code Civ. Proc. § 963, specifying interlocutory judgments from which an appeal may be taken, in corporation dissolution proceedings, an interlocutory judgment, declaring plaintiff was a stockholder, directing trustees to file an inventory and an accounting of corporation's property, and reserving for future disposition all further proceedings concerning the accounting and the settlement, was not appealable.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Edmund A. Rossi against Arthur J. Caire and others. From an interlocutory judgment establishing the status of plaintiff as a stockholder, defendants appeal. On motion to dismiss the appeal. Motion granted.

Frank P. Deering and J. F. Bluxome, both of San Francisco, for appellants.

D. Freidenrich and Ambrose Gherini, both of San Francisco, for respondent.

PER CURIAM. Motion to dismiss appeal from the interlocutory judgment herein. The facts of this case are sufficiently set forth in our former decisions in the cases of Rossi v. Caire, 174 Cal. 74, 161 Pac. 1161, and Rossi v. Caire, 186 Cal. 544, 199 Pac. 1042. In the latter of these cases the judgment in the defendants' favor was reversed, and the cause remanded for further proceedings consistent with the views expressed in that decision. Thereafter the trial court made and entered its interlocutory judgment in the plaintiff's favor, declaring the status of the plaintiff as a stockholder of the Santa Cruz Island Company, a defunct corporation, and directing the defendants as trustees thereof to render and file a full inventory and accounting of the properties of said corporation in their hands as the trustees thereof, and take all necessary and proper steps to obtain possession of all such properties. The decree further orders:

"That all further proceedings in the matter of the accounting and settlement of the affairs of the Santa Cruz Island Company are reserved for disposition as may be hereafter determined and adjudged therein."

It is from this decree that the present appeal has been taken, and the ground of the respondent's motion to dismiss said appeal is "that the said interlocutory decree appealed from is a nonappealable order."

We think the motion must be granted. In the first case of Rossi v. Caire, 174 Cal. 74, 161 Pac. 1161, this court, in discussing a similar decree in a previous action between the same parties, for substantially the same relief, held that the judgment in that action "merely declared the status of the plaintiff as a stockholder, the number of his shares, his right to distribution, and directed the trustees to give notice to creditors and file an inventory of the assets of the corporation. In its nature and effect it was preliminary and interlocutory, and not final." The appeal in that case was from certain subsequent orders made upon the filing of such inventory, and which directed the sale of the properties and distribution of the funds

of the corporation as reported therein. This court held that these orders were appealable as final judgments, and that upon such appeal "there may be a review of the previous proceedings, including the sufficiency of the findings to support the interlocutory judgment. These rulings cover the precise situation as presented upon the appeal, except that the appeal in this case is from the interlocutory judgment itself. Said interlocutory judgment is not one of the interlocutory judgments, orders, or decrees specified in section 963 of the Code of Civil Procedure, from which appeals are permitted to be taken, and the court is therefore without jurisdiction of the attempted appeal. Krotzer v. Clark, 178 Cal. 736, 174 Pac. 657. It follows that this appeal must be dismissed; and it is so ordered.

SHAW, C. J., and LENNON, LAWLOR, WILBUR, and WASTE, JJ., and RICHARDS, Justice pro tem., concur.

---

(58 Cal. App. 719)

**KEY et al. v. VIDOVICH et al. (Civ. 4165.)**

(District Court of Appeal, First District, Division 2, California. Aug. 5, 1922.)

**1. Reformation of instruments ⟹44—Oral evidence admissible to show mistake though contract within statute of frauds.**

Though a contract for the sale of real estate was within the statute of frauds, where defendants pleaded mistake and asked for a reformation of the contract, oral testimony was admissible to show whether or not a mistake was made.

**2. Vendor and purchaser ⟹138—Knowledge of incumbrance does not destroy effect of covenant.**

Where a vendor contracted to convey land free from incumbrances, the vendees' knowledge of the existence of an incumbrance did not destroy the effect of the covenant contained in the contract.

**3. Reformation of instruments ⟹45(3)—Evidence insufficient to show mistake in not providing for sale subject to incumbrance.**

In a suit to reform a contract for the sale of land, providing for conveyance free from incumbrances, excepting certain incumbrances, evidence, showing merely that in the negotiations an incumbrance was mentioned, and the vendees knew thereof, was insufficient to show a mistake justifying a reformation.

**4. Vendor and purchaser ⟹339—Tender unnecessary before suit, where vendor had parted with title.**

Where no question of tender and demand was raised when vendors and purchasers came together for final settlement, and no conveyance was made because of a dispute about an incumbrance, and thereafter the vendor sold to other parties, it was not necessary that the vendees should tender, or offer to tender, the remaining purchase money before suing to recover the advance payment.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by S. L. Key and another against B. Vidovich and another. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

Henry L. Meyers and G. L. Aynesworth, both of Fresno (L. N. Barber, of Fresno, of counsel), for appellants.

U. G. Hayden, of Fresno, for respondents.

STURTEVANT, J. The plaintiffs sued the defendants to compel the repayment to them of $1,000, theretofore deposited as an advance payment on a purchase of real estate. The defendants filed an answer and a cross-complaint, and were awarded a judgment on their cross-complaint. The plaintiffs have appealed from the judgment.

The parties signed a paper in words and figures as follows:

"We, the undersigned, Charles Dubbs, and S. L. Key of the county of Fresno, state of California, hereby agree to purchase of and from B. Vidovich the following described real property, situated in the county of Fresno, state of California, to wit:

"Lots Nos. 9 and 10 in section 29, twp. 13 N. of range 17 E. of M. D. B. & M. base. Known as 40 acres in the Empire Colony, and belonging to said B. Vidovich. Furnish deed and certificate of title showing same free from incumbrance.

"For the purchase price of thirty-five thousand ($35,000) dollars, payable as follows: One thousand ($1,000.00) dollars cash on the execution of this contract, and the balance of thirty-four thousand ($34,000) dollars to be paid fifteen days from March 10, 1920.

"In the event that we fail to make said payment of $34,000 on receipt of said certificate of title said cash payment of $1,000.00 is to be forfeited for nonperformance of this contract.

"We agree to pay the taxes for the year 1920–1921.

"All horses and farming tools and implements that have been heretofore used on said ranch are to be part and parcel of said ranch.

"Possession of said premises is to be given to us five days after the final payment, as above stated, has been made, and we hereby agree that said present owner may occupy the house on said premises for a period of thirty days after said final settlement.

"Insurance policy on said property shall be transferred. [Signed] Charles Dubbs.
"S. L. Key.

"I hereby accept the terms in the sale of the above described property made by my agent, E. B. Wilson and agree thereto.
"B. Vidovich.
"Leni Vidovich.

"Dated: Fresno, California, March 10, 1920."

By their cross-complaint the defendants contended that the instrument above set forth did not express truly the contract as made by the parties, and that the real contract made by the parties was as follows (the portions which were alleged to have been omitted by and through mistake are in italics):

"We, the undersigned, Charles Dubbs and S. L. Key, of the county of Fresno, state of California, hereby agree to purchase of and from B. Vidovich the following described real property, situated in the county of Fresno, state of California, to wit:

"Lots Nos. 9 and 10 in section 29, Twp. 13 N. of range 17 E. of M. D. B. & M. base. Known as 40 acres in the Empire Colony, and belonging to said B. Vidovich. *Said B. Vidovich* to furnish deed and certificate of title showing same free from incumbrance, *except taxes for the year 1920, water right agreement with Fresno Canal & Land Corporation, recorded in Volume Y of Covenants, page 137, Records of Fresno County, California, and agreement to sell and deliver raisins produced on said premises to the California Associated Raisin Company, recorded in volume 95 of Covenants, page 281, records of said Fresno county, all of which incumbrances we agree to assume.*

"For the purchase price of thirty-five thousand ($35,000) dollars, payable as follows: One thousand ($1,000) dollars cash on the execution of this contract, and the balance of thirty-four thousand ($34,000) dollars to be paid fifteen days from March 10, 1920.

"In the event that we fail to make said payment of $34,000 on receipt of said certificate of title said cash payment of $1,000 is to be forfeited for nonperformance of this contract.

"We agree to pay the taxes for the year 1920–1921.

"All horses and farming tools and implements that have been heretofore used on said ranch are to be part and parcel of said ranch.

"Possession of said premises is to be given to us five days after the final payment, as above stated, has been made, and we hereby agree that said present owner may occupy the house on said premises for a period of thirty days after said final settlement.

"Insurance policy on said property shall be transferred. [Signed] Charles Dubbs.
"S. L. Key.

"I hereby accept the terms in the sale of the above-described property made by my agent, E. B. Wilson, and agree thereto.
"B. Vidovich.
"Leni Vidovich.

"Dated: Fresno, California, March 10, 1920."

The trial court made findings in which it specifically reformed the contract as the defendants claim the contract should have been worded, and thereupon it rendered a judgment enforcing the same.

[1] The appellants contend that the contract was one that fell within the statute of frauds, and that oral testimony should not have been permitted to alter the same. The general rule is as appellants contend, but as the defendants had interposed a cross-complaint based on the ground of mistake, although the contract in question fell within the statute of frauds, oral testimony was admissible to show whether or not a mistake had been made. F. P. Cutting Co. v. Peterson, 164 Cal. 44, 127 Pac. 163.

Commencing a few days before March 10th and extending over nearly the whole of the rest of the month of March, the parties and their agents were discussing the real estate deal, evidenced at least in part by the instrument herein first set forth. There is much testimony in the record to the effect that the plaintiffs were informed at an early date that the defendants were members of the California Associated Raisin Company; that they were also informed that the defendants had been complying with the terms of their contract, and were members in good standing. There is no evidence that the plaintiffs objected to the raisin contract except as is hereinafter mentioned. As from the beginning, the parties discussed two different purchase plans. One plan was that the transaction should be for cash. The other plan was that the sale should be made on a cash payment at the time of the sale and the balance to stand as a lien, and, in the latter plan the total sales price was to be higher than in the cash plan. There is no testimony in the record that the plaintiffs ever expressly agreed, orally or in writing, to take the property for a stated consideration subject to the raisin contract. Just before the paper was signed, the vendor and the vendees commenced to reach agreements regarding the various covenants. Thereupon Mr. Wilson, the agent of the vendor, commenced to make notes regarding the covenants to be inserted in the contract of sale. Later, when all of the covenants seemed to have been agreed upon, he took his notes to a typist of his own selection, and in a few minutes returned with a formal typewritten contract. With regard to the passages, inserted in the contract by the decree made by the trial court, there is no evidence that Mr. Wilson had taken down any notes on those subjects, nor that the paper as written and produced by him omitted any provisions that the parties had orally expressly agreed to. The notes made by Mr. Wilson were not produced, nor were the same called for. Although seven or eight persons were present at the various conversations that were held prior to the execution of the written instrument, no one of the witnesses testified that the vendees had expressly agreed at any time to take the property subject to the raisin contract. The most that was testified to in that behalf was that by reason of certain statements made it manifestly appeared that the vendees knew of the existence of said contract at the time that the contract of sale was executed.

On the 25th day of March, the date that

the final payments were to be made, the attorney for the vendees called attention to the fact that the raisin contract was so worded as to constitute it an incumbrance. When he stated the point the vendor and the vendor's agents controverted the legal proposition that such a contract did constitute an incumbrance. Then it was for the first time that a controversy arose as to whether or not the written instrument signed by the parties fully and fairly stated the agreement which they had made.

[2] In view of the pleadings in this case it is necessary for us to consider the effect of the evidence introduced as applicable to an action at law and as applicable to an equitable action brought to reform the executory contract hereinabove set forth. Taking up first the action at law, it may be argued that the trial court was entitled to receive in evidence the formal written contract, and for the purpose of interpreting the terms of that instrument, that the trial court would be entitled to refer to the circumstances under which it was made. Civ. Code, § 1647. And it may be argued that, in exercising that power, it had the right to consider testimony showing that the purchasers signed the executory contract *knowing* of the existence of the raisin contract as an incumbrance. But such knowledge on their part would not destroy the effect of the covenant contained in the contract. In the case of Funk v. Voneida, 11 Serg. & R. (Pa.) 109, 14 Am. Dec. 617, the court was considering the effect of an incumbrance that had been duly recorded and of which the purchaser had constructive notice. At page 112 of 11 Serg. & R. (Pa.) (14 Am. Dec. 617) the court said:

"It is no answer to his complaint, to say, it was his duty to search the record, and to have protected himself by some special covenant, against this specific incumbrance. It was no part of this case, that he had actual notice; but if he had, it could make no difference. The plaintiff covenanted against all incumbrances. The rule as to the vendee, is, caveat emptor; so, let the vendor take care of the covenants he enters into. There was no special stipulation on the subject, and the plaintiff might safely rely on the general one. Notice of the mortgage would make no difference, as was determined in Levit v. Witherington, 1 Lutw. 317."

In the case of Smith v. Lloyd, 29 Mich. 382, the court was considering a general covenant against incumbrances, which expressly excepted a certain mortgage in the sum of $7,300. It transpired that the mortgage, principal and interest, amounted to $7,537. The purchaser contended that he was not liable for the excess. On page 388 the court said:

"In an action of covenant like this, I see nothing in the suggestion that this clause was sufficient notice to the purchaser, so that he might have ascertained the existing amount by due diligence. It is as usual, and certainly as competent, to covenant against *known* as unknown incumbrances or defects of title; and, with this covenant, the purchaser was not called upon for the exercise of any diligence."

The above cases express the general rule. Rawle on Covenants (5th Ed.) § 88; 39 Cyc. 2054.

[3] Taking up now the action to reform the deed on the claim of a mistake, the action for equitable relief rests solely on the evidence recited by us. The evidence which was insufficient to obtain relief at law was likewise insufficient to justify a reformation as for a mistake. There was some evidence that the minds of the parties had not met, but there was no evidence of a mistake.

[4] When the parties came together on March 25, 1920, it was apparently for the purpose of a final settlement. It appears from the record that the vendees took with them at least some moneys to make the final payment. The question of formality, or informality of their tender and demand was not raised. The parties at once launched into a discussion of the raisin contract being or not being an incumbrance. In the early part of September, 1920, the defendants sold the property in question for $45,000. After that sale had been made it was no longer necessary that the vendees should again tender, or offer to tender, the remaining unpaid purchase payments before commencing their action.

For the reasons above stated the judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

---

58 Cal. App. 672

## GARIN v. PELTON et al. (Civ. 4186.)

(District Court of Appeal, First District, Division 2, California. Aug. 4, 1922. Hearing Denied by Supreme Court Oct. 2, 1922.)

**1. Certiorari ⊂⊃42(8)—General demurrer raises question as to whether proceedings are of a judicial character.**

The general demurrer to a petition for a writ of certiorari raises the question whether the proceedings sought to be reviewed are of a judicial character, as only such proceedings can be reviewed in certiorari.

**2. Certiorari ⊂⊃21 — Proceedings leading to closing of a street not subject to review in certiorari.**

Proceedings by a board of trustees of a municipality leading to the closing of a street, authorized by St. 1889, p. 70, Deering's Gen. Laws 1915, act 3927, are not judicial and not subject to review in certiorari.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Petition for certiorari by H. P. Garin against Allen E. Pelton and others, constituting the Board of Trustees of the City of San Leandro. Judgment for defendants, and plaintiff appeals. Affirmed.

See, also, 208 Pac. 693.

George D. Collins, Jr., of San Francisco, for appellant.

J. Allison Bruner, City Atty., of San Leandro (Pillsbury, Madison & Sutro and Charles A. Ruggles, all of San Francisco, of counsel), for respondents.

NOURSE, J. This is an appeal from a judgment in favor of defendants upon their demurrer to plaintiff's petition for a writ of review. The defendants constitute the board of trustees of the city of San Leandro. As such they enacted Ordinance No. 276 (N. S.), closing and abandoning a portion of Hepburn street, between Martinez and Alvarado streets.

[1] It is the theory of the plaintiff that the trustees exceeded their jurisdiction in enacting said ordinance, and for that reason he has asked that all the proceedings be annulled. The general demurrer of the defendants necessarily raises the question whether the proceedings sought to be reviewed and annulled were of a judicial character, because proceedings of such character only can be reviewed in certiorari.

[2] The power to conduct the proceedings leading to the closing of the street has been conferred upon the defendant by the act of March 6, 1889 (Stats. 1889, p. 70, Deering's General Laws, act 3927). Under the terms of this act the board of trustees is called upon to exercise its judgment in determining whether a street should be closed, and before making its determination is required to give a notice of the time and place when protests may be received and heard and to conduct a hearing thereon. In Brown v. Board of Supervisors, 124 Cal. 274, 279, 57 Pac. 82, 83, the Supreme Court expressly held that—

"The hearing thus authorized was not a judicial hearing, but merely a mode of procedure for ascertaining the public interest, and that the board might determine whether that interest would be subserved by the improvement."

The rule thus announced has not been departed from, and it must be taken as settled, therefore, that the proceedings had under the terms of the act of March 6, 1889, are not judicial, and are therefore not subject to review in certiorari.

The judgment is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

---

58 Cal. App. 674

## GARIN v. PELTON et al. (Civ. 4187.)

(District Court of Appeal, First District, Division 2, California. Aug. 4, 1922. Hearing Denied by Supreme Court Oct. 2, 1922.)

**Prohibition ⟸6(2)—Will not lie to prevent closing of street.**

Prohibition will not lie to prevent proceedings by the board of trustees of a municipality to close a street, as such proceedings are not judicial.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Proceeding in prohibition by H. P. Garin against Allen E. Pelton and others, constituting the Board of Trustees of the City of San Leandro. Judgment for defendants, and plaintiff appeals. Affirmed.

See, also, 208 Pac. 693.

George D. Collins, Jr., of San Francisco, for appellant.

J. Allison Bruner, City Atty., of San Leandro (Pillsbury, Madison & Sutro and Charles A. Ruggles, all of San Francisco, of counsel), for respondents.

NOURSE, J. This is an appeal from a judgment adverse to plaintiff in an action seeking to prohibit respondents from closing a certain street in San Leandro. Respondents insist that the proceedings which appellant sought to prohibit were not judicial. The proceedings are the same as those considered in Garin v. Pelton, No. 4186 (Cal. App.) 209 Pac. 377, this day decided. It was there held that certiorari would not lie to review the proceedings because they were not judicial, and for the same reason prohibition cannot lie.

The judgment is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

---

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

58 Cal. App. 748

## LACHMAN CO. v. CENTRAL CALIFORNIA BERRY GROWERS' ASS'N et al.
## (Civ. 4245.)

(District Court of Appeal, First District, Division 2, California. Aug. 12, 1922.)

**1. Appeal and error ⊂=842(1)—Determination of trial court of question of venue held not conclusive.**

In action for breach of contract against an individual and a corporation, where the contract was set forth, the question whether a breach of the contract could give rise to a cause of action against a corporation defendant so as to warrant joinder of such defendant was one of law, the determination of which was not conclusive on appeal.

**2. Venue ⊂=41—Contract held to give no cause of action against defendant joined.**

In action against a berry grower and a berry growers' association, a corporation, for breach of contract for the sale of berries made by the individual defendant subject to the approval of the corporation defendant and approved by the corporation defendant, the contract *held* to create no obligation on the part of the corporation defendant in favor of plaintiff in case of breach of such contract; so that, as respects the question of venue, the corporation defendant was not a necessary party, and its joinder could not defeat the individual defendant's right to have the action tried in the county of his residence under Code Civ. Proc. § 395.

**3. Venue ⊂=41—Statement of cause of action against joint defendant is not conclusive.**

The fact that the complaint in an action for breach of contract stated a cause of action against a corporation defendant joined with the individual defendant was not conclusive upon the question of venue, but the individual defendant, in his affidavit filed in connection with motion for change of venue, could deny the liability of the corporation defendant and annex to said affidavit a copy of the contract, showing that the cause of action stated did not in reality exist.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the Lachman Company against the Central California Berry Growers' Association and T. Uno. From an order denying motion of the last-named defendant for change of venue, he appeals. Reversed, with directions.

S. W. Molkenbuhr and Thos. W. Firby, both of San Francisco, for appellant.

Philip S. Ehrlich, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal from an order denying the motion of the defendant T. Uno to change the place of trial of the action from the city and county of San Francisco to San Benito county, the residence of said defendant.

The action is a personal one, being an action to recover damages for alleged breach of a contract to deliver certain quantities of strawberries. Defendant Uno appeared and filed a demurrer to plaintiff's complaint, and at the same time filed an affidavit of merits and made his motion for a change of the place of trial. Said motion was based upon the ground of the residence of said Uno in San Benito county, and upon the further ground that the Central California Berry Growers' Association was not a proper defendant in the action; that plaintiff corporation has no cause of action against said Central California Berry Growers' Association, a corporation, arising out of the subject-matter of said action, or the contracts referred to in the amended complaint, and that no judgment can be entered against said Central California Berry Growers' Association, due to any alleged breach of said contracts; that said Central California Berry Growers' Association was made a party defendant herein for the sole purpose of defeating the right of the real defendant, to wit, T. Uno, to have the action tried in the county of his residence.

The amended complaint alleges that on or about the 11th and 29th days of March, 1919, at San Francisco, "plaintiff above named and defendants above named made and entered into a contract in writing under the terms of which said defendants agreed to sell and deliver to plaintiff, and said plaintiff agreed to buy from defendants" 400 and 250 chests of strawberries, respectively. The written contracts were not set forth in said amended complaint. In his affidavit filed in connection with his motion, defendant Uno denied all the material allegations of the amended complaint, and specifically denied that the plaintiff had entered into any written contracts with the Central California Berry Growers' Association and defendant Uno, and said defendant Uno annexed to said affidavit copies of the contracts which were in fact actually made and entered into between the Lachman Company (the buyer) and T. Uno (the seller). No counter affidavits were filed by respondent, and it therefore appears uncontradicted in the record that the only written contracts entered into were those set forth in appellant's affidavit. Indeed plaintiff and respondent, in its brief, states, in regard to this matter:

"Plaintiff does not deny that the contracts referred to in the foregoing statement by appellant were the only contracts entered into by the parties. However, respondent does not agree that appellant's contention that the contracts set forth show that the corporation defendant was not a necessary party to the action."

The contracts set forth in the affidavit are identical except for differences in dates and in the number of chests of berries covered thereby. One of them reads as follows:

"Central California Berry Growers' Association.

"Members' Sale Contract.

"The Lachman Company, hereinafter called the buyer, agrees to purchase and accept from T. Uno, hereinafter called the seller, and the seller agrees to sell and deliver to the buyer, 250 chests of strawberries, containing an average net weight of eighty pounds and the buyer agrees to purchase from the seller an additional number of chests of none berries, not to exceed none chests as the seller may elect to deliver.

"Both parties agree that:

"(a) Deliveries hereunder shall be made between the date of May 15, 1919 and Sept. 15, 1919.

"(b) Deliveries shall be in quantities of not less than five chests, nor more than twenty chests per day.

"(c) Said berries shall be field run, reasonably ripe, and of a quality suitable for canning, preserving and packing purposes.

"(d) The berries need not be packed in baskets, but may be delivered loose in the slides or crates as may be prescribed by Central California Berry Growers' Association.

"(e) Said berries shall be delivered and accepted at Betabel Station, Calif., and no deductions in weight on account of quality or variety shall be made by the buyer without first notifying the seller or the manager or assistant of the Central California Berry Growers' Association.

"(f) The purchase price of said berries shall be 11 cents per pound net, and the buyer to pay all transportation charges.

"(g) An association fee of 8 cents per chest of berries delivered hereunto shall be retained from the seller's returns, and paid to Central California Berry Growers' Association by the buyer.

"The buyer agrees to:

"(a) To make daily reports to the seller or to the seller's agent as to weights, specifying gross, net and tare.

"(b) Each and every Wednesday to make settlement in full to Central California Berry Growers' Association for all berries delivered hereunder the preceding week.

"(c) That no berries delivered under this agreement shall be sold as fresh fruit but that all of said berries must be used for canning, preserving or packing purposes.

"(d) To empty all containers as soon as possible and to return the same to the owners thereof, through channels by which same have been delivered, freight charges prepaid. For every such container not returned within five days after final delivery thereunder the buyer agrees to pay the seller $2.50.

"This contract shall be void in case of fires, strikes, accidents or other causes beyond the control of either party, and is subject to approval for the seller by the Central California Berry Growers' Association, and for the buyer by his general office.

"Read, considered and signed at Betabel, California, this 29th day of March, 1919.

"The Lachman Co.
"T. Uno, Seller.

"Approved: The Lachman Company, by Charles Lachman. Central California Berry Growers' Ass'n, by H. M. Wit, Manager."

[1] Respondent's position in support of the ruling of the trial court is that as the amended complaint alleged that the contracts were entered into between plaintiff and both defendants, and the trial court, in denying the motion of appellant, has impliedly so found, that matter may not be examined into by this court upon appeal. But the error of respondent is in treating such a determination by the trial court as a determination of fact, when in reality it is a question of law. It being admitted by plaintiff that its cause of action against either or both of the defendants grew out of the contract which we have herein set forth and another contract of similar legal import, the question of whether or not such contracts bound the defendant, Central California Berry Growers' Association, and could give rise to a cause of action against it, was purely one of law, in the determination of which, we think the trial court erred. It is clear that this contract creates no obligation on the part of Central California Berry Growers' Association in favor of the plaintiff, and no judgment could be rendered against said association because of the failure of Uno, the seller, to comply with his contract and deliver the strawberries to the plaintiff.

[2] Under such circumstances, the Central California Berry Growers' Association is not a necessary party to the action, and its joinder as a defendant cannot defeat appellant's right to have the action tried in the county of his residence. Section 395, Code Civ. Proc.; McDonald v. California Timber Co., 151 Cal. 159, 90 Pac. 548; Sayward v. Houghton, 82 Cal. 628, 630, 23 Pac. 120.

[3] The mere fact that a complaint states a cause of action is not conclusive. It may be shown that the cause of action stated does not in reality exist. Karst v. Seller, 45 Cal. App. 623, 188 Pac. 298, 300.

The order appealed from is reversed, with directions to the trial court to grant the motion of defendant Uno to change the place of trial to the county of his residence.

We concur: NOURSE, J.; STURTEVANT, J.

58 Cal. App. 794

## LACHMAN CO. v. CENTRAL CALIFORNIA BERRY GROWERS' ASS'N et al. (Civ. 4240.)

(District Court of Appeal, First District, Division 2, California. Aug. 12, 1922.)

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the Lachman Company against the Central California Berry Growers' Association and T. Toyama. From an order denying the last-named defendant's motion for change of venue, he appeals. Reversed, with directions.

S. W. Molkenbuhr and Thos. W. Firby, both of San Francisco, for appellant.
Philip S. Ehrlich, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal from an order denying the motion of the defendant T. Toyama to change the place of trial of the action from the city and county of San Francisco to San Benito county, the residence of said defendant.

By stipulation and order heretofore made herein, this appeal is considered upon the transcript and briefs on file in this court in the case of The Lachman Co., a Corporation, v. Central California Berry Growers' Association et al., No. 4245, 209 Pac. 379, of the records of this court. The essential facts are identical in the two cases, and for the reasons given in the opinion filed in said case of The Lachman Co. v. Central California Berry Growers' Association, No. 4245, the order appealed from herein is reversed, with directions to the trial court to grant the motion of defendant Toyama to change the place of trial of the action to the county of his residence.

We concur: NOURSE, J.; STURTEVANT, J.

58 Cal. App. 796

## LACHMAN CO. v. CENTRAL CALIFORNIA BERRY GROWERS' ASS'N et al. (Civ. 4241.)

(District Court of Appeal, First District, Division 2, California. Aug. 12, 1922.)

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the Lachman Company against the Central California Berry Growers' Association and T. Toyoshima. From an order denying the last-named defendant's motion for change of venue, he appeals. Reversed, with directions.

S. W. Molkenbuhr and Thos. K. Firby, both of San Francisco, for appellant.
Philip S. Ehrlich, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal from an order denying the motion of the defendant T. Toyoshima to change the place of trial of the action from the city and county of San Francisco to San Benito county, the residence of said defendant.

By stipulation and order heretofore made herein, this appeal is considered upon the transcript and briefs on file in this court in the case of The Lachman Co. a Corporation, v. Central California Berry Growers' Association et al., No. 4245, 209 Pac. 379, of the records of this court. The essential facts are identical in the two cases, and for the reasons given in the opinion filed in said case of The Lachman Co. v. Central California Berry Growers' Association, No. 4245, the order appealed from herein is reversed, with directions to the trial court to grant the motion of defendant Toyoshima to change the place of trial of the action to the county of his residence.

We concur: NOURSE, J.; STURTEVANT, J.

58 Cal. App. 690

## PEOPLE v. ROE. (Cr. 609.)

(District Court of Appeal, Third District, California. Aug. 4, 1922. Hearing Denied by Supreme Court Oct. 2, 1922.)

**1. Criminal law ⊂⊃970(7)—Indictment and information ⊂⊃154—Objections to indictments held waived by failure to demur and motion in arrest inappropriate.**

Objections to an indictment under Pen. Code, § 1004, on the ground that it does not conform to sections 950–952, in that the facts are not stated in such manner that a person of common understanding would know what was intended, that it is not in the prescribed form, and that it is indefinite and uncertain as to the offense charged, are all waived by failure to demur thereto, in view of section 1185, and such objections cannot be taken advantage of after conviction by a motion in arrest of judgment.

**2. Indictment and information ⊂⊃110(3)—Indictment charging criminal syndicalism in language of statute sufficient.**

Where the charge of criminal syndicalism is based upon a violation of Criminal Syndicalism Act, § 2, subds. 1, 2, 3, and 5, the specific acts constituting the crime alleged must be set forth in the indictment, but where the charge is based upon a violation of subdivision 4 of such section, the indictment is sufficiently specific if framed in the language of the subdivision itself.

**3. Criminal law ⊂⊃369(1)—Testimony as to acts of lawlessness held admissible to show character of an organization.**

In a prosecution for the crime of criminal syndicalism, evidence of certain acts of lawlessness, sufficiently connected with the Industrial Workers of the World to establish them as the acts of that organization, were held admissible for the sole purpose of showing the character of the organization to which the defendant admittedly belonged.

**4. Insurrection and sedition ⟸2—Evidence of the nature of an organization prior to the passage of the Criminal Syndicalism Act held admissible.**

In a prosecution for criminal syndicalism, testimony of the character and practices of an organization known as the Industrial Workers of the World before the passage of the Criminal Syndicalism Act *held* admissible, where after the passage of the act they continued to promulgate the same principles and practices as before, as tending to prove the nature and character of the organization, not because the defendant was liable for what the organization did before the statute was passed, but because, knowing its character, he violated the act by remaining a member.

**5. Insurrection and sedition ⟸2—Evidence held sufficient to sustain a conviction under the Criminal Syndicalism Act.**

Evidence *held* sufficient to establish the nature, purpose, and methods of the Industrial Workers of the World so as to sustain a conviction of one admittedly a member under the Criminal Syndicalism Act, declaring any person who "is or knowingly becomes a member of any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism" is guilty of a felony.

**6. Criminal law ⟸829(3, 18)—Requested instructions on reasonable doubt and defining sabotage held covered by charge given.**

Requested instructions as to reasonable doubt, and defining the word "sabotage" as used in the Criminal Syndicalism Act, and declaring that the term so defined "must be used as a means of accomplishing a change in industrial ownership or control or effecting a political change," and further specifying the nature of acts which it might embrace, *held* properly covered by instructions given.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

James Roe was convicted of criminal syndicalism, and from the judgment and an order denying a new trial, he appeals. Affirmed.

Austin Lewis, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was indicted and tried for and convicted of the crime of violating certain provisions of the act of the Legislature of 1919 penalizing what is generically described by said act as "criminal syndicalism." Stats. 1919, p. 281. He presented a motion for a new trial, which was denied, and the appeals are from the judgment and the order denying his motion for a new trial.

The defendant, for a reversal of the judgment and the order, contends: (1) That the indictment is violative of sections 950, 951, and 952 of the Penal Code, in that the purported statement therein of the act or acts constituting the offense sought to be charged is not set forth "in such manner as to enable a person of common understanding to know what is intended," that it does not conform to the form of an indictment as is exemplified by section 951, and that it is lacking in directness and certainty as to "the particular circumstances of the offense charged," the claim being that, to state the offense which is by the indictment attempted to be lodged against the accused, the circumstances essential to the completion of said offense under the statute must be set forth with particularity; (2) that error was committed in the admission of certain testimony; (3) that the evidence is insufficient to support the verdict; (4) that the court erred to the prejudice of the substantial rights of the accused by its refusal to read to the jury two certain instructions proposed by him.

[1] 1. No demurrer was interposed to the indictment, but a motion in arrest of judgment was, after conviction, made by the defendant upon the ground that it does not conform to the requirements of sections 950, 951, and 952 of the Penal Code. See section 1004, Pen. Code. Of course the question of the sufficiency of the facts to state a public offense was not raised by the motion. The objection to the indictment upon the ground upon which the motion in arrest of judgment was based is deemed to have been waived by the failure to demur to that pleading. Pen. Code, § 1185; People v. Tomsky, 20 Cal. App. 672, 677, 130 Pac. 184. We will, however, briefly consider the objection. To do this, it will be necessary first to examine some of the provisions of the statute defining "criminal syndicalism," and upon certain of whose provisions the indictment against the accused is based. The first section of said act reads as follows:

"The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change."

The second section, in subdivisions 1, 2, 3, 4, and 5 thereof, describes or specifically enumerates as many different and distinct acts as coming within the description of "criminal syndicalism" as the same is defined in section 1. Upon subdivision 4 of section 2 the indictment here is founded. Said subdivision reads: Any person, who "organizes or assists in organizing, or is or knowingly becomes a member of, any organization, socie-

ty, group or assemblage of persons organized or assembled to advocate, teach, or aid and abet criminal syndicalism," is guilty of a felony, etc. The indictment is, substantially, in the language of said subdivision 4 of section 2 of the statute, and is as follows:

"The said James Roe, on the ——— day of June, A. D. 1921, at the county of Sacramento, in the state of California, and before the finding of this indictment, was then and there willfully, unlawfully, feloniously and knowingly a member of an organization, society, group and assemblage of persons known and designated as the 'Industrial Workers of the World,' and sometimes known and referred to as the 'I. W. W.,' which said organization, society, group and assemblage of persons was then and there organized and assembled to advocate, teach, and aid and abet criminal syndicalism contrary," etc.

[2] The position of the defendant is that, since the people, in proof of the charge, relied, to a large extent, upon certain literature issued by and under the authority of the organization to which the defendant is alleged to belong, in the form of books, booklets, magazines and other like publications, in which the principles of said organization were declared and advocated, it was incumbent upon the prosecution to plead such publications or printed matter, or so much thereof as would constitute the offense of criminal syndicalism as it is denounced or defined by said subdivision. We need not follow the learned argument of counsel for the defendant supporting this proposition. It is sufficient to say that the same point arose, was considered, and decided adversely to the position of the defendant in the cases of People v. Steelik (Cal. Sup.) 203 Pac. 78, and People v. Taylor (Cal. Sup.) 203 Pac. 85. It is held in those cases that, while the charge of criminal syndicalism in an indictment or information is insufficiently stated unless the acts specified in the statute as constituting the same are specifically set forth in such pleading, said crime is sufficiently stated where it is based upon subdivision 4 of section 2 of said statute if the accusatory pleading merely charges the crime in the language of said subdivision. In other words, those cases hold that where the charge of criminal syndicalism is based on subdivisions 1, 2, 3, and 5 of section 2, the acts enumerated in said subdivisions as constituting criminal syndicalism must be pleaded with a degree of particularity that will impart to the accused precise information of the acts with the commission of which he is charged, and which, with the evidence adduced to sustain such charge, upon the conviction of the accused thereof, will operate as a bar to another or further prosecution for the same specific acts of criminal syndicalism, but that, where the charge is the violation of subdivision 4, the statement in the indictment or information is sufficient if it is in the language of said subdivision, since the acts therein denounced as acts of criminal syndicalism are sufficiently described by the language itself of said subdivision to make it perfectly clear what was thereby intended. In the Steelik Case the court said, quoting the syllabus:

"An indictment charging a defendant with belonging to the Industrial Workers of the World sufficiently charges an offense under subdivision 4 of section 2 of the act."

This language is, of course, to be read with the qualification that the indictment must also show or allege that the Industrial Workers of the World constitute an organization banded together for the purpose of advocating, teaching, or aiding and abetting criminal syndicalism as said crime is described by section 1 of the act; and the indictment upon which the defendant was tried and convicted, it will be observed, specifically so alleges or charges. There is nothing said in the Taylor Case, supra, at variance with what is said in the Steelik Case regarding the point under consideration. In the Taylor case it is said:

"On the consideration of the petition for a transfer we were inclined to the opinion that, where a defendant was charged with advocating a certain doctrine or printing a certain book or pamphlet, or circulating the same, it was essential that the name and description of the book, document, etc., should be contained in the indictment for the information of the defendant."

The court said, however, that the question did not arise in that case, for the reason that as to the counts in the indictment based on the subdivisions of section 2 denouncing as an offense the act of printing or publishing or distributing literature in any form which advocated the commission of acts of criminal syndicalism, the jury had disagreed, and said counts were thereupon dismissed. It is thus to be noted that the court did not decide the point; but if it had and so had held that, as to an indictment based upon the subdivisions relating to spoken or printed words or books or pamphlets advocating acts of criminal syndicalism, such spoken or written words or books or pamphlets should be pleaded or named and described, it is clear, as has been explained, that the rule so laid down would have no application to the indictment against the defendant in this case.

[3] 2. The first of the several assignments of error based upon rulings admitting certain testimony arose as follows: One Arada, a laborer, with some 48 or more other laborers, in the month of August, 1917, was employed to dig potatoes on a ranch about 15 miles from the city of Stockton, and, while so engaged, some 14 other men made their appearance at said ranch and applied to the owner of the ranch for like

employment, and were put to work, commencing their labors in the afternoon, shortly after the lunch hour. These 14 men worked all of the afternoon, and at night retired in the "bunk" house on the ranch with the other men. On the following morning the fourteen men referred to abandoned the work and left the farm. The other men (those at work when the 14 arrived at the ranch) resumed work that morning, but had not proceeded far when their feet developed a burning sensation, the pain therefrom increasing within a short time to such an intensity that it became unbearable, and so they could not proceed with their labors. On removing their shoes, and inspecting the inside thereof, they discovered that acid in the form of a powder—something of the color of brown sugar—had been deposited therein by some party or parties. The injury thus inflicted upon them required them to cease work and seek immediate medical treatment. Arada testified that he was so crippled as the effect of the burns thus produced that he was compelled to remain in the county hospital under treatment for over a year. In fact, he testified, it was for a while thought by the attending surgeons that it would be necessary, to preserve his life, to amputate one of his lower limbs. Neither Arada nor the other men with whom he was working when the "14" appeared at the ranch were members of the Industrial Workers of the World. After the "14" left the ranch, some I. W. W. papers were found in the "bunk" house where they slept the night they remained on the ranch. The objection to this testimony was that it was hearsay, and further that the acts were not connected up to the I. W. W. organization, and consequently not binding upon the defendant. Other witnesses in the case (former members of the I. W. W.) testified that a certain chemical combination (described by one of them as such a solution of potassium with other chemicals as would immediately produce burns when the solution came in contact with a body containing moisture) was one of the instrumentalities employed by said organization to terrorize laboring men who were not members of the organization, and thus so to intimidate them as to cause them to refuse to take employment in the fields or fruit orchards of the country. This description of this chemical combination tallied, substantially, with the description given by the witness, Arada, of the chemical particles which were placed in the shoes of the laborers with whom the said Arada was working at the time of the incident referred to by him. This testimony, together with the circumstance of the finding of I. W. W. papers at the ranch after the "14" men had departed therefrom, it being also shown that prior to the arrival of said "14" men at said ranch no such papers were seen on or about the premises, constituted a sufficient foundation for the allowance of Arada's testimony, which was admissible, not for the purpose of connecting the defendant with the act or acts supposed to have been committed by the "14" men, but for the sole purpose of showing the character of the organization to which the defendant is alleged to belong, and to which the circumstances as revealed by said testimony and other testimony as to the practices of the organization strongly tend to show the "14" men belong or belonged.

[4] The other like assignments of error involve rulings permitting, over objections by defendant, certain ex-members of the I. W. W. organization to testify in detail as to the principles advocated by said organization and its activities for many years prior and subsequently to the time at which the Legislature passed the Criminal Syndicalism Act in carrying out by a variety of violent means said principles. This testimony was admissible as tending to disclose the character of said organization, and this is even true if the principles so advocated and the acts so practiced were advocated and practiced by the organization before the defendant became a member thereof. This proposition, however, is fully examined and clearly explained, and all the objections urged here against the testimony referred to conclusively answered in the Steelik Case, supra, as follows:

"In this case, the only question the defendant can be heard upon is whether or not the evidence of the conduct of members of the I. W. W. before the passage of the act is admissible as tending to establish the character of the organization after the passage of the act and during the time the defendant belonged thereto. It seems too clear for discussion that where the issue involves the character of an organization it is proper to determine the character of the organization from the conduct of its members and officers, including the propaganda which it publishes. It is no doubt true that the presumption of innocence would overcome the legal presumption that when the nature of a thing is once shown it is presumed that it continues thereafter as long as such thing usually continues. Code Civ. Proc. § 1963, subd. 32. But where such proof is fortified by actual proof that subsequent to the passage of the act the organization continued to publish the same sort of propaganda, it is proper to consider the evidence of the conduct of the organization both before and after the passage of the statute in order to determine whether or not it is such an organization as is denounced by the statute. As the defendant knowingly continued his membership in the organization after such conduct had been denounced by the statute as criminal, he is liable, not for what the organization did before he joined it or for its character before the statute was passed, but because after the statute was passed he violated the terms thereof by knowingly remaining a member thereof. It is contended that the evidence of these members of

the I. W. W. was inadmissible for the further reason that it consisted of declarations of coconspirators, and was not admissible until the conspiracy was established by other evidence than such declarations. In making this contention the appellant wholly misconceives the applicability of the rule with reference to the declarations of coconspirators. The evidence adduced in court by the coconspirators as witnesses are not declarations of conspirators, but direct testimony to the facts to which they testify. Aside from the discredit which attaches to them as accomplices, their evidence is entirely competent to establish the facts to which they testify. The rule for which counsel contends is applicable only when it is sought to introduce extrajudicial declarations and statements of coconspirators."

[5] 3. The point that the evidence is insufficient to support the verdict is entirely without merit, to confirm which statement it will be necessary to go no further than to refer herein in a very general way to the evidence.

The fact that, at the time of his arrest, the defendant was a member of the organization known as the Industrial Workers of the World, and had been such member since the year 1918, was admitted by him, not only at the time of his arrest, but also when he testified at the trial of this case in his own behalf. As to the character of said organization, its principles, policies, and practices, it is clear that there is ample evidence to show that the implied finding of the jury that the propaganda sponsored and spread over the world by said organization involves, not only the teaching of political principles, revolutionary in their character, but also the sanctioning and advocacy of violent and criminal methods for the carrying out of those principles.

The defendant was arrested on the 22d day of June, 1921, at Third and O streets in the city of Sacramento, by two police officers of said city, upon telephonic information to the effect that he was selling and distributing what is known as I. W. W. literature. In his possession was a canvas bag or knapsack which contained many copies of magazines, books, booklets, and pamphlets in which were printed articles or addresses vigorously supporting and advocating the I. W. W. cause and its objects and the methods of putting its principles into effect. The defendant admitted that he was selling and thus distributing these publications. They consisted of 30 or more printed documents, here introduced in evidence, and copious extracts therefrom, read to the jury, and so incorporated into the record of this case. The general purpose of said organization, as it was disclosed by the publications referred to, is to secure control of the government of the United States and of the state governments, and substitute for our present form of government what said organization calls an industrial government—that is to say, said organization believes in and vigorously advocates a government in which all laws shall be made in the workshop instead of by the Legislature. According to the publications referred to said organization teaches that—

> Our government as it now exists "is merely a reflex of the industrial conditions of the country; that the governments we have to-day are the instruments of the capitalist class; and as an organization they [the members thereof] ignore the government. They have their own government, their own rules, their own regulations and they abide by those and no other."

The "preamble of the Industrial Workers of the World" very clearly illustrates their attitude or position toward the governments of this country. It reads in part:

> "The working class and the employing class have nothing in common. There can be no peace as long as hunger and want are found among millions of the working people and the few who make up the employing class have all the good things of life. Between those two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system."

Upon its face the foregoing does not appear to state more than an innocent or a legitimate economic proposition. No one of sense and fairness will deny the right of the laboring classes to maintain an organization for proper self-protection. No sensible and fair person will deny that an equitable division of the profits accruing from the combined operation of capital and labor between these two essential elements of industrial progress and prosperity should be had. Nor is it a crime per se, or, for that matter, a crime at all, for a person or a class of persons to advocate a scheme according to Utopian ideals for the government of the peoples of the earth and an equal distribution among all the people of the fruits of all material or industrial activity in all its manifold forms. Such a condition, if practicable under the existing order of things in this world, would certainly present an ideal situation of the most exalted character. Such may be the real ultimate object of the I. W. W. and kindred organizations, but, if this be so, it will readily be admitted that the scheme is wholly chimerical, as undoubtedly More, who sought to establish the same sort of political philosophy through his Utopia, and Bellamy, following the same general line of thought, essayed the presentation of an analogous conceit in his Looking Backward, really themselves believed. While, as stated, there is no criminal purpose to be imputed to the fact of the mere advocacy of a plan for the government of the peoples of the earth which would or might bring to them what may well be termed a condition of consummate beatitude in wordly affairs,

yet, when in attempting to crystalize such a condition any organization resorts to criminal acts of any character, or proposes to do it by the destruction of property and vested rights, then it has clearly transcended the line of demarcation between right and wrong; and the vice of the whole scheme of the organization known as the I. W. W. is, according to the testimony in this case, in the methods which it advocates and to which its members without scruples resort for carrying out its principles, and as to this phase of the case the record before us overflows with proof of the most dastardly crimes known to the criminal law which were resorted to for the avowed purpose of terrorizing the people, in the vain hope of intimidating them into accepting the propaganda of the I. W. W. as the true faith in the matter of government. According to the testimony of the two witnesses, who, as above stated, were former members of the Industrial Workers of the World (Coutts and Dymond by name), the members of that organization not only believe in and teach the overthrow of our present system of government, but sanction as the means of accomplishing that result the crime of arson, sabotage, which means the willful destruction of the machinery of industry and other property, and any other act which, in their judgment, will instill into the people at large a feeling of absolute terror. Numerous instances of fires started by members of the organization, whereby valuable properties were destroyed, were given by Dymond in this case. For instance, he testified that in Stanislaus county in the year 1917, during one night, some eight haystacks, containing large quantities of hay, and situated on as many different ranches in near proximity to each other, were set on fire and destroyed, the several fires burning at the same time or almost simultaneously. In the city of Modesto in the same year, so Dymond proceeded, eight different stables and their contents were destroyed by incendiary fires on a single night. Dymond testified that he personally knew that this wholesale destruction of property was caused by the direct acts of members of the I. W. W. He further testified that while no specific action was ever taken by the organization, as such, authorizing the destruction of property by the members thereof by acts of sabotage or other criminal means, it was, nevertheless, one of the rules of the organization that the members thereof in such matters should act upon their own initiative whenever they thought it necessary to accomplish a particular object or the ends of the general purposes of the organization. In a word, both he and Coutts testified that the organization and its members believed in and advocated "direct action"; that is, instead of resorting to lawful methods or pacific means for the redress of what they conceived to be the industrial wrongs inflicted upon them or for the adjustment of any grievances arising between the laboring element and the capitalistic class, they believed in and advocated the taking of such matters into their own hands and settling them according to their own methods. The organization, said these witnesses, had no more sympathy for members of the American Federation of Labor than it had for the capitalistic class, and that one of its own aims was to block by any means which would accomplish that end, howsoever criminal they might be, every act or step taken by the former organization to maintain a high wage standard for its members. The theory of this line of thought seems to be that no contract or compact of any kind or nature should be made between the laboring men and the capitalistic class. In other words, it is antagonistic to the principles of the I. W. W. organization to recognize the right of any man or set of men to fix or establish the compensation for labor; that the whole industrial and politico-economic system as it exists to-day is without a just foundation, and is at variance with every correct idea of industrial rights and economy. Asked what was the attitude of the members of the I. W. W. towards men and women who had been sent to prison for the commission of crime, Dymond replied that persons so convicted, and who had served terms of imprisonment in the penitentiaries of the country, were regarded by the members of said organization, regardless of the nature of their crimes, as martyrs. But it is not necessary to proceed further in a review of the evidence or in setting forth the principles of the organization to which the defendant admitted that he belonged and the violent methods which that organization was shown to advocate for the accomplishment of its objects. From the record, reams and reams could be written and recited of the utterances, printed and spoken, of the members of that organization, advocating the destruction of our present system of government and of criminal acts and conduct by members directed to the advancement of that ultimate object of said organization. There now has been presented herein a sufficient explanation or exposure of the cardinal principles, the ultimate purpose and the methods of the Industrial Workers of the World, as the same were revealed by the testimony, documentary as well as oral, by the record before us, to show that, as maintained at and before the trial of this case, they constituted an organization which comes clearly within the inhibitions of the Criminal Syndicalism Act of this state.

We may add that the testimony generally in this case is very much of the same character as that which was presented in the cases of People v. Steelik, supra, and People

v. Taylor, supra, of which synoptical statements are given in the opinions therein.

But the point is urged that there is no testimony showing that the defendant became and continued to remain a member of said organization knowing or having knowledge that its object was to advocate, teach, or aid and abet criminal syndicalism. The record discloses evidence of circumstances which, if accepted as verity by the jury, as evidently it was, were sufficient to persuade the triers to the conviction that the defendant knew at all times that said organization advocated and taught criminal syndicalism. It is not necessary to make special reference to these circumstances.

[6] 4. The court refused to allow two instructions proposed by the defendant, and it is here claimed that in such refusal prejudicial error was committed. The first of these involved a definition of the word "sabotage" as the same is used in the statute, and further declared that "sabotage" as so defined "must be used as a means of accomplishing a change in industrial ownership or control or effecting a political change," and that unless unlawful acts or violence are employed as a means of accomplishing a change in industrial ownership or control or effecting a political change, such acts or violence do not come within the scope of the "Criminal Syndicalism Act."

That instruction was substantially covered by the instruction, given by the court, in the language of section 1 of the act in question, wherein "criminal syndicalism" is defined, and wherein also the word "sabotage" is defined as meaning "willful and malicious physical damage or injury to physical property," and by the further given instruction to the effect that, to justify a conviction, it was necessary to show beyond a reasonable doubt, not only that the defendant was, at the time mentioned in the indictment, a member of the Industrial Workers of the World, and that said organization was then and there a society or group or assemblage of persons then and there organized or assembled to advocate, teach, or aid and abet criminal syndicalism as that term is defined in the statute and in "these instructions," etc., but also that the defendant then and there knew and had knowledge that the purpose and objects of said organization, etc., "were and was the commission of the acts denounced by the criminal syndicalism law," etc.

The other instruction which the defendant proposed and the court disallowed was covered by the given instruction above considered. It would have told the jury what the court did tell them that—

"In order to convict the defendant, you must be convinced beyond a reasonable doubt that between the date of this act going into effect and the 22d day of June, 1921, the date of his arrest, defendant did discover and know that the organization herein referred to as the I. W. W. was an organization for the purpose of advocating, teaching, aiding, and abetting criminal syndicalism."

The court having given substantially a similar instruction—one covering precisely the same principle—the refusal to repeat it is, of course, no ground for just complaint.

The defendant appears to have been fairly tried and legally convicted, and the judgment and the order are therefore affirmed.

We concur: FINCH, P. J.; BURNETT, J.

---

58 Cal. App. 658

## BIBBY et ux. v. PACIFIC ELECTRIC RY. CO. et al. (Civ. 4228.)

(District Court of Appeal, First District, Division 2, California. Aug. 2, 1922. Rehearing Denied Sept. 1, 1922. Hearing Denied by Supreme Court Sept. 28, 1922.)

**1. Appeal and error ⊂⊃1064(1)—Instruction as to single or joint liability to plaintiff held not prejudicial where two codefendants were actors in automobile-street car accident.**

In an action by occupant of defendant's automobile, which collided with codefendant's street car, an instruction that, if plaintiff's injury was found to have been proximately caused by the accident, there should be a finding against at least one of the defendants, or both if their negligence was concurrent, *held* not prejudicial.

**2. Trial ⊂⊃228(1)—Refused instruction concerning auto driver's rights with reference to motorman's duties held multifarious.**

Where one or both auto owner and street railroad could be found responsible for the collision causing plaintiff's injuries, refused instruction concerning auto driver's rights with reference to motorman's duties at crossings *held* multifarious.

**3. Street railroads ⊂⊃90(4)—Motorman may assume automobile driver will use care.**

A motorman exercising ordinary care may assume that an automobile bus will not be driven so close to his car as to be struck when the car's approach can be observed by the use of ordinary care, and it is not his duty to slow down until he sees that the automobile will continue upon the track, and he must then use ordinary care.

**4. Street railroads ⊂⊃99(10)—Automobile bus driver negligent in failing to see street car.**

An automobile bus driver who fails to see and heed a street car visible to him by the use of ordinary care before driving into a place of danger is guilty of negligence.

**5. Street railroads ⊂⊃85(4)—Rights of automobile bus driver and motorman not equal.**

The rights of the driver of an automobile bus and the motorman on an interurban car

of a street car company are not equal, and their duties to avoid collision while traveling on the railroad rails at an intersection are not identically the same.

6. Trial ⊂238—Instructions held not unfavorable to auto owner suddenly confronted with danger of collision with street car.

Where one or both auto owner or street railway could be found responsible for a collision causing plaintiff's injuries, two instructions *held* not erroneous as to auto owner as setting up different standards of conduct for the two vehicles suddenly confronted with danger.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by J. R. Bibby and wife against the Pacific Electric Railway Company and F. M. Dimmick. From a judgment against defendant Dimmick, he appeals. Affirmed.

Frank M. Gunter, Clyde R. Burr, and Janeway, Beach & Pratt, all of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondents.

STURTEVANT, J. The plaintiffs commenced an action against the defendants to recover damages for injuries caused by a collision which occurred between the hotel bus owned and operated by the defendant Dimmick and an interurban car owned and operated by the defendant Pacific Electric Railway Company. The plaintiffs had judgment against the defendant Dimmick, and that defendant has appealed.

The plaintiffs are husband and wife. In their complaint they charge negligence against the owner of the bus and against the street car company. The latter filed an answer in which it denied that it was negligent and pleaded contributory negligence on the part of the plaintiffs. The other defendant filed an amended answer, on which he went to trial, and therein he denied negligence on his part, and alleged that the accident was caused by the negligence of the street car company. Plaintiffs called several witnesses who testified that at the time of the accident the hotel bus was running at a speed variously estimated at 15, 16, 17, or 18 miles per hour, and that the street car was traveling at the rate of 5 or 6 miles per hour. The accident occurred in the month of February at about 9:30 in the evening, and the evidence showed that the headlight on the street car was lighted, and that the headlights on the auto bus were lighted. There was no evidence introduced by any one of the parties proving or tending to prove that the plaintiffs, or either of them, was guilty of contributory negligence. They had arrived on an evening train and had entered the auto bus of the defendant Dimmick to go as guests to stop at his hotel. There was evidence that the street car had stopped at the intersection of Fifth and San Pedro streets and that the conductor had given the signal to go ahead, and that thereupon the motorman had sounded his gong and had started forward, and when he had proceeded but a short distance the auto bus approached from the side, and then turned slightly in the same direction the car was going, but, continuing ahead, brushed the front end of the car and was turned over. The street car proceeded a few feet and came to a stop. At the time of the trial the driver of the auto bus could not be produced as a witness, nor was his deposition produced.

[1] For grounds of reversal the appellant complains of certain alleged errors made by the trial court in giving, or refusing to give, certain instructions. Upon the request of the plaintiffs the court gave an instruction worded as follows:

"You are instructed that under the evidence there is no question of contributory negligence in this case, and if you find that the plaintiff, Elizabeth Bibby, was injured proximately by the happening of the accident, then you will find against at least one of the defendants, or both of them if you find that the negligence that caused the accident was the concurrent, joint, and contemporaneous negligence of each defendant acting one with the other; but, whether you find against both defendants, you will have to find against one of them."

The giving of a very similar instruction was discussed in the case entitled Blackwell, etc., v. American Film Co. (Cal. App.) 192 Pac. 189. In that case it was held that the giving of the instruction was not a prejudicial error. For the reasons assigned in that case we think that the giving of the above instruction was not prejudicial error in this case.

[2] The appellant requested the trial court to give his (appellant's) instruction No. 44. The trial court refused to give it. The appellant assigns such refusal as error. The instruction was multifarious. Among other things it charged as follows:

"* * * When the driver of an automobile approaches the crossing of street car or railroad tracks laid in the streets or public highways, for the purpose of crossing the same, he has a right to assume and act upon the theory that he has an equal right with others, including the street car, and has a right to act upon the belief and expectation that the street car company, as well as himself, will use the reasonable care that the situation requires to avoid running down any person on the street or public highway, and that those approaching him from the side, will look out ahead and use reasonable care and caution to avoid a collision with him. The driver of an automobile has a right to expect that those in charge of street cars will operate them in the manner, and run them at the speed, which is

customary at the particular place and is governed by the law regulating their speed, and that they will give the usual warning signals, and take the usual precaution to avoid injury to others."

If the foregoing instruction was intended to state to the jury that, under the facts enumerated, the driver of the auto bus was relieved from exercising his faculties of sight and hearing in order to ascertain whether an interurban car was approaching, then the instruction was not sound. Loftus v. Pacific Electric Ry Co., 166 Cal. 464, 467, 137 Pac. 34. Furthermore, it was not applicable to any evidence introduced at the trial.

[3] The Pacific Electric Railway Company requested, and the court gave, an instruction as follows:

"The motorman on a car if he is exercising ordinary care has the right to assume that an auto bus would not attempt to drive upon the track so close to an approaching car as to be in danger of being struck thereby, when the approach of the car can be seen or heard by the use of ordinary care. It is not the motorman's duty in such a situation, to slow down or to stop his car when the automobile first approaches the track, nor until the motorman sees, or in the exercise of ordinary care should conclude, that the automobile would continue to proceed upon the track in front of the car. When he sees that the auto bus will attempt to continue upon the track in front of the car, if he then uses ordinary care to avoid the accident, that is all that is required of him in that respect."

It appears to be a correct statement of the law. Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 755, 134 Pac. 709; 36 Cyc. 1517.

[4] The same party requested, and the court also gave, an instruction worded as follows:

"I charge you that it is as much negligence to fail to see that which can be observed by the exercise of ordinary care as it is negligence not to look at all. If from the evidence you believe that the car of defendant railway company was visible to the driver of the auto bus before he passed from a place of safety to one of danger, then I charge you that it was the duty of the driver of the auto bus not only to look and listen with ordinary care before going upon said tracks or in a place of danger, but actually to see and heed that which could have been seen or heard approaching upon said track by the exercise of ordinary care; and if you believe from the evidence that the driver of the auto bus was negligent in this respect, and that such negligence on his part was alone the direct or proximate cause of the accident, then plaintiffs cannot recover against defendant railway company and your verdict must be in its favor."

As addressed to the facts of the instant case that instruction seems to be supported by Hamlin v. Pacific Electric Ry. Co., 150 Cal. 776, 782, 89 Pac. 1109.

[5] The appellant does not challenge any particular passage, and does not cite any authorities showing that any passage in the last two instructions is an erroneous statement of the law. The appellant's position with reference to all three of the instructions is:

"It will therefore be seen that the court in the case at bar deliberately refused the instruction of appellant placing the two defendants in exactly the same status as to their duty to observe and avoid collision with each other, and instead set up two different standards—one for the railroad company and one for the appellant. It is well settled that the rights and duties of the two were precisely the same."

If by this expression the appellant means to state that the driver of the auto bus and the motorman on the interurban car had equal rights and were under identically the same duties with reference to traveling on the railroad rails, the position of the appellant is not tenable. Scott v. San Bernardino Valley, etc., Co., 152 Cal. 604, 610, 93 Pac. 677.

[6] The appellant also complains that the trial court in instructing the jury declared one standard of conduct applicable to the Pacific Electric Railway Company and another as applicable to the defendant Dimmick when the driver should be suddenly confronted with unexpected dangers. Instruction No. 25, given at the request of the Pacific Electric Railway Company, was as follows:

"A motorman who, exercising ordinary care, is suddenly confronted with unexpected danger is required to exercise only that care which an ordinarily prudent man confronted with such unexpected danger would exercise. The very best judgment or foresight is not expected of him. If he does what at that moment appears best to do, and in so doing does what an ordinarily prudent man would have done, it is all that is required of him, even though it appears that, viewed in the light of after-acquired knowledge, it might have been better to have done something else."

Instruction No. 32, given at the request of the appellant, was as follows:

"You are instructed that a person suddenly confronted with danger, caused through the negligence of another, is not required to use that calm, cool, and deliberate judgment or action that he would be expected to use under ordinary circumstances; therefore if you shall believe that, while the driver of the bus belonging to defendant F. M. Dimmick was attempting to cross the street and the tracks of the said defendant's railway at the time and place under controversy, he was using ordinary care, and if you further find that the motorman negligently operated said car, and thereby put him in danger, then the said driver under those circumstances would be required to use the same care that an ordinarily prudent person would have used under the then existing circumstances in trying to escape from any impending

danger to him thus caused, and, if the driver was thus placed in danger, and then used the care as herein defined, then I charge you he was not guilty of negligence, whatever he may have done under these circumstances in attempting to escape from any impending danger, and mere error or mistake of judgment under such circumstances shall not be taken by you to be negligence on his part."

The utmost that can be truly said in behalf of the appellant's point is that appellant's instruction was a more complete and concrete statement of the same rule than was his opponent's instruction.

We find no error in the record.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

---

58 Cal. App. 725

## GAVER v. EARLY et al. (Civ. 4180.)

(District Court of Appeal, First District, Division 2, California. Aug. 9, 1922. Hearing Denied by Supreme Court Oct. 5, 1922.)

**1. Guardian and ward ⟸146—Complaint for accounting held sufficient against general demurrer, though not designating items of shortage.**

Complaint in action for accounting for money which defendants, while one was guardian of plaintiff and the other was attorney for the guardian, collected, but fraudulently retained and omitted from their account, which was approved and allowed, after which plaintiff formally released them, *held* sufficient as against a general demurrer, though not designating the items making up the amount claimed to have been so omitted.

**2. Guardian and ward ⟸146—Complaint for accounting held to sufficiently plead fraud, in view of trust relation.**

Complaint in action for accounting for money which defendants, one as plaintiff's guardian, the other as the guardian's attorney, received, but fraudulently retained and omitted from their account, after allowance of which plaintiff released them, *held* to sufficiently plead the fraud, in view of the trust relation.

**3. Limitation of actions ⟸100(7)—Statute begins to run only from discovery of fraud.**

Since the gist of the action for an accounting for moneys which defendants, as plaintiff's guardian and as the guardian's attorney, respectively, retained and omitted from their account, was fraud, limitations did not begin to run till plaintiff discovered the facts.

**4. Witnesses ⟸276—Plaintiff held entitled to call and to examine to designated extent defendant, who in the matters involved was attorney for other defendant.**

Plaintiff in an action for an accounting for money which defendants, one (G.) as guardian of plaintiff, the other (E.) as attorney for the guardian, had collected, but had fraudulently retained and omitted from their account, could call and examine E. as a witness as to his acts and statements, so long as it did not extend to any conversation with or communication from G., his client.

**5. Release ⟸31—General release does not extend to claims not known or suspected.**

Under Civ. Code, § 1542, declaring that a general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, such a release executed to a guardian and her attorney by the ward does not affect his claim, then undiscovered by him, for money which they had fraudulently retained and omitted from their account.

**6. Attorney and client ⟸20—Plaintiff's attorney not disqualified because having been a clerk in office of one defendant then attorney for other defendant.**

Plaintiff's attorney was not disqualified to act as such because shortly before bringing the action he was clerk in the office of one defendant who was then attorney for the other defendant.

**7. Guardian and ward ⟸157—Findings of shortage and fraud in guardianship supported by evidence.**

Evidence in action against one who was guardian of plaintiff, and another who was the guardian's attorney, based on fraudulent omission from their account of money collected, *held* to support findings of shortage and fraud.

**8. Attorney and client ⟸104—Guardian held charged with notice of matters which her attorney knew and should have communicated to her.**

Relative to admission in action against a guardian and her attorney for receipts which they fraudulently retained and omitted from their account of a passbook which had been in the attorney's possession, showing receipt by them of a stock dividend from a bank, it is immaterial that the guardian had never known of it, she being charged with notice of whatever her attorney, who was her agent, had notice of, and ought in good faith and in the exercise of ordinary care and diligence to have communicated to her.

**9. Appeal and error ⟸1050(1)—Admission of evidence harmless in view of other proper evidence.**

Any error in admitting ledger sheet was harmless, it showing only the same facts shown by a passbook properly admitted.

**10. Appeal and error ⟸1011(1)—Finding on conflicting testimony not disturbed.**

Finding on conflicting testimony as to price to be paid for shares of stock will not be disturbed.

Appeal from Superior Court, Sonoma County; A. B. Mackenzie, Judge.

Action by Andrew Poe Gaver against William H. Early and another. Judgment for plaintiff, and named defendant appeals. Affirmed.

R. P. Henshall and Nat Schmulowitz, both of San Francisco, for appellant.

A. H. Crook, of San Francisco, and W. F. Cowan, of Santa Rosa (R. C. Young, of San Francisco, of counsel), for respondent.

STURTEVANT, J. The plaintiff brought an action against the defendants for an accounting. Judgment went for the plaintiff. The defendant W. H. Early appealed from the judgment under section 953a of the Code of Civil Procedure.

The record includes everything, and it is very long, including upwards of 2,000 pages of typewritten manuscript. It shows that Andrew P. Gaver, Sr., died testate, leaving him surviving one daughter and one son, a minor, who has since attained his majority, and who is the plaintiff in this case. By the terms of his will the father named the defendant, Ellen Gaston, his sister, as executrix of his will, and requested her to name W. H. Early as her attorney for herself as executrix. After her brother's death Mrs. Gaston took out letters, and on November 29, 1909, she also took out letters of guardianship over the person and estate of the plaintiff, then a minor. In each proceeding she employed W. H. Early as her attorney. The proceedings in probate in the matter of the estate of the father were so conducted that a decree settling the final account and distributing the estate was rendered May 8, 1911. No inventory in the guardianship proceeding was filed until November 10, 1911. About two months later, January 10, 1912, the first account in the guardianship proceedings was filed. It was approved by order of court January 22, 1922. The second account was filed July 3, 1913, and was approved July 14, 1913. The third account was filed March 12, 1914, and was approved March 30, 1914. The fourth and final account was filed September 16, 1914, and was approved September 28, 1914. By the decree of distribution real property comprising eleven tracts and personal property consisting of cash, stocks, mortgages, etc., were distributed to the two children. The securities were of such a nature that they were falling due, were collected, and the proceeds were reinvested from time to time continuously from the date of the father's death until the date of the alleged settlement between this plaintiff and the defendants. The inventories, the accounts, and the decrees were so drawn that one cannot trace from one paper to another each of the items set forth. At the time of her appointment as guardian Mrs. Gaston was 77 years of age or thereabouts. She did not actively take up her duties as guardian, but her attorney, the defendant Mr. Early, took up the actual management of the ward's affairs, and attended to the details. Pending the guardianship proceedings matters were carried on as though Mr. Early was attorney for the ward. In that way they transacted the business. When the minor attained his majority, he and Mr. Early went over the final account, and thereafter the same was presented to the court and approved. At no time did Mrs. Gaston or Mr. Early keep formal book accounts, and the matter of settling the last account was not free from difficulties. Nevertheless an account was prepared, and the plaintiff signed a written application asking the court to allow the account. About four months later the plaintiff signed a formal release discharging Mrs. Gaston, and also discharging Mr. Early. A little later the plaintiff left for Ann Arbor, Mich., to attend college. While he was away Mr. Early acted as his financial agent, and, during a part of the time, held the plaintiff's power of attorney. One of the last transactions between Mr. Early and the plaintiff occurred in 1916–17. That matter gave rise to a dispute which caused the plaintiff to have an accountant make a full examination of his accounts. One result of that examination was that the plaintiff obtained such information as led him to believe that he had not received from his guardian and her attorney all of the moneys which they had received for his account. He made a demand for a further accounting, it was refused, and the plaintiff brought this action.

[1, 2] The plaintiff pleaded his cause of action in two counts. In the first count he pleaded a cause of action as based on a mutual mistake. In the second count he pleaded a cause of action as based on fraud. The trial court rested its judgment on the second count. Therefore we shall take up that count only. The plaintiff alleged the facts which we have set forth. In the charging part of his pleading he alleged an attack on each one of the accounts filed in the guardianship proceedings. Each attack was similarly worded except as to dates and amounts. One attack was:

"That thereafter, and during the period of time beginning with the 1st day of January, 1912, and ending with the 31st day of December, 1912, both dates inclusive, there was paid to said defendants, and they did receive, the sum of $10,706.01, for and on account of said estate of said plaintiff, then a minor, which fact said defendants and each of them well knew; that notwithstanding said knowledge on the part of said defendants, and for the purpose of fraudulently concealing the true facts as to said moneys paid and received as aforesaid from said court and said plaintiff, and for the purpose of fraudulently diverting a portion of said last-mentioned sum of money to their own use and benefit, and for the purpose of fraudulently procuring and obtaining an order of said court approving and allowing what purported to be the account of said defendant Ellen Gaston as guardian aforesaid, covering said last-mentioned period, and by them filed in that behalf, as hereinafter more fully appears, said defendants did, on or about the 3d day of July, 1913, pre-

pare and file in said court and in the matter of said estate of said minor an account purporting to be the account of said defendant Ellen Gaston as guardian aforesaid covering said last-mentioned period, wherein they did set forth, allege, and account for the sum of $7,915.97 thereof, and no more, and did intentionally and fraudulently, and for the purposes aforesaid conceal, fail to report, and account for the sum of $2,790.14 thereof; that thereafter, and on or about the 14th day of July, 1913, and by reason of said fraudulent acts and conduct of said defendants, and not otherwise, said court did approve and allow said account so filed, which said order remains in full force and effect, and has not been appealed from, vacated or set aside."

In this manner the plaintiff pleaded that the defendants had received and had not accounted for the total sum of $31,324.53. The defendants claim that the complaint was insufficient because it did not specifically designate the items which had been omitted. Neither defendant interposed a demurrer to the complaint on the ground that for the reason stated the complaint was ambiguous, etc. Each defendant did interpose a general demurrer. We think that the complaint was not vulnerable to a general demurrer. The argument of the appellant is that he should have been advised by the plaintiff's complaint as to each item which the plaintiff claimed had been omitted from the accounts which had been prepared, filed, and settled. If the plaintiff had been in a position which enabled him to so frame his pleading, he would have been able to adopt a count as for money had and received. But, under the facts, it is patent that he was wholly unable to do so. When in such an action as the instant case the plaintiff is claiming that overcharges have been made, the rule contended for by the appellant may have application; but where, as here, no claim is based on an overcharge, but the claim is made that moneys were received which were not accounted for, the rule is not so strict. Again, the defendants claim that the plaintiff did not sufficiently allege the facts showing extrinsic fraud and the defendant cites and relies on such cases as Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159, and Fealey v. Fealey, 104 Cal. 354, 38 Pac. 49, 43 Am. St. Rep. 111. Those cases did not involve a fiduciary relation. When that relation is involved a higher duty rests on the defendant, and his liability for misrepresentations or concealment will more readily be examined by the courts than in other cases. Sohler v. Sohler, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98; Aldrich v. Barton, 138 Cal. 220, 71 Pac. 169, 94 Am. St. Rep. 43; Silva v. Santos, 138 Cal. 536, 71 Pac. 703; Tracy v. Muir, 151 Cal. 363, 372, 90 Pac. 832, 121 Am. St. Rep. 117.

[3] The defendants claimed the action was barred by the statute of limitations. The very gist of the action is the alleged fraud of the defendants. The plaintiff was not bound to make outside inquiries, but was entitled to rely on the assumption that the defendants would treat him fairly. He was not bound to commence an action until he discovered facts showing that he had been treated otherwise. He commenced his action within one year after making the discovery of the alleged shortages. His action was commenced in time.

[4] The plaintiff called Mr. Early as a witness, and examined him as to his acts, statements, etc., but did not examine him as to any conversation which he had had with, or as to any communication which he had received from, his client, Mrs. Gaston. The trial court did not commit an error in allowing him to be examined as a witness on the subjects on which he was examined.

[5] The releases, which we referred to in stating the facts, were executed by the plaintiff before he made his alleged discovery. Those releases did not operate to discharge the defendants, or either of them, from claims in favor of the plaintiff which the plaintiff did not know or suspect existed at the time he executed the releases. Civ. Code, § 1542.

[6] At one time shortly before this action was commenced, and at a time when the defendant Early was attorney for the defendant Gaston, this plaintiff's attorney was a paid clerk in the office of the defendant Early. The fact of such employment did not disqualify this plaintiff's attorney from subsequently accepting employment from this plaintiff and from taking charge of this litigation. The maintenance of the action under such facts is not against public policy.

[7] This brings us to the attack which directly involves the merits of the litigation, and which the appellant presents from several angles. As stated above, the gist of the plaintiff's cause of action was fraud, together with a prayer for an accounting. There was no evidence, and the trial court did not find, that Mrs. Gaston personally was guilty of fraud. She was negligent, and so was Mr. Early. He admitted as much, but defended the action on the claim that there was no shortage. During the trial the plaintiff assumed the burden and introduced evidence to prove fraud on the part of the defendant Early. Assuming that different minds might take different views of the record, it is sufficient to state that there are such facts shown in the record as tend to support the findings of the trial court. The trial court found that the defendant Early had been guilty of fraud. It cannot be said that that finding is wholly without support. One would expect, in such a record, to find a formal statement of the account. In that account one would expect to find an itemized list of moneys received, etc., and an itemized list of ex-

penditures, and a balance struck. In this record there is no such statement. But our attention has not been called to the fact that any formal request was made of the trial court asking it to make such a formal statement, nor to the refusal of the trial court so to do. In its findings of fact the trial court made findings as to the amounts which it found had been received, and which had not been accounted for. As an illustration, the fourth finding is:

"That prior to the filing of said first account and on July 23, 1910, there was paid to said defendant Early $2,000, and on September 3, 1910, $3,000 on account of and pursuant to two decrees of partial distribution made in the matter of the estate of said Andrew P. Gaver deceased, in favor of said plaintiff, and on May 8, 1911, $5,036.83, on account of and pursuant to a final decree of distribution in the said estate of Andrew P. Gaver, deceased. That pursuant to said final distribution there was also distributed to plaintiff an undivided one-half interest in certificate of deposit No. 2350 of the Santa Rosa Bank, dated July 2, 1909, in the sum of $38,987.60, with interest at the rate of 6 per cent. per annum. That thereafter said defendant Ellen Gaston indorsed said certificate of deposit No. 2350 and delivered the same to said defendant Early. That thereafter, and upon the 28th day of June, 1911, said defendant Early did collect and receive as interest on said certificate of deposit $2,339.22, one-half of which last-mentioned sum, to wit, $1,169.61, was collected and received by him for and on account of the estate of said plaintiff, and the other one-half of said amount was collected and received by him for Bessae Gaver Steitz, the sister of said plaintiff. That thereafter said defendant Early collected the principal of said certificate of deposit No. 2350 on the dates and in the amounts as follows: October 16, 1911, $8,987; October 23, 1911, $10,000; October 24, 1911, $10,000, and October 28, 1911, $10,000. That one-half of said sums, to wit, $19,493.50, was collected by him for and on account of the estate of said plaintiff, and a like amount was collected by him for said Bessae Gaver Steitz. That on the 5th day of July, 1911, a stock dividend of $2,500 was declared by the Bank of Tomales upon stock owned by said plaintiff and credited to the bank account of said defendant Ellen Gaston, as guardian of said plaintiff, and was thereafter collected and received by said defendant Early. That each and all of the foregoing items, together with the dates of collection and the amounts thereof, were entirely omitted from said first account, and no part thereof was accounted for therein, nor otherwise, nor at all, except the sum of $16,851.39, which appears in said first account in the following manner and not otherwise: 'Cash received from the estate of Andrew P. Gaver, deceased, $7,357.89,' and 'Cash received Santa Rosa Bank Deposit, $9,493.50.' That both of said last-mentioned entries were inserted in said first account by said defendant Early fraudulently, and for the purpose of concealing the fact that he had omitted therefrom and had converted to his own use the sum of $16,348.55 thus omitted from said first account as aforesaid."

That finding, and similar findings, show the items the court allowed as receipts which had not been otherwise accounted for. As the trial court proceeded with the trial it made certain calculations by virtue of which other items of receipts were set off against certain expenditures which likewise had not been otherwise accounted for; that is, errors in favor of the defendants were set off against errors against the defendants. An illustration of the procedure followed by the trial court is the matter of the rents received between the date the guardian filed her first account and the date she filed her second account. The proof introduced at the trial tended to establish the sum of those rentals at $7,190.94; the amount stated in the second account was $4,966. The apparent shortage was $2,224.94, but in this connection there were some disputed items of some doubt which the court determined in favor of the defendants, and thereupon it deducted from the sum last mentioned $100, thereby charging the defendants with the net item of $2,124.94. Finding 5. Such procedure is not the most approved method; however, during the trial, each party was allowed to oppose each item against him and to fully present each item to which he could lay any claim. While the trial court made offsets as above recited as to items which are not expressly disposed of in the findings, the appellant has not called to our attention any prejudicial error. The appellant makes a claim that he has been overcharged $14,422.23, and enumerates the items. It is true that the findings made without the issues do not show that the component parts of that $14,422.23 were allowed, but the reporter's notes show there was no overcharge. The appellant does not cite to us any part of the record showing prejudicial error in allowance or disallowance for or against him. We have carefully examined the record, and we do not find any such instances. On the other hand, we do find that the component factors of the said $14,422.23 were given due consideration. Although not in the manner suggested or advocated by the appellant, nevertheless the same were not improperly disposed of, nor were the same ignored.

[8, 9] The defendants were charged with $2,500 as a stock dividend received from the Bank of Tomales. Such an item appeared as an entry in the passbook and also on the loose-leaf ledger account of the bank. The plaintiff offered in evidence separately the passbook and the loose-leaf ledger account of the bank, which were marked, respectively, Plaintiff's Exhibits 33 and 32. The passbook was objected to as being incompetent, irrelevant, and immaterial, and hearsay, not identified as a record of the bank by any witness, no proof that Mrs. Gaston ever had it in her possession, or ever saw the book, or knew anything of the entries in it, or had any

knowledge of it at any time. As appears from the facts which we have already recited, Mr. Early was the agent of Mrs. Gaston, and Mrs. Gaston is deemed to have had notice of whatever Mr. Early had notice of, and ought in good faith and the exercise of ordinary care and diligence to have communicated to her. The evidence shows in many places that Mr. Early had possession of the passbook at many times, indeed nearly all of the time. The book contains the item in question as being the second item entered therein: "Date, July 6, 1911; deposit, $2,500; balance, $7,527.54." There was no error in admitting the book in evidence. The loose-leaf ledger account, Plaintiff's Exhibit 32, contained as the second item thereon: "Date, July 6, 1911; Div. 86; Deposit, $2,500." Conceding, without deciding, that it was error to admit the ledger sheet, it is patent that the sheet showed only the same facts which were shown by the passbook. If it was error to receive the sheet in evidence, the error was not prejudicial.

[10] After the probate court had settled the fourth account it was clear that the plaintiff was entitled to receive over $20,000 in cash. However, the plaintiff stated to Mr. Early that he wanted investments for his cash, and in that conversation, and other conversations held at about the same time, the plaintiff and Mr. Early discussed the matter of the plaintiff taking in part payment 71 shares of the capital stock of the Bank of Santa Rosa. The plaintiff testified that he agreed in those conversations to pay $60 per share. Mr. Early testified that the plaintiff was to pay $130 per share. The trial court adopted that version of the facts as recited by the plaintiff, and gave the defendants credit for the bank stock at $60 per share. With the record standing as it does, we think this court may not disturb the allowance as made by the trial court.

As the trial proceeded the judge presiding at the trial propounded many questions to witnesses and made many statements to counsel of and concerning his impressions regarding the proof introduced. The appellant cites certain of those passages, and claims that the trial court decided the case, or at least parts of it, before the case had been finally submitted. We think this contention is not borne out by the record, but, on the other hand, that the trial judge worked most patiently to develop all of the facts, and gave each particle of the testimony full consideration without regard to any of the remarks that were made during the progress of the case.

We find no error in the record, and the judgment against the defendant W. H. Early is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

58 Cal. App. 736

## GAVER v. EARLY et al. (Civ. 4181.)

(District Court of Appeal, First District, Division 2, California. Aug. 9, 1922. Hearing Denied by Supreme Court Oct. 5, 1922.)

**1. Guardian and ward ⟸49—Guardian may employ attorney for collections.**

A guardian of a minor possessed of a large estate may employ an attorney to collect interest, dividends, and rents.

**2. Guardian and ward ⟸33—Guardian charged with funds she should reasonably have received.**

A guardian may be charged with rents, interest, and the like, which she never received, but might and should have received by the exercise of due and reasonable care, diligence, and prudence in her modes of dealing.

**3. Guardian and ward ⟸33—Guardian must use care in selecting attorney, and must supervise his acts.**

A guardian employing an attorney to assist her in collections must make selection with reasonable care, and must supervise his acts with the same care, and, failing to supervise his acts, is liable for breach of trust through his misappropriation.

**4. Guardian and ward ⟸146—Guardian's liability for breach of trust adjudicable in action for accounting.**

The amount of liability of a guardian for breach of trust through failure to supervise the acts of an attorney employed by him to make collections, resulting in misappropriation by him, may be adjudicated in an action for accounting.

Appeal from Superior Court, Sonoma County; A. B. Mackenzie, Judge.

Action by Andrew Poe Gaver against William H. Early and Ellen Gaston. Judgment for plaintiff, and, defendant Ellen Gaston having died, Lulu I. Steits, her executrix, appeals. Affirmed.

Geary & Geary, of Santa Rosa, and F. A. Meyer, of Petaluma, for appellant.

A. H. Crook, of San Francisco, and W. F. Cowan, of Santa Rosa (R. C. Young, of San Francisco, of counsel), for respondent.

STURTEVANT, J. This is an appeal from the judgment by the defendant Ellen Gaston. It presents no point that we have not discussed in the appeal of her codefendant, Gaver v. Early (No. 4180) 209 Pac. 390, this day filed.

[1-4] In addition to what was said by us in that case, we think it is proper to add that, when Mrs. Gaston accepted the appointment of guardian of a minor possessed of a large estate comprising 11 or 12 tracts of real estate, and a large number of mortgages, stocks, and savings bank accounts, she had a right to employ an attorney or agent to

collect interest, dividends and rents. 1 Perry on Trusts (6th Ed.) § 404. But it is settled law that a violation by a trustee of a duty which equity lays upon him, whether willful and fraudulent or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust (3 Pomeroy's Eq. Juris. § 1079), and he may be charged with rents, profits, interest, income, proceeds of sales, and the like, which he never in fact received, but which he might and should have received by the exercise of due and reasonable care, diligence, and prudence in his modes of dealing (Pomeroy's Eq. Juris. § 1070). When the trustee employs third persons as agents and attorneys, he must select them with reasonable care and he must supervise their acts with the same care. McClure v. Middletown Trust Co., 95 Conn. 148, 110 Atl. 838, 840; Donaldson v. Allen, 182 Mo. 626, 650, 81 S. W. 1151; Duckett v. National Mechanics' Bank, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513, 516. Conceding, without deciding, that under the facts in the instant case Mrs. Gaston was justified in employing Mr. Early in the capacity in which he was employed, she wholly failed to supervise his acts in any respect whatsoever, and the court so found. Under these circumstances she was liable for a breach of trust, and, in an action as for an accounting, the amount of her liability could be properly adjudicated. 1 C. J. § 68.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

189 Cal. 599

## PEOPLE v. LEE YICK. (Cr. 2413.)

(Supreme Court of California. Sept. 19, 1922. Rehearing Denied Oct. 19, 1922.)

**1. Criminal law ⟸1159(3) — Conflicting evidence not subject to review when sufficient to sustain verdict.**

Where the evidence for the people, though flatly contradicted by that for defendant, was amply sufficient to sustain the verdict, it is not subject to review by the Supreme Court.

**2. Homicide ⟸169(7) — Evidence of statements by defendant two weeks before killing held admissible.**

Where it was the contention that defendant, an officer of a Chinese tong, ordered members of the tong to kill deceased, evidence that defendant, two weeks before the murder, applied to the police department for leave to arm members of his tong with revolvers, and thus prevent a tong war, and guaranteed that his tong would do no shooting, was admissible as tending to show his position of authority and his anticipation of the possibility of a war, and to enable the jury to determine whether his order was one likely to be obeyed.

**3. Criminal law ⟸368(3) — Evidence as to statement by third person in connection with stabbing preceding killing admissible as res gestæ.**

Where there was evidence that after L., a member of a Chinese tong, was stabbed, de-

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

fendant, an officer of the tong, ordered its members to kill any members of another tong they could find, and that W. soon thereafter killed deceased, evidence that W., while questioning L. following the stabbing, cried out for vengeance on the members of the other tong, was part of the res gestæ, and admissible, especially as it was apparently favorable to defendant as showing that W. acted on his own initiative, and not on defendant's order.

**4. Witnesses ⟸383—Impeachment of defendant's testimony showing absence from headquarters of tong where slayers obtained weapons not impeachment on immaterial matter.**

On the trial of an officer of a Chinese tong for aiding and abetting the murder by ordering the killing of members of another tong, where it was the state's theory that the assassins procured their weapons at the headquarters of the tong and defendant denied being there, it was proper to impeach his testimony by proof of a statement shortly after the killing that he stayed at the headquarters of the tong until after he heard the shots fired.

**5. Criminal law ⟸823(5)—Instruction on trial of aider and abetter not erroneous as permitting conviction without finding of malice aforethought in view of other instruction.**

Where the court had charged that murder in the first degree was the killing of a human being with malice aforethought and that the indictment charged defendant with killing deceased with such malice, a further instruction that if deceased was killed by persons other than defendant, and defendant aided and abetted the killing by giving advice or counsel or command, which was acted upon by the parties doing the killing, he was equally guilty of the offense with those who committed the crime, was not erroneous as permitting a conviction without proof of malice aforethought.

**6. Homicide ⟸30(1)—If slayer acted with malice aforethought, one ordering killing was equally guilty.**

Under Pen. Code, §§ 31 and 971, abolishing all distinctions between principals in the first or second degree and accessories before the fact, if those committing a homicide were animated by malice aforethought, one who commanded them to do the killing was equally guilty; the giving of the order involving malice aforethought and premeditation.

**7. Criminal law ⟸1171(1)—Reference to Chinese tong wars in argument held not harmful.**

As it is a matter of common knowledge that the Chinese resort to systematic murder of members of opposing tongs in order to carry out their purposes, a reference to tong wars in the district attorney's argument on a trial for murder claimed by the state to have been committed in a tong war was not harmful.

**8. Criminal law ⟸726—Improper for district attorney, when not sworn as a witness, to state whereabouts of absent witness.**

It was improper for the district attorney, without being sworn as a witness, to state that an absent witness had gone to China, though the statement was provoked by the direct question of defendant's counsel during his argument.

**9. Criminal law ⟸1171(3)—Remark of district attorney concerning whereabouts of absent witness held harmless.**

Where six witnesses for the people and nearly as many for defendant testified to what occurred on a certain occasion, the district attorney's improper remark, during the argument of defendant's counsel, that an absent witness, who would have testified concerning the same matter, had gone to China, was not prejudicial.

**10. Criminal law ⟸719(3)—Proper to comment on testimony of witness that he told district attorney a certain thing, but not to assert the fact as of the district attorney's own knowledge.**

Where, on redirect examination, in explanation of matters brought out on cross-examination, a witness testified that he told the district attorney that he heard defendant order the killing of members of another Chinese tong, it was proper for the district attorney to comment on such testimony in his argument, but not to state, on his own knowledge, that the witness did tell him, or that he knew as a matter of fact, that the order was given.

**11. Criminal law ⟸729, 730(7)—No prejudicial error where district attorney disclaimed personal knowledge and court told jury not to take his statement as evidence.**

Where the district attorney utilized testimony of a witness that he had told the district attorney a certain fact in a fashion which might be deemed a corroboration by him of the witness, but, upon objection, read the portion of the record upon which he relied and expressly disclaimed any knowledge of the matter, and the court told the jury that it was improper for the district attorney to speak of it of his own knowledge, and charged elaborately that the jury were not to take the statements of counsel as evidence, there was no prejudicial error.

**12. Criminal law ⟸961—Determination of conflict in testimony as to whether juror was asleep is for the trial court.**

The determination of a conflict in the affidavits, on motion for new trial, as to whether a juror was asleep while the instructions were being read, is for the trial court.

In Bank.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Lee Yick was convicted of murder in the first degree, and he appeals. Affirmed.

Harris & Hayhurst, M. K. Harris, R. G. Retallick, and Herbert McDowell, all of Fresno, for appellant.

B. W. Gearhart and O. L. Everts, both of Fresno, U. S. Webb and John H. Riordan, both of San Francisco, and Philip Conley, of

Fresno (O. L. Everts, of Fresno, of counsel), for the People.

WILBUR, J. The defendant, Lee Yick, was convicted of murder in the first degree and the death sentence was imposed. It is not claimed by the prosecution that the defendant personally killed the murdered man Fook Kee, but it is claimed that the defendant, as second president of a Chinese tong, the Suey On tong, ordered the killing, and that the murder was committed in pursuance of and because of such orders. The evidence relied upon by the prosecution to sustain the conviction is substantially as follows: Shortly before 9 o'clock on the evening of June 7, 1921, a Chinaman named Lee Nam, a member of the Suey On tong, staggered into China alley with a knife in his hand, having shortly before been stabbed. A police officer who was present sent for the defendant Lee Yick to come and interpret the dying statement to be made by the stabbed man. The defendant came immediately and asked Lee Nam who had stabbed him. Lee Nam replied that Wong Bing, belonging to the Bing Kong tong, had stabbed him. Thereupon Lee Yick, in the presence of a crowd of bystanders, gave orders in the Chinese language to the then present members of his tong, the Suey On tong, to get their guns and kill any members of the Bing Kong tong that they could find. Among the members of the Suey On tong present were Wong Toy and Tuck Jick. These men, with three or four others, immediately left, followed by the defendant, Lee Yick. They all repaired to the headquarters of the Suey On tong, across the street at 1013 China alley, where again Lee Yick gave the following order:

"Quick, go quick! Wong Toy and Tuck Jick is gone and see yourself that you men rush toward Fook Kee's place."

Wong Toy and Tuck Jick and Lee Jim, armed with revolvers apparently obtained at the Suey On tong headquarters, proceeded immediately across the street to the butcher shop of Fook Kee, a member of the Bing Kong tong, and there shot and killed him, and shot and wounded another Chinaman there present. Two weeks before the murder of Fook Kee, the defendant had applied to the police department of Fresno for leave to arm some of the members of the Suey On tong with revolvers in order that they might aid the vigilance of a watchman who had been employed by the Suey On tong, and thus prevent a tong war. The defendant then guaranteed that the Suey On tong would do no shooting.

[1] The evidence of the people was amply sufficient to sustain the verdict of murder in the first degree, and, indeed, inconsistent with any other verdict, and although flatly contradicted by the evidence of the defendant and his witnesses in so far as the orders claimed to have been given by the defendant for the killing of the Bing Kongs is concerned, is not subject to review by us. We will, therefore, devote our attention to the errors alleged to have been committed in the admission and rejection of testimony and in the instructions to the jury and the alleged misconduct of the district attorney and of a juror.

[2] The appellant complains of the admission in evidence of the above-mentioned statements made by the defendant to members of the police department two weeks before the murder, when the defendant requested that a permit be granted to members of the Suey On tong to carry revolvers. This evidence was admissible for several reasons. It tended to show that the defendant occupied a position of authority in the Suey On tong, such that he could guarantee the conduct of his tong members, and it showed that the defendant anticipated the possibility of a war between his tong and some other tong in Chinatown. The evidence was relevant for the purpose of enabling the jury to determine whether or not the demand or order of the defendant that members of the Bing Kong tong should be killed was one which was likely to be obeyed as one given by a leader to his followers.

[3] Evidence was admitted to the effect that before the defendant arrived at the side of the dying Lee Nam and had questioned him as to who had stabbed him, Wong Toy had also questioned Lee Nam and that Lee Nam had told Wong Toy he had been stabbed by a member of the Bing Kong tong; that Wong Toy thereupon evidenced great excitement and cried out for vengeance upon the Bing Kongs. It is claimed that it was an error to permit this testimony of declarations and acts of Wong Toy not in the presence of the defendant. Inasmuch as Fook Kee was killed by Wong Toy, we cannot see how the defendant would be prejudiced by evidence tending to show the animosity of Wong Toy. Such evidence would tend to show that he may have acted upon his own initiative instead of upon the orders of the defendant and consequently was favorable to the defendant. However that may be, the circumstance was clearly part of the res gestæ. The exclamations and conduct of Wong Toy merely showed his excitement and his animosity against the Bing Kongs. There was nothing in the statement to inculpate the defendant nor to show his connection with the killing. It was not a declaration of coconspirators, admissible as such, but was one of the incidents in connection with the double murder admissible as a part of the res gestæ, tending as it did to show the probable effect of an order to kill given to an already excited and overwrought Chinaman.

[4] The defendant complains of a ruling

of the court permitting the examination of two police officers in rebuttal of the defendant's testimony on the ground that it was sought thereby to impeach the defendant upon an immaterial matter. The defendant had testified that immediately after leaving the side of the dying Lee Nam he went to the headquarters of the Suey On tong and stood in the doorway a moment and then proceeded across the street to other houses along the street looking for Ah Chin, the president of the Suey On tong; that he did not again return to the headquarters of the Suey On tong, but remained with a friend over night. The officers called in rebuttal testified that defendant had told them shortly after the killing that he had gone immediately from the side of the dying Lee Nam to the headquarters of the Suey On tong and remained there until he heard the shots fired which killed Fook Kee. In view of the fact that the prosecution was based upon the theory that the assassins procured their weapons at the Suey On tong, it was clearly important to determine whether or not the defendant procured and delivered these weapons to the assassins. If he only went to the doorway of the Suey On tong and immediately left after asking for the president, it would tend to show that he did not aid the assassins in getting their weapons. On the other hand, if he remained at the Suey On tong he had the opportunity to give them weapons, to give further orders, and to get in connection with others who might be implicated or interested in the commission of the crime. While the circumstance was perhaps of no great importance in view of the fact that the people's case rests upon the evidence of the giving of the orders for the killing at the side of the dying Lee Nam and evidence of the subsequent order given at the door of the Suey On tong to kill Fook Kee, the whereabouts of the defendant at the time of the killing and immediately prior thereto was material, and it was proper impeaching testimony to prove that defendant had stated that he was at the Suey On tong headquarters when the murder occurred.

The defendant claims that an instruction given at the request of the people was erroneous. This instruction is as follows:

"You are instructed that if you find from the evidence introduced herein, beyond a reasonable doubt and to a moral certainty, that the decedent Fook Kee was killed and murdered as charged in the indictment by persons other than this defendant, that the defendant herein, Lee Yick, did willfully, unlawfully, and feloniously aid and abet the killing of Fook Kee, as charged in the indictment herein, by willfully, unlawfully, and feloniously, prior to the commission of the acts which caused the death of said decedent, Fook Kee, giving advice or counsel or command to the party or parties whom you find from the evidence, beyond a reasonable doubt, did, in fact, cause the death of said Fook Kee, and which advice or counsel or command was so acted upon by such party or parties, then you are instructed that this defendant is equally guilty of the offense charged in the information with the party or parties who did commit the crime, even though the evidence shows that said defendant was not personally present at the time the crime was actually perpetrated."

[5, 6] It is claimed that this instruction is erroneous in that it permits a verdict of guilty without proof of malice aforethought. This instruction contains a correct statement of the law. The jury had been instructed that murder in the first degree was the killing of a human being with malice aforethought; that the indictment charged the defendant with killing Fook Kee with malice aforethought. The jury by the instruction complained of were informed that if they found that Fook Kee was killed and murdered as charged in the indictment, that is to say with malice aforethought, then they were to find the defendant guilty if he willfully, unlawfully, and feloniously aided and abetted the killing of Fook Kee by willfully, unlawfully, and feloniously giving advice or command to the parties who killed Fook Kee, which advice, counsel, or command was acted upon by such murderers, that the defendant was equally as guilty as those who committed the crime, although not personally present at the time the crime was actually perpetrated. That is to say, if the defendant ordered Wong Toy and others to kill the deceased, Fook Kee, and they killed Fook Kee with malice aforethought, acting upon said order or command, the defendant was guilty of murder in the first degree the same as those who at his command actually killed the deceased. This instruction is strictly in accord with sections 31 and 971 of our Penal Code, which abolished all distinction between a principal and an accessory before the fact, and principals in the first or second degree, and provides that any one who aids and abets or advises and encourages the commission of a crime is guilty as principal. Under the instructions, in order to bring in a verdict of murder in the first degree it was essential that the jury should find that the murderer who actually did the killing was animated by malice aforethought. That being true, the defendant who commanded him to do the killing would be equally guilty. It is impossible to arrive at any other conclusion than that the defendant himself was animated by malice aforethought if, as the jury found, he actually ordered some one over whom he had authority to go and kill Fook Kee. The premeditation which the law requires is necessarily involved in the giving of the order.

[7] It is contended that the district attorney was guilty of prejudicial misconduct in his argument to the jury. The theory upon which he presented the case to the jury was

that this killing occurred in a tong war between the Suey On tong and the Bing Kong tong; that Wong Toy was a subordinate member of the tong commanded by the defendant, and that the killing was the result of defendant's orders given by virtue of his authority as second president of the Suey On tong. As it is a matter of common knowledge that the Chinese in this state resort to systematic murders of members of opposing tongs in order to carry out their purposes, we cannot see how the reference of the district attorney to tong wars can be declared harmful. People v. Ho Kim You, 24 Cal. App. 451, 141 Pac. 950. There is no other part of the general line of argument of the district attorney which was objected to or excepted to which requires any further consideration.

[8, 9] There are, however, two other points, raised in connection with the district attorney's argument that require consideration. The district attorney having failed to produce a witness, Lee Bing Tom, whose name was indorsed on the indictment, defendant's counsel during his argument turned to the district attorney and asked: "Why isn't he here?" The district attorney replied, "I will tell you why, he has gone to China." The district attorney should not have answered counsel, except as a witness under oath, even when provoked by the defendant's counsel so to do. The statement of the district attorney was in the nature of unsworn testimony. However, there was the evidence of six witnesses on the part of the people and nearly as many on the part of the defendant as to what occurred by the side of the dying Lee Nam. Under these circumstances, the failure of the prosecution to call another witness then present was of no serious consequence, and therefore the whereabouts of the witness was immaterial. We are unable to see any prejudice resulting to the defendant from the declaration of the district attorney.

A more serious question is that arising from a statement of a fact by the district attorney during his argument. He said:

"* * * But I knew that night, the night of the shooting, he gave those orders. George Haw, the Chinese witness that spoke to you in English, told me in Chinatown, as soon as I arrived on the scene of the crime—he says: 'Lee Yick is responsible for this. I heard him give the orders.'"

George Haw had testified on the subject of his statement to the district attorney.

On cross-examination of the witness, conducted by Judge Harris, after a detailed examination as to the statements made by Lee Yick at the side of Lee Nam, the following had occurred:

"Q. 'Go get your guns and shoot the Bing Kongs,' that is what he said, was it? A. Yes, sir.

"Q. Is that all he said? A. So he was gone, then, followed right behind the boys and left

"Q. And was that all he said? A. That is all I heard.

"Q. Who did you first tell about that, who did you tell what your evidence would be here, anybody?"

The witness did not directly answer this question, and for that reason was questioned by the district attorney on redirect examination as follows:

"Q. The judge [Judge Harris, defendant's attorney] asked you who you told about Lee Yick first that night. Who did you tell first that night? A. That night I think—I was sent around Fook Kee's that night and then I told you.

"Q. That same night. And you told what officer first when you went to Fook Kee's? A. I told Mr. Ben Wickstrom."

The statement of the district attorney as to what George Haw said was a perfectly proper statement of the evidence although it was so stated that an inference might have resulted that the district attorney was adding the weight of his testimony to that of the witness by his statement, "George Haw told me." This is perhaps accentuated by the fact that the district attorney in his argument said "I knew" and put into the mouth of George Haw a statement in somewhat different terms than that justified by his evidence, "Lee Yick is responsible for this, I heard him give the orders," while the evidence was that George Haw told the district attorney that the order was given by Lee Yick to kill Bing Kongs. Thereupon the argument was interrupted by the following colloquy:

"Mr. Harris: He said that to you?

"Mr. Gearhart: Yes, sir. And on your cross-examination in this case, you asked him in reference to it.

"Mr. Harris: You say this was as soon as you, yourself, went over to Chinatown?

"Mr. Gearhart: Yes, sir.

"Mr. Harris: We assign that as error. It is not in the evidence. Now, the district attorney goes further; the district attorney says he knows, as I understand his argument, that as soon as he went over there, *he knew this had been done.*

"Mr. Gearhart: Give me the transcript. I am going to read to the jury, if you are quoting me on something. I will read the whole—no, there is too much of it. (reads):

"'Q. The judge asked you' (page 45, line 24). 'The judge' (referring to Judge Harris) 'asked you who you told about Lee Yick first that night. Who did you tell first that night? A. That night, I think—I was sent around Fook Kee's that night, and then I told you'—indicating me (District Attorney Gearhart).

"Mr. Harris: Now that is not what I object to. I object to the district attorney stating to the jury *that he knew what was done as soon as he went over there.*

"Mr. Everts (assisting the district attorney): The testimony shows that the counsel has just

read that that is exactly what the witness said—the judge (Harris) asked him: 'Who did you tell about this matter?' And he answered: 'I told you, Mr. District Attorney,' is this witness' answer, and I submit the district attorney had a right to comment upon that, under those circumstances.

"Mr. Harris: *That is not what I object to.* I object to the district attorney's statement: *'I knew as soon as I went over there, this man had done that.'* I say that is not in the record, and it is improper, and we assign it as error. I don't want to interrupt the district attorney at all, even if he gets out of the record, but a thing like that, I think it is improper.

"Mr. Gearhart: Would it satisfy you if I say I knew it because George Haw told me?

"Mr. Everts: That is exactly what he said, in following it up.

"Mr. Harris: The district attorney said: 'I know what I said he did.'

"The Court: I don't think it is proper for the district attorney to state it of his own knowledge.

"Mr. Gearhart: There has not been any inference that I was there and saw the crime committed. I don't understand the Chinese language. I would have to speak Chinese to know all this, and I was not over there at the time." (Italics ours.)

[10, 11] It was proper for the district attorney to comment on the testimony of George Haw, but it was not proper for him to either state that George Haw had told him on the night in question of the orders given by Lee Yick, nor was it proper for the district attorney to state that he knew as a matter of fact that the orders had been given. The district attorney disavowed any personal knowledge concerning the killing or what was said by Lee Yick. At the time the court stated to the jury that it was improper for the district attorney to speak of it of his own knowledge, and subsequently instructed the jury elaborately that they were not to take the statements of counsel made during the argument as evidence. The matter then stands thus: The question of whether or not the witness George Haw had told the district attorney of the statement made by Lee Yick was an immaterial matter and one which could only be brought out, as it was, by the defendant's cross-examination of the witness, followed by an explanation on redirect. The district attorney utilized the testimony to fortify his argument and did so in a fashion which might be deemed a corroboration of this witness on this immaterial matter, but upon the objection of counsel the district attorney read the portion of the record to the jury upon which he relied as the basis for his statement and expressly disclaimed any knowledge of the killing. Under these circumstances, followed as the argument was by the instruction to the jury, we think that no prejudicial error was committed.

It seems, moreover, that defendant's real objection to the argument was not to the method of stating the fact of George Haw's statement to the district attorney, but to the declaration, "This man has done that," a statement never made by the district attorney."

[12] But one other point is raised in the case, and that is the alleged misconduct of one of the jurors. Upon the motion for a new trial affidavits were filed by the defendant's attorneys to the effect that during the reading of the instructions they had observed that juror Perkins was asleep. They do not claim that the attention of the judge or of opposing counsel or of the juror was called to this situation until after the jury had retired and the judge was leaving the bench, when his attention was called to it. It is a sufficient answer to this point to say that other affidavits were filed tending to show that this juror was not asleep and that the determination of that conflict in testimony was for the trial court. In the light of that determination we must assume that the juror was not asleep,

Judgment affirmed.

We concur: SHAW, C. J.; WASTE, J.; LAWLOR, J.

---

189 Cal. 58

## PEOPLE v. WONG TOY. (Cr. 2406.)

(Supreme Court of California. Sept. 19, 1922. Rehearing Denied Oct. 19, 1922.)

**1. Criminal law ⟸1035(3), 1053, 1129(1)—Defendant cannot complain of remarks in presence of jury panel before examination without objection, exception, assignment of error, or challenge to jurors.**

Where no objection was made, exception entered, or error assigned, because of alleged prejudicial remarks of the judge in the presence of members of the jury panel in denying a continuance, and attention of the court or counsel was not called thereto in any manner, and the jurors present were not examined upon their voir dire with reference thereto, and defendant did not request the court to excuse them, or call other jurymen, or challenge them peremptorily or for cause, though his peremptory challenges were not then exhausted, he cannot complain of the remarks.

**2. Criminal law ⟸1170½(5)—Witnesses ⟸372(2)—Question on cross-examination as to employment of attorney held proper, but its exclusion not prejudicial.**

A question asked deceased's grandson on his cross-examination, as to whether he or his family were hiring one of the attorneys, might well have been allowed; but, as the relationship already disclosed showed his interest, its exclusion was not prejudicial error.

**3. Witnesses ⊂⊃372(1)—Cross-examination as to interest largely in discretion of trial court.**

The extent of the cross-examination of witnesses as to their interest in the controversy is very largely in the discretion of the trial court.

**4. Witnesses ⊂⊃277(3)—Cross-examination of defendant concerning revolver and cartridges found in the same room with him held proper.**

Where defendant, on his direct examination, denied his guilt and denied that he had any cartridges at any time, it was proper to cross-examine him as to the ownership and possession of a revolver and the cartridges contained therein found in the same room with him immediately after the murder.

**5. Witnesses ⊂⊃277(5), 319—Cross-examination and impeachment of defendant concerning revolver held proper, though not of same caliber as bullets found in deceased's body.**

Where three or more men participated in a killing, each of whom fired shots from a revolver, and two revolvers of the same caliber as bullets found in deceased's body were found on the premises, the people had a right to cross-examine defendant on the theory that a revolver of a different caliber found in the room with him at the time he was apprehended was one of those used and to impeach his testimony in this respect; it not being a collateral matter.

**6. Witnesses ⊂⊃379(7)—Proper to cross-examine defendant concerning contradictory statement in application for continuance.**

Where defendant testified that several persons were at a Chinese tong club when he returned there shortly before a homicide, it was proper cross-examination to call his attention to an affidavit for a continuance in which he swore that the absent witnesses were the only witnesses by which he could prove that he was at the clubroom.

**7. Criminal law ⊂⊃1170½(6) — No error or misconduct when question not objected to, but question and answer stricken out.**

Where there was no objection to a question on cross-examination, but the question and answer were stricken out, no error or misconduct resulted.

**8. Criminal law ⊂⊃706—Not misconduct to ask witness if he was not known by a nickname.**

It was not misconduct for the district attorney, on cross-examination of a witness, to ask him if he was not known by his friends by a certain nickname.

**9. Criminal law ⊂⊃693—Assignment of error to question after it was answered too late.**

Where there was no objection to a question on cross-examination but, after it was answered, there was an objection and assignment of error, the assignment of error was too late.

**10. Criminal law ⊂⊃706—Questions asked defendant on cross-examination held not misconduct.**

Where it was the people's claim that defendant and L., an officer of a Chinese tong, were coconspirators, and that the killing was committed by defendant as an agent of the tong in obedience to L.'s orders, it was not misconduct to ask defendant on cross-examination if he had not acted as guardsman for the tong for some weeks previous to the shooting and if he had not told L. not to talk too much or he would "let the cat out of the bag."

**11. Criminal law ⊂⊃1129(1)—When asking of questions not assigned as error, question of misconduct not open.**

Where defendant did not assign the conduct of the district attorney in asking questions on cross-examination as error, he could not raise the question of misconduct in the Supreme Court.

On Petition for Rehearing.

**12. Criminal law ⊂⊃695(2)—Objection held insufficient to raise question that proper foundation not laid for testimony as to declarations in language which witness did not understand.**

Where reporter's testimony as to declarations made in the Chinese language which he did not understand was excluded on objection, but again offered after interpreter had testified that he correctly translated the questions and answers, general objection then made, which defendant's counsel expressly declined to make more specific, *held* not sufficient to call the court's attention to the fact that the interpreter's testimony was not a sufficient foundation for the reporter's testimony.

In Bank.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Wong Toy was convicted of murder in the first degree, and he appeals. Affirmed.

W. D. Crichton, Herbert McDowell, Geo. W. Jones, Harris & Hayhurst, M. K. Harris, and Rue C. Gibson, all of Fresno, for appellant.

U. S. Webb and John H. Riordan, both of San Francisco, B. W. Gearhart, Philip Conley, and C. A. Tuttle, all of Fresno (O. L. Everts, of Fresno, of counsel), for the People.

WILBUR, J. The defendant was convicted of the murder of Fook Kee and sentenced to be hanged. Some of the facts in connection with the murder are stated in the opinion this day rendered in People v. Lee Yick (Cal. Sup.) 209 Pac. 538. Several eye-witnesses testified to defendant's participation in the murder, and the defendant does not claim that the evidence is insufficient to justify the verdict, but depends for a reversal upon the alleged misconduct of the judge and of the district attorney and upon certain errors in ruling upon the admissibility of evidence.

[1] It is claimed that on July 5, when the defendant moved for a continuance of the

trial of the case, the comments upon the affidavits presented in support of the motion for a continuance, made by the judge, in the presence of the veniremen, were most prejudicial to the rights of the defendant. We will first consider this question. The affidavits offered by the defendant in support of the motion averred that there was a tong war in Fresno, the place of trial, between two Chinese tongs; that the Bing Kong tong had threatened to kill three members of the tong to which defendant's absent witnesses belonged and that these witnesses Mue Que, Ny Hong Jock, and Chan Hoy, had fled in terror from Fresno, their place of residence, and that their whereabouts was unknown to the defendant, and that they were the only witnesses by which the defendant could establish his alibi, and that a general order issued by the chief of police prevented their return until peace and quiet was restored. The district attorney filed counter affidavits in which he also made certain allegations with reference to the tong war, stating in effect that this war between the two Chinese tongs began some five or six weeks before the murder of Fook Kee, and the whereabouts of such witnesses was known to the members of the Suey On tong, to which the defendant belonged. The judge, in commenting upon the affidavits, expressed a just indignation that the community should be upset by a war between Chinese tongs and expressed the belief that the members of defendant's tong could locate such witnesses, as was averred in defendant's affidavits. The defendant's principal complaint concerning the remarks by the judge is that he expressed a doubt as to the existence of the persons defendant claimed could establish his alibi. It is claimed that by this remark the judge discredited the veracity of the defendant and thus affected the subsequent trial wherein defendant testified in his own behalf. The judge also said that he believed that if the matter were put in the hands of responsible citizens they would put an end to the tong war. This remark was no doubt the result of allegations in the affidavits concerning an effort to effect a treaty of peace between the warring tongs. The defendant now intimates that the court was advocating mob law, but there is no justification for this contention. It is evident that the attorneys for the defendant did not at any time regard the remarks of the judge as prejudicial to their client. No objection was made to the remarks of the judge; no exception was entered thereto or error assigned, nor was the attention of the court or counsel called in any manner to the fact that the defendant regarded the conduct of the judge as prejudicial. The judge stated that he regarded the matter of the tong war as absolutely irrelevant. The remarks of the judge were made in passing upon the matters averred in the affidavits presented on the motion and were in the main pertinent to the proper determination of that motion. Six of the jury panel present at the time the motion for a continuance was first presented were subsequently drawn and served upon the jury, and it is claimed that they must have carried into the jury box prejudice resulting from the remarks of the judge in disposing of the motion which was granted. The record does not clearly show that these veniremen were present at the time the judge made the remarks complained of, but assuming that they were then present, they were not examined upon their voir dire with reference to the matter. The court was not requested to call in other jurymen or to excuse these jurymen upon a peremptory challenge or for cause, and no opportunity was given to the court or to the district attorney to correct the impression made upon the minds of the veniremen of which defendant now complains. The record also shows that at the time these six members of the original panel were accepted as jurors, the defendant had sufficient peremptory challenges to have disposed of them. Under these circumstances, the defendant cannot complain of the remarks of the judge, and for that reason we refrain from further discussion thereof.

[2, 3] Defendant complains that the court erred in sustaining an objection to his question upon the cross-examination of Wong Kim Gong. This witness was a grandson of the deceased, Fook Kee. He was living in the home of Fook Kee and was supported by him at the time of the murder. He was about 18 years of age and a witness to the murder of his grandfather. On cross-examination he was asked by the defendant's counsel, "Is your family or yourself contributing or hiring Mr. Everts as attorney here?" The district attorney objected to the question on the ground that it was immaterial and the objection was sustained. The interest of a witness in the controversy is always a proper subject of cross-examination. It would have been well if the court had allowed the question to be answered, but the relationship of the witness to the deceased, already disclosed by the evidence, was sufficient to show his interest in the prosecution of the defendant. The extent of the cross-examination of witnesses as to their interest in the controversy is very largely in the discretion of the trial court, and such interest is often made the excuse for lengthy cross-examination upon wholly immaterial matter. There was no prejudicial error in the refusal to permit the witness to answer the question.

The defendant objects to the scope of the cross-examination allowed by the court in the examination of the defendant concerning the use, ownership, and knowledge of a 38-caliber revolver found in the room where

the defendant was arrested in the Suey On tong headquarters. The defendant had testified that he was in the Suey On tong headquarters at 1013 China alley, diagonally across the street from the scene of the murder at 1007 China alley, at the time of the firing of the shots which killed Fook Kee; that he remained there until he was arrested, and that he did not fire such shots or in any manner have anything to do with the killing of Fook Kee. The evidence of the prosecution was to the effect that the defendant had actually fired the shots that killed Fook Kee and for that purpose had entered the premises where the murder was committed, making his escape after the killing of Fook Kee and the wounding of a bystander. The defendant testified that shortly before his arrest a police officer entered the room where he was at the Suey On tong headquarters and took from the drawer of a desk in that room a 38-caliber revolver; that this revolver was loaded and that six cartridges were removed therefrom by the police officer, but when the officer returned with other officers to arrest the defendant, the cartridges were replaced in the revolver. The defendant was questioned on his direct examination as follows:

"Q. It has been testified here by one of the officers that he found nine cartridges in one of the rooms there, one of the sleeping rooms back of the office. Did you have *any cartridges* or do you know anything about *those cartridges* whatever?" A. I do not know." (Italics ours.)

Having denied any connection with the murder or with the weapon or ammunition with which it was committed, and having testified that he was not at the scene of the killing, the district attorney on cross-examination sought to show that the defendant had been in the habit of carrying the 38-caliber revolver in question and that it belonged to him. To this line of questions defendant objected. The defendant was asked on cross-examination as follows:

"Q. You told us about a gun that was found by the man that you term the fat sergeant. Was that gun found in your room, in the drawer in your room? A. That is not my room. I live upstairs."

Thereupon the district attorney read a statement purporting to have been made by the defendant in the presence of certain named witnesses. The general purport of the alleged answers indicated that the defendant took the revolver in question out of the drawer and gave it to the officer; that it was a 38-caliber long, and that there were six cartridges therein and that the drawer from which the revolver was taken was in a desk in the defendant's room. The questions and answers so read and defendant's testimony in relation thereto were stricken out by the court and the jury instructed to disregard them. The defendant was then asked the following question:

"Q. Now, you testified to them finding—Sergeant Ben finding a pistol over there, was that your pistol?"

This was objected to as incompetent, irrelevant, and immaterial and not proper cross-examination. The objection being overruled, the witness answered: "The gun isn't mine. I don't know who it belongs to."

Further statements purporting to have been made at the time and place above referred to were read to the witness, wherein the defendant stated that he carried the 38-caliber revolver when he was on duty in order to defend the members of his tong. Objection to this line of questions was sustained, the matter read stricken out, and the jury instructed to disregard it. Thereupon the witness was questioned as follows:

"Did you ever carry or handle or have in your possession this particular pistol that the fat sergeant found over there?"

Objection to this question was overruled, and the witness answered, "No, sir." Thereupon the district attorney again reverted to the transcript of the statement made by the defendant, above referred to, as follows:

"'Q. Where did you get that pistol? A. I carried it when I go on duty.

"'Q. What do you mean by duty? A. They were afraid that others might come and shoot them.'

"Q. Were those questions asked you and did you give those answers at the time and place?"

This was objected to as "irrelevant, incompetent, and immaterial and not cross-examination, it not tending to impeach the witness and upon all of the other grounds to the questions that were asked from that record." The court overruled this objection and the witness answered, "The questions were asked me, but that wasn't the way I answered them."

[4] In view of the fact that the witness had testified that he did not have any cartridges at any time, it was proper to cross-examine with reference to the ownership and possession of cartridges contained in the revolver which he testified was found in the same room with him immediately after the murder. It was also proper to cross-examine him concerning the revolver found in his immediate presence so soon after the murder, in view of his denial of guilt.

[5] It is claimed, however, that to allow the witness to be impeached, as he was, by his statements upon the question of his ownership of this gun, was to permit his impeachment upon a collateral matter, and that this was prejudicially erroneous. In the consideration of this claim, a further statement of the facts connected with the

murder should be made. Three or more men participated in the actual killing. Each fired shots from a revolver. The bullets found in the body of the deceased were all 32-20 caliber; one of them being a lead bullet, the others steel jacketed. Two Smith and Wesson revolvers of this caliber were found upon the premises where the murder was commited, evidently discarded by the murderers. The people had a right to cross-examine the defendant upon the theory that the revolver found in the room with him at the time he was apprehended was one of those used in the murder, and the fact that such inquiry might have been fruitless or unfavorable to the people because the caliber of the bullets found in the body was 32, instead of 38, did not make the cross-examination improper or the matter inquired about collateral. If we assume, as the prosecution had a right to do, that this revolver was used in the murder, the relevancy of the cross-examination is clear and the impeaching evidence proper. See People v. Nakis, 184 Cal. 105, 114, 193 Pac. 92.

[6] On his cross-examination the defendant was asked to state who was present at the Suey On tong club when he returned from the side of Lee Nam, a Suey On tong man who had been stabbed immediately before the murder of Fook Kee, a Bing Kong man. He replied Leong Chang Hoy, Joy Yee Jick, Ng Hung Jick, Lung Ho, and Mew Kew. In view of this evidence the defendant's attention was called to his above-mentioned affidavit for a continuance, in which he made oath that Mue Que, Ny Hong Jock, and Chan Hoy were the only witnesses by which he could prove that he was at the club room at 1013 China alley at the time of the murder, and he was asked why he stated in the affidavit that only by the witnesses named therein could he prove an alibi at the time of the murder. This was proper cross-examination upon the question of the whereabouts of the defendant at the time of the murder. We find no prejudicial error committed in the reception of evidence.

[7-9] The defendant also complains of misconduct of the district attorney in the examination of the witnesses. The first matter thus presented occurred in the cross-examination of the witness Reinhart. The question was not objected to and a motion made to strike out the question and answer was granted. There being no objection to the question, the question and answer having been stricken out, no error or misconduct resulted. A witness named Coggshall was asked on cross-examination if he was not known by his friends by the nickname of Cocky. No objection being interposed, he answered, "Yes." The answer was followed by an objection and an assignment of error. It is claimed this question constituted misconduct on the part of the district attorney. There is nothing in this point and the assignment of error was too late.

[10, 11] It is claimed that the district attorney was guilty of misconduct in asking the defendant on his cross-examination if he had acted as guardsman for the Suey On tong society for some weeks previous to the shooting, and if he had said to Lee Yick, his co-defendant, "Don't talk too much, you will let the cat out of the bag." It is a sufficient answer to this claim of misconduct to say that in view of the people's claim that Lee Yick and the defendant were coconspirators and that the killing was committed by Wong Toy in his official capacity as an agent of the Suey On tong society, in obedience to the orders of Lee Yick, the defendant's objection to these questions might well have been overruled. In any event, there was no misconduct by the district attorney in asking these questions. Moreover, the defendant did not assign the conduct of the district attorney in asking these questions as error and consequently is not now in a position to raise the question of misconduct. People v. Babcock, 160 Cal. 537, 545, 117 Pac. 549. People v. Nakis, 184 Cal. 105, 193 Pac. 92. This disposes of all the errors complained of by the defendant.

Judgment affirmed.

We concur: SHAW, C. J.; WASTE, J.; SHURTLEFF, J.; LAWLOR, J.; LENNON, J.

On Petition for Rehearing.

PER CURIAM. [12] The petition for rehearing is denied. When James Gearhart, the reporter, was offered as a witness to prove the declarations made in the Chinese language, such objection was sustained. It is apparent from the record that the district attorney and the court were of the opinion that this objection to the admissibility of the testimony of the reporter would be cured by the evidence of the interpreter, who translated the declarations of the defendant, to the effect that he correctly translated the questions and answers. The interpreter so testified, and thereupon the evidence of the reporter was again offered. The defendant made a very general objection thereto, and did not repeat the objection theretofore made that the reporter did not understand the language in which the declarations were made. The court requested the defendant to more specifically point out his objection to the evidence, but this he declined to do. It is apparent from the record that the court and the prosecuting attorney were of the opinion that the objection theretofore made had been cured, and, not having been specifically renewed, the general objection was insufficient, under the circumstances, to call their attention to the fact that the evidence of the interpreter was insufficient as a foun-

dation for the testimony of the reporter to the declarations of the defendant.

WILBUR, acting C. J., LAWLOR and LENNON, JJ., and RICHARDS, Justice pro tem., concur.

---

189 Cal. 610

**DORAN et al. v. FOSTER et al., Board of Sup'rs. (S. F. 10392.)**

(Supreme Court of California. Sept. 20, 1922.)

**Counties ⟸3½, New, vol. 14A Key-No. Series —Where constitutional provision for proposal of county charters not complied with, proposed charter need not be printed.**

Where a board, elected to propose a county charter, did not sign and file the proposed charter until 121 days after it was elected, in violation of the Constitution, requiring such boards to propose a charter within 120 days after their election, no election can be held, and the proposed charter need not be printed, as the mode provided in the Constitution is the measure of the power granted.

In Bank.

Application for writ of mandate by W. A. Doran and others, to be directed to Joseph Foster and others, as the Board of Supervisors of San Diego County, requiring them to print a proposed charter. Writ denied.

Haines & Haines, of San Diego, for petitioners.

Wright & McKee, of San Diego, for respondents.

PER CURIAM. A board of freeholders was elected for the county of San Diego to propose a county charter. They were declared elected on the 8th day of May, 1922. They did not propose a charter until the 6th day of September, 1922, which was 121 days after they were declared elected. The Constitution provides:

"It shall be the duty of said board of freeholders, within one hundred and twenty days after the result of such election shall have been declared by said board of supervisors, to prepare and propose a charter for said county, which shall be signed in duplicate by the members of said board of freeholders, or a majority of them, and be filed, one copy in the office of the county clerk of said county and the other in the office of the county recorder thereof."

The court is of the opinion that the board of freeholders did not "propose" a charter until they had signed and filed the same. The signing and filing is a method of proposal which is contemplated by the Constitution. Therefore it was not proposed within the time specified in the Constitution, and it must be held that no election can be held in pursuance thereof, and the board of supervisors is not required to print such charter. The mode provided in the Constitution for the proposal of charters is deemed to be the measure of power. Authority for this proposition will be found in People v. Gunn, 85 Cal. 246, 24 Pac. 718; People v. Riverside, 66 Cal. 290, 5 Pac. 350, and Blanchard v. Hartwell, 131 Cal. 263, 63 Pac. 349.

The writ is denied.

SHAW, C. J., LENNON, WASTE, LAWLOR, and WILBUR, JJ., and RICHARDS and MYERS, Justices pro tem., concur.

---

189 Cal. 662

**CASTAGNETTO v. SUPERIOR COURT IN AND FOR MARIPOSA COUNTY et al. (S. F. 10408.)**

(Supreme Court of California. Oct. 3, 1922. Rehearing Denied Oct. 6, 1922.)

**1. Prohibition ⟸3(1) — To prevent trial of election contest denied where objections can be cured by amending pleadings.**

Prohibition will not issue to prevent trial of an election contest under St. 1917, p. 1363, § 28, because the affidavit of contest did not sufficiently state the precinct in which recount had been demanded and the nature of the mistake or misconduct, as such matters can be readily cured by amendment, and should not be considered on application for prohibition, in view of Const. art. 6, § 4½, prohibiting new trials for trivial defects.

**2. Prohibition ⟸11—Court's error in exercise of its jurisdiction cannot be controlled by writ of.**

Any error of the trial court in counting votes in an election contest is an error in the exercise of its jurisdiction, and cannot be controlled by a writ of prohibition.

Application for writ of prohibition by John J. Castagnetto to be directed to the Superior Court of California in and for Mariposa County, Cal., and Judge J. J. Trabucco. Application denied.

J. J. Trabucco, for Mariposa County.

Devoto, Richardson & Devoto, of San Francisco, for petitioner.

PER CURIAM. [1] This is an application for a writ of prohibition to prevent the superior court of Mariposa county from proceeding with the trial of a contest of nomination as provided for in section 28 of the Primary Election Law (Stats. 1917, p. 1363). It is claimed that the affidavit is insufficient because it does not specify separately the precincts in which a recount is demanded,

nor sufficiently specify the "nature of the mistake, error, misconduct, or other cause why it is claimed that the returns from such precinct do not correctly state the vote as cast in such precinct, for the contestant and the contestee." Section 28, supra. While it may be conceded that an affidavit which utterly fails to state any ground of contest provided for in section 28 would not give the court jurisdiction, and therefore the trial of the contest should be prevented by a writ of prohibition as might be done in cases of contempt (Hutton v. Superior Court, 147 Cal. 156, 81 Pac. 409; Otis v. Superior Court, 148 Cal. 129, 82 Pac. 853; In re McCarty, 154 Cal. 534, 98 Pac. 540; see, also, Kilburn v. Law, 111 Cal. 237, 43 Pac. 615; Cline v. Superior Court, 184 Cal. 331, 193 Pac. 929), nevertheless similar allegations as a basis for an election contest have been sustained as sufficient (Abbott v. Hartley, 143 Cal. 484, 77 Pac. 410; Treanor v. Williams, 145 Cal. 316, 78 Pac. 884). In view of the amendment to the Constitution (article 6, § 4½) we are not disposed to consider matters on application for writs of prohibition which could readily be cured by amendment to the pleadings. Cline v. Superior Court, 184 Cal. 331, 342, 193 Pac. 929.

[2] It is alleged in the petition that the superior court intends to count ballots where the cross after the name is made with a lead pencil instead of with a rubber stamp. The case of Miller v. Superior Court, 25 Cal. App. 607, 144 Pac. 978, is cited as authority for the proposition that upon application for a writ of prohibition the court will consider whether or not the evidence sought to be adduced upon an election contest under section 28 of the direct primary law is admissible. That case, however, is altogether different from this. It was sought therein to offer proof that the election officers had refused to receive the votes of electors who were entitled to vote, but it was held that this was not a ground of contest under the law, and therefore evidence of such refusal should be permitted and would be prevented by a writ of prohibition. The case involved here is entirely different. The purpose of the contest is fully accomplished by the recount of the votes, and any error in counting votes is an error in the exercise of the jurisdiction vested in the trial court, and cannot be controlled by a writ of prohibition.

The application for the writ is denied.

WILBUR, Acting C. J., LAWLOR and WASTE, JJ., and RICHARDS, Justice pro tem., concur.

PER CURIAM. Rehearing denied.

LAWLOR, LENNON, and WASTE, JJ., and RICHARDS, Justice pro tem., concur.

(189 Cal. 673)

## CASTAGNETTO v. SUPERIOR COURT IN AND FOR MARIPOSA COUNTY et al. (S. F. 10413.)

(Supreme Court of California. Oct. 6, 1922. Rehearing Denied Oct. 19, 1922.)

**Elections ⟸126(5)—Vote, marked with pencil instead of being stamped, counted in primary election.**

The using of a pencil by a voter to designate his choice in a primary election is a mere technical error which does not invalidate the vote, notwithstanding the use of the word "stamping" in St. 1913, p. 1379, § 18, providing that a voter shall designate his choice on the ballot by stamping a cross in the square opposite the name of each candidate for whom he wishes to vote, in view of the further provision that no ballot shall be rejected for a technical error not rendering it impossible to determine voter's choice.

In Bank.

Application by John J. Castagnetto for certiorari to review an order of the Superior Court of Mariposa County, J. J. Trabucco, Judge, directing the counting of certain ballots marked with a pencil. Writ denied.

See, also, 209 Pac. 548.

Devoto, Richardson & Devoto, of San Francisco, for petitioner.

PER CURIAM. Conceding without deciding the question of the jurisdiction of this court to entertain the application herein for a writ of review, we are satisfied that the petition should be denied.

The sole contention of the petitioner is that in counting the ballots in a contest pending before it, following the recent primary election, the superior court has illegally counted certain ballots not stamped, but marked with a pencil cross, by reason of which the result of the primary election as declared by the board of supervisors of the county has been changed, and the petitioner has been deprived of the nomination for the office of sheriff. There is no merit in this contention. The petitioner relies upon the decision of this court in Sweetser v. Pacheco, 172 Cal. 137, 141, 155 Pac. 639, a case which arose by reason of a contest following the general election of November 3, 1914. It was there held, construing section 1205 of the Political Code, which relates to the manner in which a voter shall prepare his ballot at general elections, that the only way in which a voter can indicate his intention to vote for a particular candidate is by stamping a cross in the voting square opposite the name of such candidate. Said section 1205 contains the provision that "all crosses shall be made only with a stamp," and is mandatory in that regard.

There is no such provision in the law

governing primary elections. Section 18 of the Direct Primary Law provides as follows:

"Sec. 18. The voter shall designate his choice on the ballot by stamping a cross (x) in the small square opposite the name of each candidate for whom he wishes to vote. If he shall stamp more names than there are candidates to be nominated for any office, or if for any reason it be impossible to determine his choice for any office, his ballot shall not be counted for such office, but the rest of his ballot, if properly stamped, shall be counted. No ballot shall be rejected for any technical error which does not render it impossible to determine the voter's choice, nor even though such ballot be somewhat soiled or defaced." Stats. 1913, p. 1379.

Notwithstanding the use of the words "stamping," "stamp," and "stamped" in the section, the provision therein that "no ballot shall be rejected for any technical error which does not render it impossible to determine the voter's choice," to our mind, is sufficiently liberal in its terms to permit the acceptance and counting of a ballot which the voter has marked with a penciled cross. While the use of such penciled cross by the voter in primary elections is a departure from the requirements of the foregoing section, it is, in our opinion, a merely technical error on the part of the voter, which does not render it impossible to determine the voter's choice.

The application is denied.

LAWLOR, LENNON, and WASTE, JJ., and RICHARDS, Justice pro tem., concur.

---

189 Cal. 596

## SCHOMIG v. KEISER, Real Estate Com'r, et al. (S. F. 10229.)

(Supreme Court of California. Sept. 19, 1922.)

**1. Brokers ⟸3 — Real estate commissioner cannot revoke license of broker or salesman acting without compensation.**

St. 1919, pp. 1252, 1256, §§ 2, 12, creating a real estate commissioner and authorizing him to revoke the license of real estate brokers or salesmen in certain cases, does not authorize him to revoke license of a broker or salesman who is acting without compensation or where the acts complained of do not occur when negotiating for the sale or purchase of real estate or negotiating a loan thereon or offers to lease, or is collecting rents, as a whole or partial vocation.

**2. Brokers ⟸3—Person employed to collect payment on agreement already negotiated is not a real estate broker or salesman.**

A person employed to collect payment on an agreement which has already been negotiated is not a real estate broker or real estate salesman within St. 1921, p. 1294, and any misconduct in performing such acts does not warrant the real estate commissioner in revoking the license of such person.

**3. Brokers ⟸3—Act authorizing real estate commissioner to revoke license of broker or salesman is penal in nature.**

St. 1921, p. 1294, authorizing the real estate commissioner to revoke the license of a broker or salesman, is highly penal in its nature, and should not be construed to include anything which is not embraced within its terms.

In Bank.

Certiorari by A. Schomig against Edwin T. Keiser, Real Estate Commissioner, and another, to review an order of the Real Estate Commissioner revoking petitioner's license. Order of the Real Estate Commissioner annulled.

Carl F. Wood, of Oakland, for petitioner.
U. S. Webb, Atty. Gen., for respondents.

SHAW, C. J. The plaintiff filed a petition for a writ of certiorari directed to the real estate commissioner, and to the judge of the superior court of Alameda county, in the District Court of Appeal of the First District, Second Division. The court, without filing any opinion, denied the writ. On petition for rehearing this court granted a rehearing, and the writ was issued accordingly.

The petition shows that Edward Rautenberg filed a verified complaint with the real estate commissioner against A. Schomig, showing that he was Rautenberg's agent in the collection of payments on a contract for the sale of real estate in Oakland; that the contract was made by Rautenberg with certain colored people for the purchase of the land, and subsequently they sold the lots to Miss Wall, who was making the payments to Rautenberg by means of the agency of Schomig through the Oakland Bank of Savings, at the rate of $15 per month; that the bank was to transmit said money through Schomig to said Rautenberg; that he had received from Schomig all that had been received by him from Miss Wall excepting the sum of $114, which had been paid by Miss Wall in excess of the amount due; that Rautenberg then complained to the said bank and the bank then forced Schomig to account to him and confess that he had received the sum of $114.

The complaint was filed against Schomig to obtain an order of the real estate commissioner revoking his license as a real estate broker or a real estate salesman under section 12 of the act establishing a real estate commissioner and authorizing him to revoke licenses for certain causes. St. 1919, p. 1256. Section 12 of the act authorizes him to revoke the license of a real estates salesman or broker "at any time where the holder thereof is performing, or attempting to perform, any of the acts mentioned in

section two hereof is guilty of— * * * (5) Any other conduct, whether of the same or a different character than hereinabove specified, which constitutes dishonest dealing." Section 2 of the act defines a real estate broker as any person "who, for a compensation, sells, or offers for sale, buys, or offers to buy, or negotiates the purchase or sale or exchange of real estate, or who, for compensation, negotiates loans on real estate, leases, or offers to lease, rents, or places for rent, or collects rent from real estate, or improvements thereon, for others as a whole or partial vocation." A real estate salesman is defined by the act as any "one who for compensation is employed by a licensed broker" to do any of the acts above stated which are to be done by the real estate broker.

[1] It will be seen that this does not authorize the commissioner to revoke any license of either a broker or salesman under the act, unless he is acting for a compensation, and also unless he does the acts complained of at a time when he is negotiating for the sale or purchase of real estate, or is selling or buying the same or negotiating a loan thereon or offers to lease, or rent, or places for rent, or is collecting rents, from real estate, as a whole or partial vocation.

[2] Any employment by any person or another to collect payment on an agreement which has already been negotiated, and is in all respects perfected and the terms agreed upon, does not make the party a real estate broker or real estate salesman, and any misconduct in performing such acts would not warrant the real estate commissioner in revoking the license of such person.

[3] The portion of the act which authorizes the real estate commissioner to forfeit the license of a broker or salesman and take it away from him is highly penal in its nature, and should not be construed to include anything which is not embraced within its terms. There is no charge in the complaint, and no evidence to prove the charge if it were in the complaint, that Schomig was employed for a compensation to do the acts complained of, or that the acts themselves constituted a part of a contract for the sale of real estate. The evidence shows that they were to be performed by Schomig without compensation, and that in doing so he was not fulfilling a contract for the sale of real estate, but was merely collecting the proceeds of a contract already made. The commissioner was without authority to act in the matter at all, and had no authority to revoke the license of Schomig.

The order of the real estate commissioner is annulled.

We concur: WILBUR, J.; WASTE, J.; LAWLOR, J.; MYERS, Justice pro tem.; RICHARDS, Justice pro tem.

189 Cal. 622

## LEONI v. QUINN et al. (Sac. 3237.)

(Supreme Court of California. Sept. 21, 1922. Rehearing Denied Oct. 19, 1922.)

**Mechanics' liens ⇐78—Owner held liable for repairs by lessee.**

Where the owner of a building permitted the lessee to make certain repairs, and failed to post, or verify, or record any notice of nonliability, as required by Code Civ. Proc. § 1192, the owner is liable for such repairs, though the contractor that did the work had actual knowledge of the provisions of the lease that the owner would not be called upon to make any improvements or repairs.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Peter Leoni against Mary Quinn and others. Judgment for defendants, and plaintiff appeals. Reversed.

H. W. Zagoren, of Sacramento, for appellant.

C. E. McLaughlin and C. P. McLaughlin, both of Sacramento, for respondents.

MYERS, Judge pro tem. Plaintiff appeals from a judgment for defendant in an action to foreclose a mechanic's lien. There is no conflict as to the facts, and but a single question of law is presented. The respondent, the owner of certain real property in the city of Sacramento, leased the same to Nicoletti and Caietti for a term of years. Under the terms of the lease, which was in writing, the lessees were allowed to repair and remodel the premises at their own expense, except that the lessor agreed to pay $200 toward the plumbing repairs, to be paid by deductions from the monthly rental. The lease further provided that "the said lessor shall not be called upon to make any improvements or repairs whatsoever upon the said demised premises, or any part thereof, but the said lessees agree to keep the same in good order and condition at their own expense." It further provided that the lessees should deposit $300 with the lessor, "as security for the prompt and full performance of the terms of this lease," which was done.

The plaintiff, who was a building contractor, acted as spokesman and interpreter for the lessees in the negotiations for the lease, and was consequently familiar with the terms and provisions thereof. Subsequent to the execution of the lease the lessees let a contract to plaintiff for the repair and remodeling of the premises, and he entered upon its performance. When the work was nearly completed the lessees, having lost their license, abandoned the premises without paying plaintiff for his work and mate-

rials. He thereupon duly filed his notice of lien and commenced this action for the foreclosure thereof against the respondent as owner of the premises, under section 1192 of the Code of Civil Procedure. It is admitted that respondent at all times had knowledge of the doing of the work, and that she did not post or verify or record any notice of nonliability, as provided in said section.

The judgment for this defendant was based solely upon the admitted fact that the plaintiff at the time he did the work had actual knowledge of the provision of the lease to the effect that the lessor should not be called upon to make any improvements or repairs. It was pointed out in Pacific Sash & Door Co. v. Bumiller, 162 Cal. 664, 124 Pac. 230, 41 L. R. A. (N. S.) 296, that—

"Such contracts are good as between the owner and the lessee and serve to fix the liability as between them, but they do not affect the rights of lien claimants."

It is earnestly contended that actual knowledge must be held to be the equivalent of the notice prescribed by the Code. To so hold would be to hold in effect that the giving of an informal verbal notice would be a substantial compliance with the requirements of the section. This would amount to a repeal of the express provisions thereof which require the posting of a formal notice in writing and specifying what it must contain, and further require that a verified copy thereof must be filed for record. As was said in the case above cited:

"This provision is for the benefit of the owner, and he must avail himself of it, or otherwise, according to its terms, his interest will be liable for the lien."

But it is urged that the appellant, having performed the labor with full knowledge of the provision of the lease above quoted, must be deemed to have given credit solely to the lessees and to have waived his right of recourse against the property of the owner. Aside from the fact that to so hold would be to disregard the plain provisions of the statute, it cannot be said that the appellant elected to give credit only to the lessees. He must be deemed to have known of the provisions of the mechanic's lien statutes and the security thus afforded him. The provisions of the lease affected only the reciprocal rights and obligations of the parties thereto. The respondent gave no notice, either in writing or otherwise, that she intended to avail herself of the exemption offered by the Code section. Indeed, we might conclude with greater reason that, for the sake of getting this work done, she was willing to waive the exemption of the statute and to rely for her own protection upon the financial responsibility of the lessees and the security which she held.

What was said in Jurgenson v. Diller, 114 Cal. 491, 46 Pac. 610, 55 Am. St. Rep. 83, and Reese v. Bald Mountain, etc., Co., 133 Cal. 285, 65 Pac. 578, is not in point here. As was expressly pointed out in the latter case, section 1192, Code of Civil Procedure, was not applicable to either of those cases because they involved subtractive mining which was not "the construction, alteration * * * or repair of any building or other improvement." In Ayers v. Green Gold M. Co., 116 Cal. 333, 48 Pac. 221, it was expressly held that this section was not there applicable because the owner had no knowledge or notice of the doing of the work. Street v. Hazzard, 27 Cal. App. 263, 149 Pac. 770, is not in point for the reason that it was there stipulated that the owner had posted the notice of nonliability in full compliance with all of the requirements of the section as it then read (before the amendment of 1911).

The case of Pasqualetti v. Hilson, 43 Cal. App. 718, 185 Pac. 693, in which an application for rehearing was denied by this court, is squarely in point here, and goes even further than is necessary to sustain appellant's contentions in the instant case. It was there conceded that the owner had in due time posted written notice of nonliability which fully complied in all respects with the requirements of the section; that within the required time a true copy thereof had been filed for record; and that the plaintiff had actual knowledge thereof. It was held, notwithstanding these facts, that the owner's interest in the property was subject to the lien, for the sole reason that the copy of the notice which was filed for record was acknowledged before a notary public instead of being verified as the law requires.

It must be held that mere knowledge on the part of the lien claimant that the owner intends or desires to avail himself of the exemption offered by the statute is not sufficient to debar him from the enforcement of his lien, at least in the absence of circumstances sufficient to create an estoppel against him, which do not here exist.

The judgment is reversed.

We concur: WILBUR, J.; LENNON, J.; WASTE, J.; LAWLOR, J.; RICHARDS, Judge pro tem.

189 Cal. 649

## GREAT WESTERN POWER CO. OF CALIFORNIA v. CITY OF OAKLAND.
## (S. F. 9823.)

(Supreme Court of California. Sept. 22, 1922. Rehearing Denied Oct. 19, 1922.)

**1. Taxation ⟸373—Statutory requirement that assessor notify state board of nonoperative property reported to state as operative held mandatory.**

In St. 1911, p. 530, enacted to enforce Const. art. 13, § 14, regulating state and local taxation of corporate properties, requiring "operative" properties to be reported to and assessed by and for the state, leaving nonoperative property only subject to local taxation, the provision of section 10 that, if an assessor finds nonoperative property in a report of operative property made to the state, he shall notify the state board of equalization and the company whose property is involved, and that the board shall investigate and decide finally subject only to be set aside by the courts, was mandatory and jurisdictional, so that an assessment as nonoperative property by a city assessor of property included in the state report as operative, without such notice, was void.

**2. Constitutional law ⟸46(3)—Contention that tax act was invalid as permitting assessment of nonoperative property by state held premature prior to determining character of property taxed.**

The contention that St. 1911, p. 530, enacted to enforce Const. art. 13, § 14, was unconstitutional if construed to invalidate an assessment by a city of property as nonoperative property after its assessment by the state as operative property and without the notice therein required as in disregard of the constitutional classification and as permitting the state to assess nonoperative property, was premature where notice and proceedings for final determination as to character of the property had not been taken.

In Bank.

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Action by the Great Western Power Company of California against the City of Oakland to recover taxes paid under protest. On judgment for defendant, plaintiff appeals. Reversed, with instructions.

Guy C. Earl, W. H. Spaulding, and Chaffee E. Hall, all of San Francisco, for appellant.

Leon E. Gray, Acting City Atty., and Markell C. Baer, Deputy City Atty., both of Oakland, for respondent.

RICHARDS, Justice pro tem. This appeal is from a judgment in favor of the defendant; a general demurrer to the complaint as amended having been sustained. The action was one brought by the plaintiff to recover certain taxes paid by it, under protest, to the defendant.

The complaint alleged that the plaintiff was and is a corporation engaged in the transmission, and sale of electricity, and in the sale of steam for heat as a by-product of its said business of transmitting and selling electricity; that during the year 1919 the plaintiff owned and operated in the city of Oakland a certain steam-heating plant, which, during the whole of said year was used and operated primarily for the generation, transmission, and sale of electricity, but secondly and as a by-product of said property said plaintiff during said year sold and distributed the steam generated by said property after the same had been used for generating electricity for said purposes, but that no steam was generated or used by said plaintiff during said year for distribution or sale for heat or otherwise or at all, except only as such by-product; that on or about the 9th day of March, 1920, pursuant to the order of the state board of equalization and within the time provided thereby, the plaintiff made and filed with the said state board of equalization its report to said board, which said report set forth in detail all the property owned by said plaintiff in the said city of Oakland, particularly specifying and classifying its said property as operative property and nonoperative property, respectively; that in such report the steam-generating plant of the plaintiff in said city of Oakland was specified and classified as operative property, and as such subject to assessment and taxes for state purposes by and through the state board of equalization; that a copy of said report was immediately thereafter furnished to the assessor of the city of Oakland under the provisions of subdivision 2 of section 9 of the act of the Legislature providing for the separation of state from local taxation, approved April 1, 1911, and pursuant to which act said report had been made; that the said assessor of the city of Oakland never gave to the state board of equalization the notice required by the provisions of said act, to the effect that the plaintiff had included in its said report as operative property any property which said assessor regarded as nonoperative property, as defined by the terms of said act, and, as such, subject to local taxation, but, on the contrary, after the receipt of said report and during the month of July, 1920, notified the plaintiff that he had assessed its said steam-heating plant within the said city of Oakland as nonoperative property at the valuation of $50,000, and that a tax upon said property had been levied by the said city of Oakland for the fiscal year beginning July 1, 1920, in the sum of $1,220. The said plaintiff, claiming said assessment to be void, upon the several grounds specified in its protest against the payment of said taxes, paid the same under such protest and thereafter

commenced this action to recover the sum so paid. The trial court having sustained a demurrer to its complaint setting forth with much of detail the foregoing facts, and having entered its judgment in the defendant's favor upon the plaintiff's failure to further amend its complaint, it has taken and now prosecutes its appeal from said judgment.

The provisions of the state Constitution and of the statutes adopted in pursuance thereof providing for and regulating state and local taxation respectively of corporate properties which are necessary to be considered for the purpose of determining the present appeal are substantially as follows: In the year 1910 a new section numbered section 14 was added by amendment to article 13 of the state Constitution, which ingrafted thereon a new system for state and local taxation of properties of corporations. It provided for the annual payment to the state by certain enumerated corporations or companies, including all companies engaged in the transmission and sale of gas or electricity, of taxes upon their properties "used exclusively in the operation of their business" to be computed upon certain percentages of the gross receipts from the operation of such companies, which taxes were to be in lieu of all other taxes and licenses, state, county or municipal, upon such property. The Legislature was, by the terms of said amendment to the Constitution, instructed to pass all laws necessary to carry its provisions into effect. Pursuant to said instruction the state Legislature at its succeeding session adopted an act entitled:

"An act to carry into effect the provisions of section fourteen of article thirteen of the Constitution of the state of California as said Constitution was amended November 8, 1910, providing for the separation of state from local taxation, and providing for the taxation of public service and other corporations," etc. Stats. 1911, p. 530.

By the terms of section 8 of said act it was provided as follows:

"1. The term 'operative property' as used in this act shall include * * * (e) In the case of companies engaged in the transmission or sale of gas or electricity: The franchises, towers, poles, wires, pipes, canals, tunnels, ditches, flumes, aqueducts, conduits, rights of way, dams, reservoirs, water and water rights used exclusively in the business of the transmission or sale of gas or electricity; transformers, substations, gas holders, gas and electric generators, switches, switchboards, meters, electrical and gas appliances, oil tanks, power plants, power houses and other buildings and structures used in the operation of the business of the transmission or sale of gas or electricity and so much of the land on which said buildings and structures are situate as may be required for the convenient use and operation of said buildings. Provided, that the operative property of the companies enumerated in this section, shall also include any other property not above enumerated that may be reasonably necessary for use by said companies exclusively in the operation and conduct of the particular kinds of business enumerated in section two of this act. The operative property mentioned in subdivision (a), (b), (c), (d), and (e), of this section shall not be subject to taxation for county, municipal, or district purposes except as otherwise provided for in the constitution and laws of this state."

By the terms of subdivision 4 of said section 8 of said act it was provided that:

"The state board of equalization shall have power to make rules and issue instructions not inconsistent with the Constitution and laws of this state for the guidance of assessors in determining what is operative property and what is nonoperative property of companies named in this section."

By the terms of subdivision 2 of section 9 of said act it was provided:

"Each of the companies mentioned in section two of this act shall report, in such detail as the state board of equalization shall prescribe, all of its property in this state which comes under the definition of operative property in section eight of this act. When any such company operates both within and without this state it shall report the mileage over which it operates both within and without this state. It shall also report the location of said property within this state by counties, cities and counties, municipalities, and districts, in such manner and in such detail as said board of equalization shall prescribe. It shall also, at the same time, furnish a duplicate of the report covering so much of said property as is located in any county, city and county, and municipality, or district, to the assessor of the county, city and county, city, or district in which such property is located."

By the terms of section 10 of the said act it was provided:

"If any assessor finds in the report of the operative property in his county, city and county, municipality, or district, furnished to him by any of the companies as required in section nine of this act, any piece or parcel of property which he regards as nonoperative property, or partially operative and partially nonoperative he shall, within thirty days after receiving such report, notify the state board of equalization thereof by mail, which notice shall contain a general description of the property and the assessor's reasons for regarding the same as nonoperative property. He shall also mail a copy of the notice to the company whose property is involved. The said board shall investigate the nature of the property and its use, and, if an agreement between the said board, the assessor, and the company as to the proper classification of such property cannot be reached, then the said board shall, under such rules of notice as it may deem reasonable, set a date for a hearing, at which the assessor and the company may be present or represented. At such hearing the board shall, from the evidence presented and from the best information it can obtain, decide the matter in dispute, and determine whether such property is operative

or nonoperative or in what proportion operative and in what proportion nonoperative. The said board shall enter its decision in its minutes, and shall send a copy thereof to the assessor and the company, and also to the proper officer of any city affected thereby. Said decision shall be binding upon all parties, the state, the county, city and county, municipality, or district, and the company, unless set aside by a court of competent jurisdiction, and each such assessor must note the decision on his assessment roll, and must assess such property accordingly."

The foregoing provisions of the act of 1911 were incorporated in substantial form in the Political Code in the year 1917, and appear therein in section 3664 et seq. thereof. Stats. 1917, p. 336.

The respondent herein, in support of the action of the trial court sustaining its demurrer to the plaintiff's complaint and of the judgment based thereon, makes three main contentions: First, that the said steam-heating plant of the plaintiff is not "operative property" within the intent and meaning of the foregoing provisions of the Constitution providing for state taxation of property of gas and electric companies, "used exclusively in the operation of their business," and hence is the proper subject of local taxation; second, that the terms of the statute above set forth providing that, when the assessor finds in the report which the corporation has made to the state board of equalization, and of which he has been furnished a copy, any piece of property which he regards as nonoperative property or as partially operative and partially nonoperative property, he shall, within a specified period, notify the said board and said corporation of his reasons for regarding the same as nonoperative property, which notification shall cause said board to institute an investigation into the nature and use of said property, upon the hearing of which it shall be determined by said board whether such property is operative or nonoperative property, which determination shall be binding upon all parties, is a merely permissive proceeding on the part of said assessor, and that his failure to pursue the same is a mere irregularity which did not render the tax in question void; third, that if such procedure is not merely permissive in so far as the assessor is concerned, the provision of the statute requiring it is unconstitutional and void.

[1, 2] As to the first of these contentions it may be said that the question as to whether or not the said steam-heating plant of the plaintiff, used as it is alleged to be, primarily for the generation, transmission, and sale of electricity, and after which use the steam heat thereby developed being thereafter sold and distributed as a by-product, is to be classed as operative or nonoperative property within the intent and meaning of the state Constitution, is an interesting inquiry and is one not altogether covered or concluded by the previous decisions of this court in the cases of Lake Tahoe Ry. Co. v. Roberts, 168 Cal. 551, 143 Pac. 786, Ann. Cas. 1916E, 1196, and Southern Pacific Co. v. Richardson, 181 Cal. 280, 184 Pac. 3. It is nevertheless a question which is not presented to this court for final determination in this case; and this by reason of the conclusion we have arrived at with respect to the second contention of the respondent herein as above set forth. It is our opinion that the determination of the question as to whether any certain property of a public service company is or is not subject to state taxation as "operative property used exclusively in its business" is one which is committed in the first instance to the state board of equalization under and by virtue of the procedure outlined in section 10 of the act of 1911 above quoted. In support of this conclusion it may be said that the people of the state of California, in adopting the amendment to the Constitution in the year 1910 above referred to, intended to work a radical change in the method of deriving revenues for public purposes through state and local taxation through a separation of those properties which should be subject to state taxation from those which should be subject to local taxation. This change was to be effectuated chiefly with relation to the properties of corporations of the class commonly known as public service corporations. It was expressly provided in said amendment to the Constitution that the properties of such corporations used exclusively in the operation of their business should be subjected solely to state taxation through the method provided for in said amendment; and in order to accomplish this result the Legislature was expressly directed to pass such laws as should be necessary to carry into effect the provisions of said amendment to the Constitution and to provide for a valuation and assessment of the property thus to be subjected to state taxation and to prescribe the duties of the state board of equalization with respect thereto. In obedience to this direction the Legislature of 1911 undertook to frame and adopt the act of that year and which as we have seen expressed in its title its purpose to be that of "providing for the separation of state from local taxation." In drawing the line of demarcation between those properties of public service corporations which, if used exclusively in their business, should, under the terms of said provision of the Constitution, be subjected to state taxation, and those of their properties which if not thus used should remain subject to local taxation, it requires no very close or intimate acquaintance with the business and properties of such corporations to perceive that there would be properties thereof which from their nature and uses

would lie close to or even across the line of such demarcation; and it was the evident design of the Legislature in the adoption of subdivision 2 of section 9 of said act, and also of section 10 thereof, to provide a method of procedure for the determination of any question which might arise as to whether certain of the properties of such corporations did or did not come within the designation of "operative properties" as defined in the Constitution and statute, for the purpose of subjecting such property to state or local taxation. The method thus provided was that of requiring each of such corporations to render a report to the state board of equalization in such detail as said board should prescribe, of all of its property coming within the definition of "operative property" as defined in section 8 of said act. A duplicate of such report was also required to be furnished to the assessor of the county, city and county, city, or district in which such property was located, upon receipt of which such assessor, if he found therein any property within his jurisdiction which he regarded as nonoperative property or partially operative or partially nonoperative property, "shall within thirty days after receiving such report notify the state board of equalization thereof by mail, which notice shall contain a general description of the property and the assessor's reasons for regarding the same as non-operative property. He shall also mail a copy of the notice to the company whose property is involved." It would seem to be obvious that the purpose of these provisions in said act was that of preventing clashes between the state board of equalization and local assessors with respect to what property of such corporations was subject to their respective jurisdictions for the purposes of state or local taxation, and thus avoiding double taxation; and this is made even more apparent by the succeeding provisions of section 10 of said act, which provided for an investigation by the board of equalization to be held for the purposes of determining whether the property in question is or is not operative property, and which further provide that such determination, when made, "shall be binding upon all parties, the state, the county, city and county, municipality or district, and the company, unless set aside by a court of competent jurisdiction; and each assessor must note the decision on his assessment roll and must assess such property accordingly." In view of the foregoing express provisions of section 10 of the act of 1911, we are constrained to hold that the contention of the respondent is not well founded, wherein it insists that the requirement therein that the assessor shall give notice of his objection to the particular piece of property in the report of the public service corporation to the state board of equalization as "operative property" is not mandatory, but merely permissive, and that such assessor is not required to give such notice, but may proceed to assess such property as nonoperative property if he so regards it, without giving any such notice and without any hearing or determination of the question before the state board of equalization. This court has, in substance, held otherwise in the case of Pacific Electric Railway Co. v. Rolkin, etc., 164 Cal. 154, 128 Pac. 20, in construing these very provisions of the act in question. In that case the failure of the city assessor of Los Angeles to file with the state board of equalization within the time prescribed in said act his protest against the taxation of the property in question in that case as operative property of the Pacific Electric Railway Company was held jurisdictional, and a later filing of such protest by him ineffectual to prevent the said board from placing such property upon its roll as operative property, and that its action in so doing was as valid as if no such belated protest had been filed. In harmony with these views we now hold that the failure of the assessor of the city of Oakland to file with the state board of equalization the required notice of his claim that the property in question was nonoperative property of the plaintiff was jurisdictional in so far as his right to thereafter claim that said property was nonoperative property or to assess the same locally as such was concerned. His subsequent action in attempting to assess said property as nonoperative property of such corporation was not, as the respondent contends, a mere irregularity, but, on the contrary, was an attempt to levy a local assessment upon property of the corporation, the status of which had, under the procedure provided in said act, been fixed for that fiscal year as operative property thereof, subject only to state taxation. The attempt of the assessor to thereafter subject the same to local taxation was therefore utterly void. The respondent, however, contends that to so hold is to render the act of 1911 unconstitutional as permitting the assessment of nonoperative property by the state board of equalization and as relieving such property from local taxation. This contention, however, begs the question at issue by assuming that the property in question is nonoperative property, an assumption which may not be made by the assessor or his principal, the respondent herein, after the valid assessment of such property as operative property by the state following the failure of said assessor to present that issue to the state board of equalization by filing the notice and protest required by law. The cases of Lake Tahoe Ry. Co. v. Roberts, supra, and Hines v. Richardson (Cal. Sup.) 197 Pac. 346, cited by respondent in aid of this contention, do not support the same, since those cases arose out of controversies between the public service corporations, parties thereto, and

the state, involving the assessment by the latter of said properties of said corporations alleged by them to be nonoperative property, and hence not subject to state taxation. The discussion of this question is foreclosed in the instant case by the failure of the city assessor to present it in the proper forum and at the proper time.

The respondent makes certain other contentions touching the sufficiency of the plaintiff's complaint which we do not deem of sufficient merit to require separate consideration.

The judgment is reversed, with instructions to the trial court to overrule the demurrer to the plaintiff's complaint.

We concur: WASTE, J.; LENNON, J.; LAWLOR, J.; SLOANE, J.; MYERS, Justice pro tem.

---

189 Cal. 685

## PHILLIPS v. BYERS, Sheriff. (L. A. 6653.)

(Supreme Court of California. Oct. 4, 1922.)

**1. Appeal and error ⊂⊃607(2)—Notice to clerk to prepare transcript need not state intention to appeal.**

The notice to the clerk to prepare the transcript on appeal, under Code Civ. Proc. § 953a, need not state that the party desired to appeal; the only notice of appeal appellant was required to give being that prescribed by section 941b.

**2. Chattel mortgages ⊂⊃15—Mortgage on canned goods of buyer and canner of fruits held valid, he being a "manufacturer" and not a "merchant."**

Under Civ. Code, § 2955, excepting from goods which may be subjected to mortgage the stock in trade of a merchant, a mortgage on canned goods of a company engaged in the business of buying and canning of raw fruits and vegetables contained in a storeroom where its finished products were kept awaiting purchasers was valid, the company being a manufacturer as distinguished from a merchant, giving those words their ordinary meaning in absence of statutory definition; as one who simply manufactures an article and sells it is not a merchant, and, though a manufacturer may also be a merchant if he buys and sells goods, he does not become one by disposing of the goods he has produced at a manufacturer's profit.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Manufacturer; Merchant.]

**3. Sheriffs and constables ⊂⊃114—Sheriff held liable for seizing mortgaged goods without tendering the amount of mortgage to mortgagee.**

The sheriff renders himself personally liable as for a conversion if he seizes mortgaged goods without paying or tendering to the mortgagee the amount of the mortgage or depositing such amount as required by Civ. Code, § 2969.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by William S. Phillips against James C. Byers, sheriff, for conversion. From judgment for defendant, plaintiff appeals. On hearing after affirmance of the judgment by the District Court of Appeals, Second District, Division 2. Judgment of the Superior Court reversed.

William H. Wylie, of San Diego, for appellant.

William G. Mirow and Arthur F. H. Wright, both of San Diego, for respondent.

LAWLOR, J. The plaintiff, Wm. S. Phillips, brought this action against the defendant, James C. Byers, sheriff of San Diego county, to recover damages for the alleged conversion by defendant of certain goods upon which the plaintiff claimed to hold a chattel mortgage. The goods consisted of 585 dozen cans of string beans and 32 dozen cans of catsup, the property of the Standard Canning Company, a corporation, whose business was the buying and canning of raw fruits and vegetables, and which company had canned the goods in question.

On August 1, 1919, the company gave to one A. S. Bridges a promissory note for $23,516.41 and to secure its payment executed a chattel mortgage on—

"all the personal property of every kind owned by said mortgagor and on the premises in block nineteen, * * * among which are items as follows, to wit: All canned string beans; all canned tomatoes; all canned or bottled catsup; all vegetables and fruit in stock, or in process of being manufactured, canned or preserved; all wooden packing boxes; all lug boxed products; all time cards; all salt; all fuel oil; all silicate. * * * Also all canned products of every kind as they are produced upon said leased premises from time to time hereafter, the lien of this mortgage to attach to them as fast as the same are produced or manufactured, together with the cans and containers thereof."

The mortgage was recorded on August 11, 1919, and on September 10, 1919, the note and mortgage were assigned to the plaintiff. Subsequently the mortgage was foreclosed, and a deficiency judgment entered for $8,462.65.

In March, 1919, J. A. Williams, secretary of the company, had requested one I. Isaac Irwin to make a lease of certain farm lands to one Phillip Colburn, in order that Colburn might raise tomatoes thereon to be canned by the company. In payment of the rent for the land five notes, aggregating $1,500, signed by Colburn and indorsed by the company, were given. These notes were not paid, and on November 24, 1919, Irwin brought suit on them against Colburn and the company, and

judgment in his favor was rendered and affirmed on appeal. (Cal. App.) 204 Pac. 551. A writ of attachment was issued in the action on the same day, and by virtue thereof the defendant, as sheriff of San Diego county, acting through a deputy, entered the premises of the company, took possession of the 585 dozen cans of string beans and the 32 dozen cans of catsup, and removed them. Thereafter plaintiff began this action, alleging the execution and assignment of the note and mortgage, that the mortgage covered the property in question, and that it had been unlawfully removed by the defendant and converted to his own use.

Defendant in his answer alleged the company was not a manufacturing corporation, but was a corporation merchant, and that the goods attached were part of its stock in trade, which, by section 2955 of the Civil Code, it was forbidden to mortgage. That section provides:

"Mortgages may be made upon all growing crops, including grapes and fruit, and upon any and all kinds of personal property, except the following: * * * 3. The stock in trade of a merchant."

The court found in favor of the defendant, and that as against Irwin the mortgage was void. From judgment entered pursuant thereto plaintiff takes this appeal.

[1] It is first necessary to consider respondent's contention that the transcript on appeal should be disregarded, and the appeal dismissed for the reason that appellant, in his notice to the clerk to prepare the transcript on appeal under section 953a of the Code of Civil Procedure, did not state that he desired or intended to appeal, or that he had appealed from the judgment, which statement is required by the section, and that at the time the notice was given there was no notice indicating that appellant contemplated appealing. This position is untenable. It was held in Smith v. Jaccard, 20 Cal. App. 287, 128 Pac. 1023, 1026, in which case a petition for a hearing by this court was denied, that section 953a of the Code of Civil Procedure does not provide for a notice of appeal; that none of the proceedings there prescribed is jurisdictional to the appeal, and that the provision requiring the reporter to file the transcript within 20 days after notice to prepare it is merely directory. As the section does not purport to provide for a notice of appeal, the requirement of a statement that the party has appealed or intends to appeal must be regarded as merely directory, and the absence of such a statement in the notice cannot affect the regularity of the transcript, although the requirement that such a notice shall be filed is undoubtedly mandatory. Des Granges v. Des Granges, 175 Cal. 67, 165 Pac. 13. That there was no notice of appeal on file at the time the notice to prepare the transcript was filed is immaterial, for section 953a expressly provides that the party may state in such a notice that he "intends to appeal," and in such a case there would be no notice of appeal on file. Respondent insists he was entitled to know whether or not appellant intended to appeal, but section 953a does not provide for any notice to the opposite party; it deals entirely with notice to the clerk relative to the preparation of the transcript. The only notice of appeal appellant was required to give was that provided by section 941b of the Code of Civil Procedure (since repealed by Stats. 1921, p. 194).

Appellant's first assignment of error is to the action of the court in finding that—

"Said corporation was at all times * * * mentioned in the pleadings a merchant and was doing a merchandising business in the sale of its canned and preserved products"; that "said corporation maintained as a storeroom and place of business a certain room in the city of San Diego, where its finished products were kept awaiting purchase by its customers"; that "on the 1st day of August, 1919, and for some time prior thereto, the said Standard Canning Company of San Diego had and kept in its said storeroom as a part of its stock in trade, 585 dozen No. 10 cans of string beans, which beans had been preserved and canned by said Standard Canning Company of San Diego, and also had in its said storeroom 32 dozen cans of catsup, which catsup had been preserved by said Standard Canning Company of San Diego and that said string beans and catsup were held by said corporation as a part of its stock in trade awaiting sale to its customers at such times as a price acceptable to said corporation might be offered therefor."

It is insisted the company was a manufacturer, and as such entitled to mortgage the manufactured goods in question. The distinction between a manufacturer and a merchant is well recognized, and the cases wherein they have been distinguished are numerous, but the tests applied to determine in which class particular persons or groups belong have varied widely, depending in part on the purpose for which the classification was made in each instance.

In Wakeman v. Hoyt, 28 Fed. Cas. p. 1350 No. 17051, and In re Eeles, 8 Fed. Cas. p. 365, No. 4302, it was held that, within the meaning of the Bankruptcy Act, any one who bought goods and sold them, in the same or an improved state, "used the trade of merchandise," for the carrying on of his business required the extension of credit on an uncertain capital stock.

Respondent has cited a number of authorities from the courts of Missouri, wherein it was held that one who kept on hand a stock of goods manufactured by him for sale in the course of trade was a merchant. But an examination of those cases shows they were decided under a statute requiring merchants

to obtain a license, and defining a merchant to be:

"Every person, corporation or copartnership of persons, who shall deal in the selling of goods * * * at any store, stand or place occupied for that purpose." Rev. St. Mo. 1899, § 8540.

In State of Mo. v. Whittaker, 33 Mo. 457, it was said:

"We cannot go beyond the statute to find any other definition of a merchant."

The effect of such a rule is to render one who manufactures upon order only a manufacturer, and one who manufactures goods for sale in the course of trade a merchant.

Norris Bros. v. Commonwealth, 27 Pa. 494, and Commonwealth v. Campbell, 33 Pa. 380, were decided under statutes taxing dealers in goods and expressly exempting manufacturers selling their own wares upon their own premises. These two cases held that certain manufacturers who so sold their products were not merchants.

Union County Nat. Bank v. Ozan Lumber Co., 179 Fed. 710, 103 C. C. A. 584, held that a company which manufactured and delivered log rollers on order only was a manufacturer. The court considered the proposition that a manufacturer who deposits his goods "in his store or factory from which he sells them in the usual course of business would probably be a merchant and dealer * * * notwithstanding the fact that he manufactured the articles dealt in," but held such a rule inapplicable to the case there under consideration, and did not approve of it as a general statement of the law.

In Chattanooga Plow Co. v. Hays, 125 Tenn. 148, 140 S. W. 1068, in which case "dealer" and "merchant" were used synonymously, it was said:

"The most restricted definition that can be given to the term 'dealer' is one who takes profit in the distribution of goods and wares to the trade, in addition to the manufacturer's profit. A manufacturer is one engaged in making materials, raw or partly finished, into wares suitable for use. Anderson's Dictionary of Law; Webster. The marked distinction between a manufacturer and a merchant is that the merchant, or dealer, sells to earn a profit, and the manufacturer sells to take profit already earned. He must buy the materials out of which to make his finished product, and he must sell the product of his factory after it is finished. But such dealings are not his occupation. The one supplies him with the materials with which to pursue it, while the other merely enables him to take the profit earned. * * *

"The complainant sells nothing except the product of its own factory, and does not sell that for a dealer's profit. Its only sales are to jobbers and commission men, and the only profit it takes is for manufacturing the article sold. While it deals, and is a dealer, its dealings are merely incidental to its occupation of manufacturer."

In City of New Orleans v. Le Blanc, 34 La. Ann. 596, it was said:

"The defendants are either dealers or they are manufacturers. If they are not dealers, they are manufacturers. They may be both. A dealer is not one who buys to keep, or makes to sell, but one who buys to sell again. He stands between the producer and the consumer, and depends for his profit, not upon the labor which he bestows on his commodities, but upon the skill and foresight with which he watches the markets.

"A manufacturer is not one who creates out of nothing, for that surpasses human power; neither is he one who produces a new article out of materials entirely raw. He is one who gives new shapes, new qualities, new combinations to matter which has already gone through some artificial process. * * *

"In so far as they make barrels, hogsheads, and similar articles of wood, such as coopers make, the defendants must be considered as manufacturers, and as such, exempt from the license sought to be collected from them. But the case is different where they deal in articles of wood not manufactured by themselves; as when they buy and sell hoop poles."

In Ong Chew Lung v. Burnett, 232 Fed. 853, 147 C. C. A. 47 it was said:

"If Ong Hung in 1903 was engaged solely in conducting a factory for the manufacture of materials furnished by others, he was not a merchant; but if in addition to the work of a factory he bought and sold goods, he was a merchant."

In Egan v. State (Tex. Cr. App.) 68 S. W. 273, it was held that one who manufactured ice and sold it was not a dealer.

The Standard Dictionary defines "merchant" as:

"A person who buys and sells commodities as a business and for profit; especially, one who has a place of sale and stock of goods; a trader."

The same work defines "manufacture" as:

"1. To make or fashion by working on or combining material, form or produce by some industrial process; fashion by hand or machinery. * * 2. To work or fashion by labor into useful or desirable forms; form or make into something."

A merchant is distinguished from a dealer in that he must have a store, stand or other place to keep and sell his goods, while a dealer may buy and sell without such aids to his business. Kansas City v. Ferd Heim Brewing Co., 98 Mo. App. 590, 73 S. W. 302, 303.

[2] From the authorities above referred to it appears that in the absence of statutory regulation or special circumstances, the courts have given the ordinary meaning to the terms "merchant" and "manufacturer." It follows that one who simply manufacturers an article and sells it is not a merchant, and that although a manufacturer may also be a merchant if he buys and sells goods, he does

not become one by disposing of the goods he has produced, at a manufacturer's profit. There is no statute in this state which defines the terms, and in the absence of such provision they must be given their ordinary meaning. The Legislature must have had in view the distinction between them when it inhibited the giving of chattel mortgages on the stock in trade of merchants only.

In the case at bar there is no question but that the string beans and catsup which were attached were canned by the Standard Canning Company, and this constituted it a manufacturer. The evidence shows it sold both on contract and on orders for goods which it had already canned. It also shows that goods were sold only to brokers, jobbers, and wholesale grocers. There is no evidence that such goods were sold for any profit other than that ordinarily made by the manufacturer; that is, there were no sales at a figure which would give the company the profit ordinarily made on a purchase and sale by a middleman. The company did not act as its own broker or wholesaler, and there was uncontradicted evidence that it did no retail business and bought no manufactured products for the purpose of making a profit on a resale. It received no profits other than those earned through canning vegetables.

Therefore, giving full weight to the testimony that the company sold its manufactured goods standing in the warehouse, as well as those manufactured to order, such a fact would not be sufficient to render the company a merchant. It follows the court erred in finding the company was a merchant and in holding the mortgage invalid under section 2955 of the Civil Code. This conclusion makes it unnecessary to consider the other points made by the parties concerning Irwin's right to be classed as a creditor of the company.

[3] It is not claimed the sheriff complied with the provisions of section 2969 of the Civil Code, which provides that before mortgaged property may be attached, the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or must deposit such an amount with the county clerk or treasurer to the order of the mortgagee. In Irwin v. McDowell, 91 Cal. 119, 27 Pac. 601, it was said:

"From these sections it clearly appears that an officer has no right to take mortgaged personal property under process against the mortgagor, unless he first complies with the requirements of section 2969; and if he does so, he makes himself liable as for a conversion."

Judgment reversed.

We concur: WILBUR, Acting Chief Justice; WASTE, J.; LENNON, J.; RICHARDS, Justice pro tem.

(189 Cal. 548)

## PEOPLE v. ROE. (Cr. 2423.)

(Supreme Court of California. Sept. 18, 1922. Rehearing Denied Oct. 16, 1922.)

**1. Homicide ⟸112(1), 122—Rule as to provoking attack does not prevent reliance on self-defense, or defense of another when evidence in conflict.**

The rule that one may not by the commission of a felonious assault provoke a deadly counter attack upon himself or another, and in the course of the counter attack kill the assailant and then invoke self-defense, or defense of another, does not prevent defendant from relying on such defenses when the evidence is in complete and irreconcilable conflict, not only as to the purpose and intent with which defendant and her codefendants entered deceased's home, but also as to the nature and magnitude of the initial assault, and as to whether or not deceased, or defendant and her codefendants, were the aggressors.

**2. Criminal law ⟸814(1, 3)—Instructions must be confined to points pertinent to issue, and not cover issues unsupported by evidence.**

Under Pen. Code, §§ 1093, 1127, the charge must be applicable and confined to the points pertinent to the issue, and to such matters as may be necessary for the jury's information, and may not, though correctly stating abstract legal principles, be extended to cover an assumed issue which finds no support in the evidence, or which the undisputed evidence shows does not exist.

**3. Criminal law ⟸1172(6)—Inapplicable instruction, calculated to mislead and probably affecting conclusion, is prejudicial error.**

While there may be exceptional cases in which an inapplicable instruction will not prejudice defendant, when it is clear that such instructions are well calculated to mislead the jury, and in all likelihood affected their conclusion to defendant's prejudice on the only issue in the case, the giving thereof, though correct in principle, is prejudicial error.

**4. Homicide ⟸300(9)—Charges on self-defense should not have been given when it was undisputed that no attack was being made on defendant.**

Where it was undisputed that, when defendant killed deceased, deceased and a codefendant were locked in a death struggle, and there was no evidence or claim that deceased was making any assault on defendant, instructions on self-defense should not have been given at the request of the people.

**5. Homicide ⟸300(5), 340(2)—Instructions on self-defense held prejudicial, where claim was that killing was in defense of another.**

Where it was defendant's claim that she killed deceased in defense of a codefendant, instructions on self-defense, including an instruction that to justify a killing on the ground of self-defense, it must have appeared to the slayer as a reasonable person that the danger was so urgent and pressing that to save his

own life or prevent his receiving great bodily harm, the killing was absolutely necessary, etc., though stated in the abstract, *held* confusing and prejudicial.

**6. Criminal law ⊜823(10)—Instruction requiring defendant to establish that killing was in defense of another by preponderance of evidence held not cured.**

An instruction, requiring defendant to establish by the preponderance of the evidence the essentials of her defense that the killing was in defense of another's person, was not cured by an instruction for defendant, if she killed deceased, reasonably believing it was necessary to do so to save her codefendant from a murderous assault, as in conjunction they required the jury to be satisfied by a preponderance of the evidence that she had such reasonable cause for belief.

**7. Criminal law ⊜1159(2)—Appellate court can only determine whether error has led to verdict.**

Under Const. art. 6, § 4½, prohibiting new trials unless error has resulted in a miscarriage of justice, while an appellate court has power to a limited extent to weigh the evidence, it is not substituted for the jury, and cannot determine as an original inquiry the question of guilt or innocence, but can only decide whether the error has led to the verdict reached.

**8. Homicide ⊜340(1)—Affirmance of codefendant's conviction not conclusive that errors were not prejudicial.**

That the District Court of Appeal held a codefendant's conviction upon a separate trial sustained by the evidence does not militate against the conclusion that errors in charging on defendant's claim that she killed deceased in defense of her codefendant operated to her prejudice and contributed materially to the verdict.

**9. Homicide ⊜327—Appellate court cannot consider verdict in another case in determining whether errors prejudicial, where proceedings therein not before it.**

In determining whether errors in charging on defendant's claim that she killed deceased in defense of her codefendant were prejudicial, the Supreme Court cannot consider the verdict on such codefendant's trial, where the record of the proceedings and evidence in that case is not before it.

**10. Criminal law ⊜1186(4)—That another jury might under proper instructions render the same verdict immaterial in determining whether instructions erroneous.**

In applying Const. art. 6, § 4½, prohibiting new trials except where there has been a miscarriage of justice to erroneous instructions, it is immaterial that another jury upon a new trial might, upon the same evidence and proper instructions, render a verdict of guilty.

**11. Homicide ⊜244(3)—Defendant not required to establish justification by preponderance of evidence, but only to raise reasonable doubt.**

Pen. Code, § 1105, casting on defendant the burden of proving circumstances to justify or excuse a homicide, does not require her to prove such circumstances by a preponderance of the evidence, but only by evidence sufficient to create a reasonable doubt, and hence, where defendant claimed she killed deceased in defense of B., it was error to charge that the burden was on her to prove by a preponderance of the evidence that deceased was the aggressor, and that B. used all reasonable means to avoid further conflict.

**12. Criminal law ⊜823(10)—Instruction, requiring defense to be established by preponderance of evidence, not cured by instructions on presumption of innocence and reasonable doubt.**

The usual instructions as to the presumption of innocence and the necessity of proof of guilt beyond a reasonable doubt did not render harmless an instruction imposing on defendant the burden of establishing by a preponderance of the evidence her sole defense that she killed deceased in defense of another.

**13. Criminal law ⊜743—When defendant gave contradictory testimony, it was for the jury to determine which was true.**

Where defendant gave contradictory answers as to her reason for shooting deceased, it was the province of the jury to determine under proper instructions which statement was true as though they had been made by different witnesses.

Lawlor, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Maybelle Roe was convicted of murder in the first degree, and she appeals. Reversed.

Rehearing denied; Lawlor, J., dissenting.

Davis, Rush & MacDonald, Alfred F. MacDonald, Wm. B. Beirne, J. B. Joujon-Roche, and Verge & Willson, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

LENNON, J. This case is here on rehearing after decision of the District Court of Appeal, First Division, Second District, reversing the judgment of the trial court. Upon behalf of the people it was earnestly contended in the District Court of Appeal, as is contended here, that the trial court's instructions to the jury upon the subject of self-defense—held by the District Court of Appeal to be beyond the issues raised in the case, and therefore confusing to the jury and prejudicial—were, in fact, helpful rather than harmful to the defendant's case, even though the claimed defense of the person of another against a felonious and deadly assault was the only defense which was interposed by the defendant to the charge of murder upon which she was tried and convicted. In this behalf it is the contention of the Attor-

ney General that the evidence educed upon the whole case shows that the defendant was not entitled in any event to interpose the defense of self-defense or the correlated defense of the defense of the person of another, and that therefore neither the instructions given upon the subject of self-defense nor that instruction which erroneously required the defendant to show by a preponderance of evidence certain essentials necessarily involved in the only defense interposed, viz. the defense of the person of another, can be held to have operated to the prejudice of the defendant. With reference to the latter instruction it is further contended that, even though it should be held that the defendant was entitled to have the jury instructed upon the law relative to the right of one person to make a defense of the person of another, still the evidence educed upon the whole case points so overwhelmingly to the guilt of the defendant that it may be fairly said the verdict of the jury would have been the same even if the admittedly erroneous instruction had not been given, and therefore it is insisted that the judgment should be affirmed pursuant to the provisions of section 4½ of article 6 of the Constitution.

[1] These contentions, as we read and understand the briefs filed in behalf of the people's case, rest upon the erroneous assumption that the evidence as a whole shows overwhelmingly that the affray in which the deceased was killed by the defendant Maybelle Roe was instigated and consummated by her, acting in conjunction with three codefendants jointly indicted with her, pursuant to a conspiracy entered into by all of said defendants, which had for its sole purpose a felonious and murderous assault upon the deceased, and, further, that the evidence shows that, with such purpose and intent, said defendants entered the home of the deceased, where the altercation commenced, and which culminated, on the lawn of the home of the deceased, in the death of the deceased by the hand of the defendant Maybelle Roe. With this assumption as a premise, it is argued that both the right of self-defense and the defense of the defense of the person of another were foreclosed to the defendant upon the theory that it is the law that one who willfully and deliberately, for the purpose of creating a necessity for self-defense, provokes, by the commission of a felonious assault, a deadly counter attack upon him, cannot, because of and in the course of the counter attack, kill his assailant and then invoke the defense of self-defense or the defense of the person of another who, as the result of the original assault, became involved in and was being subjected to the deadly counter assault. Although not embodying a full exposition of the law of self-defense, still, generally speaking, the theory contended for in this behalf comports with a fundamental feature of the law of self-defense as settled and accepted in this jurisdiction, but obviously it can have no application to a situation where, as in the instant case, the evidence adduced upon the whole case is in complete and irreconcilable conflict, not only as to the purpose and intent with which the defendant Maybelle Roe and her codefendants entered the home of the deceased, but also as to the nature and magnitude of the initial assault, and as to whether or not the deceased or the defendant Maybelle Roe and her codefendants were the first aggressors in that assault. People v. Travis, 56 Cal. 251; People v. Hunt, 59 Cal. 430; People v. Hecker, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403; People v. Kennett, 114 Cal. 18, 45 Pac. 994; People v. Worthington, 115 Cal. 242, 46 Pac. 1061.

It may be conceded that the evidence educed in support of the people's case and relied upon for a conviction, if it stood alone, would suffice to support the verdict. And, of course, if that were the only evidence offered and received in the case, there would be little reason for contending that the inapplicable and admittedly erroneous instructions complained of were prejudicial to the defendant's case. But opposed to this evidence, the record shows facts and circumstances leading up to and attending the killing of the deceased, as disclosed by the evidence educed in support of the defense, which, if believed by the jury, would have tended to create a reasonable doubt of the defendant's guilt, and yet, even though believed by the jury, may well have been held by it, under the erroneous instructions of the trial court, to be lacking in the preponderance which said instructions declared was necessary to overcome the evidence educed in support of the people's case. In this behalf the record shows the evidence offered and received in behalf of the defendant to be as follows:

Mrs. Julia Doane was the owner of a certain dwelling house on Sherman avenue, in Venice, Cal., which she rented on September 5, 1919, to McCullough Graydon, the deceased. At various times there had been considerable controversy over the payment of the rent. Finally Mrs. Doane raised the rent, and, when the Graydons failed to pay the increase, served them with notice terminating their tenancy. Graydon maintained that he had a lease of the premises for a year, while the Doanes insisted that his was a month to month tenancy only. The Graydons continued to occupy the house until May 10, 1920, when they left, taking all their belongings with them with the exception of a sewing machine, which Mr. Graydon ordered turned over to the sewing machine company. About a week after their departure, the Doanes took possession, and on July 17 rented the house furnished for two

months at a rental of $150 per month. Graydon sued for possession of the premises, and on July 24 a writ of possession was directed to the sheriff, which resulted in Mrs. Doane's tenants being dispossessed on the 28th of that month.

On August 30th, at about 5 o'clock in the afternoon, Mr. Graydon applied at the county clerk's office for a writ of possession. Before issuing the writ the clerk in charge asked Graydon if a bond on appeal had been filed, to which he replied in the negative. However, prior to the issuance of the writ of restitution, and on August 27, Mr. Burr, attorney for Mrs. Doane, went to the county clerk's office to file an appeal bond in the case of Graydon v. Doane. Mr. Graydon was at one of the counters, and Mr. Burr inquired of him whether he had the files in that case, stating to Graydon that he was filing a bond on appeal and wanted to check up some dates. He also mentioned that this was to stay any execution that might issue in the case. August 31 was a holiday, and it was not until the clerk checked up the register of actions on the morning of September 1 that the discovery was made that a bond had been filed, and that the writ was erroneously issued.

At about 10:30 on the morning of September 1 Mr. Doane went to the Sherman avenue house for the purpose of verifying a bill for some plumbing repairs, and met the deputy sheriff there, who told him that Mr. Graydon had been put in possession of the house. Doane returned home, and, after getting into communication over the telephone with Mr. Burr, went back to the Sherman avenue house and ascertained that the sheriff had left. He thereupon told Mr. Graydon that a mistake had been made in giving him possession of the premises, and again left for home, where he received a telephone message, requesting him to go to 36 Sherman avenue.

When Mrs. Doane's attorney, Mr. Burr, learned on September 1 of the clerk's error in issuing the writ of restitution, and that Mr. Graydon had been put in possession of the house, he got in communication with Mr. Oscar A. Bowers, and asked the latter to drive down to Venice and inform Mr. Graydon that the place had been turned over to him by mistake, and told Bowers that if he would get word to the deputy sheriffs in Venice to get in touch with the sheriff's office in Los Angeles, the deputies would be instructed not to levy the writ. Bowers then communicated with the sheriff's office, and they also asked him to deliver the message to Graydon.

Bowers lived with the Roes at their home in Los Angeles, and invited appellant, Maybelle Roe, who had been in ill health for some time, to accompany him on the trip to Venice. They went first to Mrs. Doane's millinery store, and, not finding either of the Doanes there, drove to the Sherman avenue house. When Mr. Doane, in response to the telephone message, arrived at the Sherman avenue place, he found Bowers and Mrs. Roe on the walk in front of the house. Bowers spoke to him about the mistake that had been made, and told him that the sheriff said to call up the latter's office, and that the Doanes could demand possession of the house. Doane then went up on the porch and knocked on the door. Mr. Graydon did not open the door, but talked to him through the window. He asked Graydon to give up possession of the house, but the latter refused. Doane then left and tried, without success, for at least a half hour, to get the sheriff's office at Los Angeles on the telephone. He started back to the house, and saw Mrs. Doane going up the steps. He followed her up the steps and into the house as the door was opened. Mr. and Mrs. Graydon, Miss Marshall, and a taxicab driver were there. Bowers and Mrs. Roe sat in the automobile for some time, and Bowers suggested that, as neither the sheriff's deputies nor the Doanes had come, they perhaps had better return to the city. Mrs. Roe then went up to the house, and, seeing Mrs. Doane there, motioned for Bowers to come up. When he and Mrs. Roe reached the front of the house, Mrs. Doane was looking through the door, and Mr. Doane was standing as if he were just entering the house. Mrs. Roe called to Mrs. Doane, and the latter said she wanted Bowers and Mrs. Roe to come in and verify the statement the sheriff had made. Mr. Graydon remarked: "They can't come in here. You will have no witnesses to any conversation in this house today." And Mrs. Graydon said: "If Mrs. Roe comes in here I will kill her."

They walked up on the porch, Mrs. Roe preceding Mr. Bowers, and when the former reached the door, "Mr. Graydon came through the door at an angle about 45, struck Mrs. Roe right in the face, knocked her glasses off, knocked her right down in the corner on the porch right by the door." Neither Bowers nor Mrs. Roe had said a word up to that time. Bowers then stepped up to catch Mrs. Roe and prevent her falling through the glass doors. He asked Graydon why he had struck her, whereupon Graydon "reached right back out of the door and struck me (Bowers) right over the right eye with a pair of knucks, and immediately struck me again on this side," and at about the same moment Mrs. Graydon rushed in the doorway and hit Mrs. Roe over the head with a blackjack. Bowers had his hands out to keep Mrs. Roe from falling, when Graydon grabbed him by the wrist, ran his arms around behind him, and Mrs. Graydon and Miss Marshall beat him over the head and shoulders. Mr. Doane, a man of about 70 years, tried to separate the two men fighting on the porch, but Graydon picked Bowers

up and carried him bodily down on the walk. Mr. Doane's sight is very poor, one eye having been lost in an operation and the other having only partial sight. By the time he felt his way down the steps Mr. Graydon had Mr. Bowers on the ground and was on top of him. They struggled across the lawn and then back again to the center of the yard, and stood, "Mr. Graydon on the right of Mr. Bowers, with his left arm over his shoulder, around his neck, and choking him." Mrs. Graydon then ran out after Mrs. Roe, and Miss Marshall sprang off the porch and hit Mrs. Doane "with something hard," and they both fell to the ground. From the blows he received while on the porch Bowers was rendered unconscious, and the next thing he realized he was lying on the lawn, and Graydon had slipped up Bowers' necktie and was drawing it so tight that Bowers could not breathe. Bowers' eyes were bulging out of his head and his tongue was hanging out. Mrs. Roe pleaded with Graydon not to hurt Bowers, as he was a cripple, to which Graydon replied: "I don't give a damn if he is; I am going to kill him anyhow." Mrs. Roe again begged Graydon not to kill Bowers, and then went back to the porch, and "Miss Marshall came in the house, and she run out and knocked Mrs. Doane down, and I [Maybelle Roe] saw a revolver in her hand, and I grabbed the revolver and fired; I grabbed the revolver away from her and fired," and then dropped the revolver on the ground. She fired the shot because she thought that Graydon was killing Bowers. In falling, Mr. Graydon struck his face on the bricks that were set at an angle on the edge of the grass plat.

After the shooting, Mrs. Graydon handed Mrs. Roe her handbag, and the latter and Mr. Bowers went back to their automobile. They just started the car when the police officers arrived and arrested them. When Mrs. Roe opened up her handbag to take out her handkerchief in order to wipe the blood from her head, she found the blackjack. It was the first time she had seen it. Neither Bowers nor Mrs. Roe had gone to the house armed with a set of brass knuckles or a blackjack. Although the officers took a pair of knuckles from Bowers' pocket, he claims that he never owned or carried a pair of them.

From the evidence in defendant's behalf it appears that Mr. Graydon had made threats against Mrs. Doane on several occasions. Mrs. Florence A. Rennie, who was engaged in the real estate business in Venice, testified that in a conversation with Mr. Graydon some time during the middle or latter part of August, he said, referring to Mrs. Doane, that "he would get that old woman and all she had." Some time during the month of May Graydon also said to Donald H. Gray, a grocer, in speaking of the damage suit against Mrs. Doane: "I am going to get every cent that old woman has got; I will make her look like a dirty deuce." Gray said that he would rather give up the house than have such inharmonious conditions, to which Graydon replied: "My God, I would kill that old woman before I would give up the house."

With regard to the injuries received by the defendants, Bernice Hartley, who was acting as assistant matron at the county hospital when Mrs. Roe was taken to the county jail, testified that the latter had a cut on the left side of her head about three inches long, and a "bump" on the right side, perhaps half as large as an egg.

Mr. Burr, the attorney, saw Mrs. Roe at the jail in Venice about 5:30 on the afternoon of the homicide, and stated that she had a lump on her head, and her hair was thickly matter with blood. He also saw Mr. Bowers, who had an abrasion on his forehead about 2½ inches long, and other smaller cuts on his forehead; also a black eye.

George M. Lingo, who was connected with the Venice police department as a desk sergeant, saw Mrs. Roe and Mr. Bowers when they were first brought to the police station. While he did not make any particular examination to ascertain the extent of their injuries, he noticed that Mrs. Roe had a "puffed place well towards the front on the top of her head"; that there was blood on her face and some in her hair.

Edwin F. Jackson, engineer in the Bank of Italy building, saw Mr. Bowers on September 7 at the county jail. Bowers' eye had been blackened, and he noticed several scalp bruises and marks on his forehead; also the skin "had been knocked off" of Bowers' crippled arm. Under correct instructions the jury, when weighing the evidence of the defense, as above narrated, may well have entertained a reasonable doubt as to whether the defendant proceeded to the home of the deceased with any other purpose than to aid in peaceably regaining possession of the premises, which one of her codefendants owned, and that in so doing neither she nor her codefendants had a preconceived intent of provoking a deadly quarrel with the deceased. In short, if there be evidence, as we are satisfied there is, sufficient, if believed, to have warranted, under the rule of reasonable doubt, a finding that the affray out of which the killing of the deceased ultimately resulted was, at its inception, not more than a simple assault upon the deceased, then the deceased would not have been justified in using any greater force than would have been necessary to have defended himself against and repelled such assault. People v. Hecker, supra. And if, as the defendant claims and the evidence introduced in her behalf tends to show, the deceased in retaliation of a simple assault, or a simple trespass, committed a felonious and murderous assault upon her codefendant

Bowers, then it cannot be said that the right of the defense of the person of Bowers against the consummation of such felonious and murderous assault may be rightfully denied to the defendant Maybelle Roe. This being so, said defendant justly complains of that instruction concerning a vitally essential feature of her defense, which put upon her a greater burden of proof than that exacted by the law, and that instruction, coupled with the confusion which must have been created in the minds of the jurors as to what her real defense was by the giving of other instructions wholly foreign to the issue, operated to prevent the jury from adequately comprehending and correctly considering the only defense interposed in her behalf. This was tantamount to depriving her of any defense whatever.

[2] It is true, as has been suggested, that under the provisions of sections 1093 and 1127 of the Penal Code "the judge may * * * charge the jury, and must do so on any points *pertinent to the issue*, if requested by either party, * * *" and "in charging the jury * * * must state to them all matters of law necessary for their information." It needs no argument, we take it, to demonstrate that the provisions of the above-quoted sections contemplate and require that the trial court's charge to the jury must be applicable and confined to the "points pertinent to the issue," and to such matters of law as may be necessary for the information of the jury. This being so, the charge of the trial court may not, without error, even though correctly stating abstract legal principles, be extended beyond such limitation to the point of covering an assumed issue which finds no support in the evidence, or which the undisputed evidence in the case shows does not exist. Hughes' Instructions to Juries, § 80, p. 70; 1 Blashfield, Instructions to Juries (2d Ed.) § 82, pp. 183–186; Garcia v. State (Tex. Cr. App.) 61 S. W. 122; State v. De Wolfe, 29 Mont. 415–426, 74 Pac. 1084; Aguirre v. Alexander, 58 Cal. 21; People v. Dallen, 21 Cal. App. 770, 132 Pac. 1064; Maines v. State, 35 Tex. Cr. R. 109, 31 S. W. 667; Comptoir v. Dresbach, 78 Cal. 15, 20 Pac. 28; In re Calkins, 112 Cal. 296, 304, 305, 44 Pac. 577.

The error of inapplicable instructions rests in the fact that they pertain to points not "pertinent to the issue," and contain matters of law for the jury's consideration not "necessary for their information," and therefore, instead of enlightening, tend to confuse and mislead the jury. This is so because such instructions, in effect, either create a false issue or constitute a misstatement of the real issue, thereby distracting the attention of the jury from and befogging the real issue.

[3] There may be, of course, exceptional cases in which an inapplicable instruction will not operate to the prejudice of a defendant in a criminal case, but when it is clear, as it seems to us in the instant case, that such instructions are well calculated to mislead a jury, and in all likelihood affected their conclusion to the prejudice of the defendant upon the only issue in the case, the giving thereof, even though correct in principle, constitutes error equally as grave as would be the giving of instructions fundamentally wrong. People v. Devine, 95 Cal. 227, 30 Pac. 378.

[4] That the killing was done in the instant case while Graydon, the deceased, and Bowers, the codefendant of the defendant Maybelle Roe, were locked in a death struggle, is an uncontradicted fact. There is no evidence that at the time of the killing Graydon attempted or contemplated an assault upon the defendant Maybelle Roe. No claim was made, and none could be successfully made, under the evidence educed, either for the prosecution or the defense, that at the time of the killing, Graydon, the deceased, was making an assault upon the defendant Maybelle Roe. This being so, said defendant would not have been entitled as a matter of right, as she otherwise would be, to an instruction upon the law of self-defense. And, of course, if the trial court would have been justified in refusing such an instruction, at the request of defendant, because not pertinent to the issue in the case, then, for the same reason, the trial court was precluded from giving such an instruction at the request of the people.

[5] That the several instructions upon the law of self-defense, given to the jury at the request of the people, were calculated to confuse the jury, and must have prejudiced the defendant's case, is affirmatively shown, we think, by the fact that they charged the jury that—

> "In order to justify a killing upon the ground of self-defense, it must have appeared to the slayer, as a reasonable person, that the danger, if any, was so urgent and pressing that in order to *save his own life* or to prevent his *receiving great bodily harm* the killing was absolutely necessary; * * * that the killing was done under a well-founded belief that it was necessary for the defendant to kill the deceased at the time to save himself from death or great bodily harm; * * * that the slayer had really and in good faith endeavored to decline further trouble before the fatal shot was fired."

While it is true that these and other instructions upon the same subject did not in terms refer to the defendant Maybelle Roe, nevertheless they did refer "to the defendant" and to the "slayer," and Maybelle Roe was the defendant and admittedly the "slayer." Therefore, no matter how abstractly the subject-matters of the instructions were stated, it is idle to contend that said instructions had no reference to the defendant in the case, and if the jury applied, as doubtless they did, the requirements of said in-

structions to the situation of "the slayer" at the time of the killing, they could not fail to find, in the face of the undisputed fact that she was not being assailed by the deceased at the time of the killing, that it was not necessary for her to kill the deceased in order to save herself from death or great bodily harm, and, therefore, in keeping with the charge of the court, the jury had no alternative but to find the defendant guilty upon the fictitious issue of self-defense, which was, by the instructions complained of, created and injected into the case in conflict with and to the confusion of the defense of the person of another, which was the only defense interposed and relied upon by the defendant, and which, under the evidence bearing upon the situation of the defendant, at the time of the killing, was the only defense available to her.

[6, 7] No instructions were given which tended in any degree to cure the error of the instruction which erroneously charged the jury that a preponderance of the evidence was necessary to the establishment by the defendant of the essentials of the defense of the person of another. While instruction No. 39, and similar instructions, did charge the jury, in effect, that if the defendant Maybelle Roe killed the deceased "reasonably believing it was necessary" to do so to save her codefendant Bowers from a murderous assault, still this instruction, assuming it to be in its entirety a correct exposition of the law in the particulars stated therein, must be read in conjunction with the admittedly erroneous instruction, and when so read, necessarily required the jury to be satisfied, *by a preponderance of the evidence*, that she had reasonable cause to believe in the necessity for acting in the defense of Bowers, whereas the law required from her upon that phase of the case only such proof as would create a reasonable doubt in the minds of the jury. While it is true that section 4½ of article 6 of the Constitution confers upon this court the power to weigh, to a limited extent, the evidence in its entirety upon which a conviction has been had, still "we are not substituted for the jury. We are not to determine, as an original inquiry, the question of the defendant's guilt or innocence." We are to "decide whether, in our judgment, any error committed *has led* to the verdict which was reached." People v. O'Bryan, 165 Cal. 55, 130 Pac. 1042. We are satisfied that the verdict of guilty was arrived at by the aid of the inapplicable and admittedly erroneous instructions, and this is so, in our judgment, because they obviously obscured and crippled the defendant's defense to the extent practically of denying to her the right of any defense at all. We are fortified in this conclusion by the fact that a careful review of the cold record before us shows the evidence, educed upon the whole case, to be in irreconcilable conflict and closely balanced, in weight and quality, for and against the guilt of the defendant.

[8-10] The fact that the District Court of Appeal held the conviction of Bowers, upon a separate appeal from a verdict and judgment of conviction obtained, upon a separate trial, to be sustained by the evidence in that particular case, does not militate against the conclusion reached by the same court of appeal, in the instant case, that the errors complained of operated to the prejudice of the defendant and contributed materially to the verdict; nor can the verdict in the Bowers Case be considered by us in arriving at a similar conclusion, for the reason that the record of the proceedings had and the evidence educed in that case is not before us, and therefore we do not and cannot know that the defense interposed and the situation, in so far as the evidence in its entirety is concerned, were the same. Nor is it a matter for consideration, when applying section 4½ of article 6 of the Constitution, that another jury upon a new trial might upon such conflicting evidence and proper instructions render a verdict of guilty. Young v. Southern Pacific Co., 182 Cal. 369, 190 Pac. 36. We, therefore, adopt and approve the conclusion of the District Court of Appeal, as expressed in the opinion of Mr. Justice Victor Shaw, as follows:

"The homicide occurred at the house of McCullough Graydon, the deceased, which he occupied as tenant of Julia Doane, the owner, and who, in company with Oscar A. Bowers, Edward F. Doane, and the defendant, had gone to the house of Graydon, with whom there was a controversy as to his right to retain possession of the same, and where a violent altercation, engaged in over the subject of his vacating the premises, culminated in an encounter wherein all the parties appear to have participated, and in which Graydon was killed by defendant. As to be expected in such a case, the testimony upon the question as to how the trouble originated, who was the aggressor, who participated therein, and the part each took, and for what purpose, whether as peacemaker or aggressor, is in sharp conflict, added to which was much evidence of a circumstantial nature, the determination of all of which questions arising thereon was the province of the jury under the instructions of the court.

"Appellant attacks the instructions given by the court, claiming that as to those covering the question of self-defense, while correct statements of abstract principles of law, they are wholly inapplicable to any issue involved, and that as to another it embodied a statement of an incorrect and erroneous rule of evidence which the jury applied in the consideration of the case.

"Defendant admitted she fired the shot which killed McCullough Graydon. Her sole defense was that the act was committed under circumstances which justified her in believing it necessary, if not to save the life of Bowers, at least to save him from great bodily injury, upon which facts, if established, subject to qualifications stated by the court in charging the jury, she was entitled to an acquittal.

"While she made no claim of justification based upon self-defense, and no evidence was offered touching such issue, the court at great length instructed the jurors as to the law thereon, among other things, in substance charging them that in order to justify the taking of life upon the ground of self-defense it must not only have appeared to the defendant as a reasonable woman that she had reason to believe, and did believe, that she was in danger of her life or of receiving great bodily harm, but that her act in killing deceased was not justified unless the jury found that it appeared to her as a reasonable person 'that the danger, if any, was so urgent and pressing that in order to save his [her] own life the killing of the other was absolutely necessary.' While correct statements of abstract propositions of law, the instruction, since there was no evidence touching the question of self-defense, were not applicable to any issue involved. Moreover, they were well calculated to confuse and mislead the jury into a belief that under the instructions they should convict if, as stated by the court, they were satisfied (as they must have been from the evidence) that the defendant did not commit the act because of a belief, reasonable or otherwise, upon her part that her life was in danger, or that she was threatened with great bodily harm from an attack by the deceased. She made no claim of such character. That the giving of the instructions constituted error admits of no doubt. In re Calkins, 112 Cal. 296, 44 Pac. 577; People v. Maughs, 149 Cal. 259, 86 Pac. 187; Hayne on New Trial and Appeal, p. 350.

[11] "As stated, the defendant justified the homicide in defense of the life and protection of another, as to which the court instructed the jury that if Graydon 'was unlawfully attempting to commit a great injury upon the person of Oscar Bowers, and that the force of the circumstances was sufficient to excite the fears of the defendant as a reasonable woman that the said Graydon would succeed in his attempt to commit a violent injury or do great bodily harm to the person of said Bowers, and she reasonably believed that it was necessary to shoot the deceased to prevent the said Graydon from committing said injury to said Bowers, and, acting under such fears and belief alone, she fired the shot which killed the deceased, then and in that event I instruct you that she was justified, and * * * you should find the defendant not guilty.' This statement, however, was qualified by an instruction to the effect that the plea of justification upon such ground was unavailing if the assault upon Bowers by Graydon was procured by the former or made under the appearance of hostility created by Bowers with a view of having his adversary act upon it, in connection with which the court gave an instruction as follows: 'You are further instructed that, it being the claim of the defendant that she shot the deceased in order to save the life of Oscar A. Bowers at a time when said Bowers and said Graydon were fighting, the burden is upon the defendant *to prove by a preponderance of the evidence* (italics ours) that said Graydon was the aggressor in said fight, and that said Bowers used all reasonable means to avoid further conflict before she fired the fatal shot.'

"While section 1105, Penal Code, casts upon a defendant the burden of proving circumstances that justify or excuse the commission of a homicide, it does not mean that he must prove such circumstances by a *preponderance of the evidence*. On the contrary, while the burden of showing the circumstances under which the act is justified devolves upon a defendant, 'he is only bound under this rule to produce such evidence as will create in the minds of the jury a reasonable doubt of his guilt of the offense charged.' People v. Bushton, 80 Cal. 160 [22 Pac. 127, 549]. Under the instruction given, the verdict of the jury was made to depend upon whether or not they found that Graydon was the aggressor, and whether or not Bowers used all reasonable means to avoid further conflict before defendant fired the fatal shot; and they were told to find these facts adversely to defendant unless she established the contrary by a preponderance of the evidence. Such is not the law. Under the instruction the verdict was predicated upon the implied finding that Graydon was *not* the aggressor, and Bowers did *not* use all reasonable means to avoid further conflict, which finding as to such negative facts was based upon a preponderance of the evidence, when all that could be demanded of defendant under the law was that she produce evidence sufficient only to create in the minds of the jurors a reasonable doubt as to the existence of the alleged circumstances upon which she claimed justification. Entertaining such doubt, she was entitled to an acquittal without regard to what might appear upon a consideration of a preponderance of the evidence touching the question. Where a defendant justified the act in committing a homicide, the same degree of proof, no more and no less, is required in the determination of the issue upon which guilt or innocence depends as that which is demanded in establishing the commission of the homicide. 'Any other rule as to the weight of the evidence makes one measure applicable to one part of the case and a different one to another part and leads to confusion.' People v. Bushton, supra. In the case of People v. Elliott, 80 Cal. 296, 305, 22 Pac. 207, 210, in discussing a like instruction, the court said: 'The instruction was erroneous for the further reason that it cast upon the defendant the burden of proving circumstances of mitigation or that justified or excused the commission of the homicide *by a preponderance of the evidence*, when it was only necessary that he should introduce evidence sufficient to raise a reasonable doubt as to his guilt or the mitigating circumstances.' See, also, People v. Lanagan, 81 Cal. 143, 22 Pac. 482; People v. Morris, 3 Cal. App. 1, 84 Pac. 463. Under the law it was necessary only that defendant produce evidence the weight of which was sufficient to create in the minds of the jurors a reasonable doubt as to the existence of the alleged circumstances which justified the homicide, and if, based thereon, they entertained a reasonable doubt as to the existence of the same, defendant was entitled to an acquittal. By the instruction as given, defendant was required to produce in her defense evidence of greater weight than that which the law demands, the effect of which is identically the same as though she had been wrongly deprived of evidence touching the subject altogether.

[12] "While the court gave the usual instructions as to the presumption of innocence and the fact that defendant's guilt must be

established beyond a reasonable doubt, such instructions cannot be said to render the erroneous instruction referred to harmless. It was directed to her sole defense, which was the only issue tried, and imposed upon her the burden of establishing facts upon which the plea of not guilty was based by a preponderance of evidence, and therefore the giving of the instruction cannot be said to be nonprejudicial, as where the defense is an alibi or based upon a denial of committing the homicide. People v. Miller, 177 Cal. 404, 170 Pac. 817; People v. Wilt, 173 Cal. 477, 160 Pac. 561.

[13] "The evidence touching the issue was conflicting. Indeed, there appears to have been a sharp conflict in the testimony of the defendant herself as to her reason for firing the fatal shot, in that, while asserting on direct examination that she committed the act in defense of Bowers, she, on cross-examination, in response to the question, 'Well, why did you fire the shot?' stated, 'Because he was killing Mr. Bowers.' And in reply to the question, 'Because who was killing Mr. Bowers?' answered, 'Mr. Graydon.' In response to further questions by the district attorney, she stated: 'I don't know why I fired it. No, I did not fire it at Mr. Graydon; I never fired it at Mr. Graydon.' While in replying to the questions she gave contradictory answers, it was the province of the jury to determine under proper instructions which of the statements was true, just as though they had been made by different witnesses. The same rule applies. The mere fact that her answers were contradictory might, by reason of the conflict, have raised a reasonable doubt in the minds of the jurors, in which case, as we view the law, she should have been acquitted.

"The judgment is reversed."

We concur: SHAW, C. J.; WILBUR, J.; SLOANE, J.; WASTE, J.; SHURTLEFF, J.

LAWLOR, J. I dissent. In my opinion there are two answers to appellant's contentions concerning the six instructions on self-defense, the soundness of which as propositions of law is not questioned—first, that they were properly given, and, second, that if not applicable the giving of them could not have been misleading. It was the duty of the court to state all matters of law pertinent to the case. Pen. Code, §§ 1093 and 1127. The theory of the prosecution was that the Doanes, Bowers, and appellant had entered into a conspiracy against Graydon forcibly and by the use of pistols, brass knuckles, and a blackjack, to oust him from the premises. Under this theory Graydon would have been justified in taking the law into his own hands against any or all of them and using force against any or all of them proportionate to the danger. In such circumstances appellant would not have been warranted in killing him to save the life of any of them. It was therefore the duty of the court, whether requested by appellant or not, to charge the jury on the subject of self-defense in order to aid them in determining whether Graydon or his adversaries in the affray were at fault at the time appellant intervened and fired the shot. Clearly the right of appellant to intervene depended upon the situation that was presented to her at the time, in view of her acquaintance with all the facts, and the jury could not tell what the legal situation was between Graydon and his adversaries, upon which appellant acted, without instructions on the law of self-defense, for, of course, a mingled question of law and fact was involved. Regarded in this light, the instructions would be equally responsive to the claim of the defense that there was no conspiracy, but that Graydon was the aggressor and was endeavoring to kill Bowers. Moreover, it appears plain to me that these instructions were stated as general propositions of law. The words "defendant" and "slayer" were used, but in the abstract in each instance, and upon no theory can it be claimed they would not have had application to Graydon and his adversaries. But even if it be conceded the instructions were improperly given, I do not see how the jury could possibly have been misled into assuming appellant must be convicted unless she reasonably believed her own life or her bodily safety was in danger, in view of numerous other instructions which were given, particularly No. 39, proposed by appellant, wherein the jury were repeatedly told that if appellant killed Graydon, reasonably believing it was necessary to save Bowers from great bodily injury as a result of an unlawful attack by Graydon, she should be acquitted.

Nor do I think the erroneous use of the phrase "by a preponderance of the evidence," instead of "sufficient to raise a reasonable doubt." calls for a reversal of the judgment. Misdirection of the jury is one of the errors contemplated by section 4½ of article 6 of the Constitution. The majority opinion proceeds on the theory that, because there is a conflict in the evidence, and that there is evidence sufficient, if believed, to have warranted a finding in favor of appellant under the rule of reasonable doubt, it cannot be held the erroneous instruction did not work a miscarriage of justice.

But as I understand the constitutional provision, our inquiry does not end when such a condition is presented on appeal. We must examine the record, not alone for the purpose of determining whether the jury could have arrived at a different result, but also to weigh the probabilities of whether or not the error had in fact worked a miscarriage of justice. It was said in People v. O'Bryan, 165 Cal. 55, 65, 130 Pac. 1042, 1046, discussing this provision of the Constitution:

"This much, however, we think may be safely said. Section 4½ of article 6 of our Constitution must be given at least the effect of abrogating the old rule that prejudice is presumed from any error of law. Where error

is shown it is the duty of the court to examine the evidence and ascertain from such examination whether the error did or did not in fact work any injury. The mere fact of error does not make out a prima facie case for reversal which must be overcome by a clear showing that no injury could have resulted. * * *

"The final test is the opinion of the appellate court upon the result of the error. No doubt this view requires the court, to some extent, to weigh the evidence, and form conclusions upon its weight—a function which, heretofore, has been reserved for the jury. But it cannot be doubted that the legislators, in proposing the amendment, and the electors, in adopting it, intended to put upon the courts the performance of just that function. We are not substituted for the jury. We are not to determine, as an original inquiry, the question of the defendant's guilt or innocence. But, where the jury has found him guilty, we must, upon a review of the entire record, decide whether, in our judgment, any error committed has led to the verdict which was reached. If it appears to our satisfaction that the result was just, and that it would have been reached if the error had not been committed, a new trial is not to be ordered."

It does not follow, therefore, that it is sufficient to justify a reversal upon the ground the instruction was prejudicially erroneous that the evidence is in conflict and would sustain a contrary finding; it is the duty of the court to examine the record, including the evidence, in order to determine whether the error actually worked any injury, the burden of showing prejudice being on the party asserting the error.

In my opinion it is altogether improbable that the error affected the verdict. Briefly summarized, the evidence on behalf of the people was to the effect that before the fatal meeting Doane telephoned Bowers, requesting him to go to Venice and give notice that a bond on appeal had been filed, staying execution of the judgment under which Graydon held possession of the property. Bowers thereupon got appellant and proceeded to the house, where the shooting occurred. It appeared that both Bowers and appellant had previously taken sides in the dispute between the Doanes and the Graydons over the right to the possession of the premises; that appellant had once before accompanied Mrs. Doane to the house while Mrs. Graydon was there, and had taken an active part in the argument which ensued. The evidence shows that on the occasion in question Bowers and appellant arrived at the house and called to the Graydons, who were inside, knocking on the windows and the door and using profane language; that Mrs. Graydon left and went to the police station to secure help, but was unsuccessful, and secured a taxicab to take her home; that she endeavored to purchase a revolver at a hardware store, but was unable to do so; that Graydon informed Mrs. Doane, after the latter arrived on the scene, that a mistake had been made, and that he and his wife were leaving; that meanwhile Mr. Doane entered the house, and that Mrs. Doane called out to the others to come on in.

The testimony of both the taxicab driver and Mrs. Graydon is to the effect that appellant immediately struck Graydon over the head with something which Mrs. Graydon said was similar to the blackjack afterwards found in appellant's handbag. It was testified that Bowers also proceeded to attack Graydon, and that in a moment the three men were struggling outside the door, Graydon against Bowers and Doane, with Graydon trying to defend himself. Mrs. Graydon endeavored to go to the assistance of her husband, but was struck over the head by appellant. Recovering herself, she went into the house and procured what she said was a bill file, with which she struck appellant over the head. The struggle progressed to a point where Graydon was on his knees. He had been standing facing the porch, and his hands were held to his back, Mrs. Doane and Bowers in front of him and Doane behind him. His eyes were closed as he sank to his knees. At this point appellant went behind Graydon while he was being held by Bowers and Doane, holding a blue revolver in both hands, and, standing close to him, shot him in the back. This testimony was corroborated by Mrs. Graydon and the taxicab driver. There was evidence that before the shooting Graydon's head and face had been struck with hard instruments which caused abrasions, bruises, and blackened spots. A neighbor from her home close by heard Bowers say, immediately after the shot was fired, "You ——— ———, if that don't finish you, I have something that will." The same witness testified that Bowers, who was still behind Graydon, picked something up off the lawn, and that he and appellant went around behind the house. The revolver was never found.

When the police arrived in response to a summons by Mrs. Graydon and her sister, they found appellant and Bowers in the automobile, the engine of which had been started. The former had the blackjack in her handbag and the latter had the brass knuckles in his pocket, which articles they told the officers they had taken from the Graydons. A woman who lived in the neighborhood had searched the automobile, but found no weapon nor ammunition of any kind. Another witness testified that a short time later Doane went to the automobile. Following this, the police searched the car and found several cartridges under the floor mat. Bowers' son testified that the previous Sunday he heard his father say to appellant, with reference to Graydon, that "his hours are numbered," that appellant had said Graydon would "get his," and that on that occasion Bowers had a blue revolver in his possession. Another son of Bowers testified that several years prior to the trial Bowers had kept a

pair of brass knuckles. It may be observed that of those present the disinterested witnesses testified in favor of the prosecution, and that there was no altercation until Bowers and appellant appeared.

It is inconceivable to me that a slip in the instructions as to the measure of proof, involving a distinction which even those learned in the law might fail to notice when stated in the course of a long charge, contributed to the verdict. The jury undoubtedly concluded that appellant and Bowers were vicious meddlers, who injected themselves into the legal dispute between Graydon and Doane. I think that what was said by the District Court of Appeal in the case of the codefendant Bowers (Cal. App.) 204 Pac. 548, concerning the part he and appellant played in the controversy between Graydon and the Doanes, is equally justified by the record in this case. That opinion says:

"Both Bowers and Maybelle Roe, and especially the latter, seem from the evidence to have adopted the Doane-Graydon controversy as personal to themselves. So far as can be learned from any of the evidence, neither Bowers nor Maybelle Roe had any interest whatsoever in the Doane house or any lease made by Mrs. Doane. * * * It was appellant's statement given at the trial that on the day of the affray he took Maybelle Roe with him because she was not feeling well and needed the fresh air. Subsequent developments showed that for a person in enfeebled health Maybelle Roe was capable of great physical activity, for on the occasion of this second controversy, which resulted fatally to Graydon, her participation therein was of the more deadly consequence. That she and appellant Bowers acted with mutual intent and like purposes no reasoning mind can doubt upon examination of the record here exhibited, and by that record it is shown plainly enough that had it not been for the presence and acts of Bowers and Maybelle Roe the controversy between the Doanes and Graydons as to the possession of the house would have been settled in a peaceful way, unaccompanied by the tragedy which occurred."

The jury passed on the respective stories concerning the tragedy, and in view of the verdict of murder in the first degree it must be presumed they accepted the version of the witnesses for the prosecution. Upon this hypothesis the jury must necessarily have concluded that a foul murder had been committed, and utterly rejected the claim of the defense that appellant killed Graydon in order to save Bowers' life. Clearly it was either a deliberate murder or a justifiable homicide. Indeed, as pointed out in the opinion of the District Court of Appeal herein, the testimony of appellant herself as to her purpose in firing the shot was equivocal to say the least. I quote:

"While asserting on direct examination that she committed the act in defense of Bowers, she, on cross-examination, in response to the question, 'Well, why did you fire the shot?' stated: 'Because he was killing Mr. Bowers.' And in reply to the question, 'Because who was killing Mr. Bowers?' answered, 'Mr. Graydon.' In response to further questions by the district attorney, she stated: 'I don't know why I fired it. No, I did not fire it at Mr. Graydon; I never fired it at Mr. Graydon.'"

In view of the verdict, the jury could have given no credence to the story of the defense that, with Bowers standing over Graydon, Doane struggling against him, and appellant standing close by armed and ready to intervene, Graydon was able to throw Bowers to the ground and succeed in choking him by pulling at his necktie. It is plain to me that the jury regarded this as a fabricated defense; that they believed there was absolutely no occasion for killing Graydon, but that the killing was a part of the original conspiracy against him. Upon no hypothesis should it be held that the testimony of the defense was of sufficient weight to have created a reasonable doubt in the minds of the jury as to the guilt of appellant, even though they had been properly instructed on the measure of proof. In other words, it could have made no difference to the jury, even if they observed the distinction between the terms "preponderance of the evidence" and "sufficient to raise a reasonable doubt," which one was used. In my opinion it is improbable that the verdict was affected by any nice question of the quantum of proof, but that the jury concluded the entire defense was destitute of merit. I can hardly believe that the jury was so undecided as to the effect of the evidence that if the rule had been correctly stated to them they would have held appellant guiltless. This is the second jury that has accepted the theory of the prosecution, and in my opinion no other jury would reach a different conclusion on the evidence. The judgment should be affirmed.

189 Cal. 612

## In re COLEMAN'S ESTATE.

## UNION TRUST CO. OF SAN FRANCISCO et al. v. COLEMAN et al.

(S. F. 10177.)

(Supreme Court of California. Sept. 21, 1922.)

**Wills ⊜682(1) — Child of beneficiary under trust provision entitled to withdraw from corpus of estate amount equal to withdrawal of other beneficiary.**

Where a testator left his entire property in trust during the lives of his widow and the survivor of his two sons, the estate ultimately to vest in the heirs of his sons, 80 per cent. of the income after the death of the widow to be equally divided between these two sons with a power in each son to make certain withdrawals of the corpus of the estate, and providing that in case only one son exercised this power the trustee was to open a separate account with the other son and reinvest an amount equal to such withdrawal for the separate account of this son, "or his heirs and representatives," and one son exercised this power after the death of the other son, who left a child him surviving, that child was entitled to withdraw an amount equal to the withdrawals of the son.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of William T. Coleman, deceased. Petition by the Union Trust Company of San Francisco as trustee, for instructions as to a partial distribution of trust funds between William T. Coleman and others, heirs of decedent. From an order directing such distribution, Robert L. Coleman and certain of the heirs appeal. Modified and affirmed.

M. F. Michael and Lloyd Baldwin, both of San Francisco, for appellants.

Heller, Powers & Ehrman, Heller, Ehrman, White & McAuliffe, and Allen G. Wright, all of San Francisco, for respondents.

MYERS, Justice pro tem. Three separate appeals are here involved, each being from a separate order of the trial court in probate. Two of the orders appealed from are brief, informal minute entries, the substance of which is embodied in the third, a formal order of court signed by the judge and entered at length in the minutes. It is apparent that the determination of the appeal from the complete formal order will be determinative of the three appeals, and the parties have so stipulated. The single question here involved concerns the correct construction to be placed upon certain terms of the will as defining the respective rights of the parties in a contingency which has arisen, and the duties of the trustee with relation thereto.

The testator, William T. Coleman, died November 22, 1893, leaving a last will dated August 28, 1893, which was thereafter admitted to probate, the estate duly administered, and, on April 30, 1895, distributed to the Union Trust Company as trustee, by decree of final distribution, pursuant to the provisions of the will. The testator left him surviving his widow, a son, Robert L. Coleman, then unmarried, a son, Carlton C. Coleman, who had been married and was then divorced, and the latter's son, William T. Coleman, Jr., then about nine years of age. The son, Carlton C. Coleman, died in October, 1895, leaving his son, William T. Coleman, Jr. (respondent herein), surviving; and the testator's widow died in May, 1896. The son, Robert L. Coleman, married after the death of the testator, and had by that marriage a son and daughter, who with himself are the appellants herein; his wife having since died. Thus the sole members of the testator's family now surviving are a son and two grandchildren, appellants herein, and a grandchild by the deceased son, respondent herein.

The provisions of the will are here set forth at considerable length, in order that all the terms and expressions thereof which may shed any light upon the question of testamentary intent here at issue may be revealed. They are as follows:

"Having from my youth gladly shared my means and earnings with my sisters and brother, increasing and afterwards extending those aids to their children well through life, and helping many others of my relations, I feel that I have in all *their* behalf done my whole duty.

"Having also with a free hand continuously and pleasurably aided many public and private charities, gratuities, reliefs, promotions and benefactions, I think I have done my full duty in all of *that* regard also, and should now devote the remainder of my holdings exclusively to the support and uses of my wife and children.

"To that end I hereby give, devise and bequeath unto the Union Trust Company of San Francisco, a corporation organized and existing under the laws of the state of California and having its principal place of business in the city and county of San Francisco, in said state, all my properties, real, personal and mixed and wheresoever situate—in trust, however, and only in trust upon the conditions, trusts, terms and provisions and for the time or times hereinafter set forth.

"A. To pay (subject to B next hereinafter) monthly, if convenient, or at least semiannually, to my wife, Carrie M. P. Coleman, eighty (80) per cent. of the income thereof and with the remaining twenty (20) per cent. to create a fund or reserve fund to be used as hereinafter directed. My said wife shall have such eighty (80) per cent. for her own uses and for the legitimate and ordinary expenses of my

sons—the discretion in which regard I leave with confidence to her motherly care.

"B. I desire, provide and direct, as soon as my estate will conveniently and advantageously admit it, and upon the request or assent of my said wife, that each of my sons Carlton C. Coleman and Robert L. Coleman, separately and for his individual account and self, receive and have fifty thousand ($50,000.00) dollars (that is, one hundred thousand [$100,000.00] dollars, gross, to be equally *divided between the two*), to be so received in part or whole amount if they so choose, in real estate at fair valuations, or in any of my paper securities, at the market values, or in cash, in installments or in lump, according to the convenience of my executors or trustees, and without prejudice to my other properties, and so that the said sons shall each, within reasonably short time, receive fifty thousand dollars as his own separate right, and under his own individual control, with which to begin a business life of his own choosing and in his own way. This I hope will be invested carefully and judiciously by them and each of them, and with prudence and economy and increased by industry be the basis of independent fortunes to each; for this is, and will be, all they are for a long time to receive directly from my estate, except as hereafter set forth, as their portions coming eventually from the estate, their fixed shares of the incomes thereof, and it is enough.

"C. The net revenue of all the rest and remainder of my estate, whatever it be, and wherever and howsoever situate, goes to my wife, Carrie M. P. Coleman (as above set forth) to be by her enjoyed, income and interest, according to her sweet pleasure through life, without let or hindrance and without any accounting to any court or tribunal or to any person or power on earth now or after. Then at and after her death, all then remaining of my estate shall remain in said trustee and trust, as hereinafter provided and said trustee, and its successors, shall hold and administer such estate and the fruits and incomes thereon during the lives of my said sons, Carlton C. Coleman and Robert L. Coleman, and annually, quarterly or monthly, if it may be more convenient, pay to them, and each of said sons or their heirs and proper representatives (until both of said sons shall die, but no longer) of them forty (40) per cent. or two-fifth parts of the net incomes or revenues of the said estate, and the remaining twenty (20) per cent. or one-fifth go to or *remain with the body and bulk of the estate* (to create said fund or reserve fund hereinbefore mentioned), and be held by my executor or trustee as a reserve and safety fund to cover contingencies of extraordinary needs or unusual damages to properties (by fires, or earthquakes, or by exceptional shortages in rents or other income, or resulting from war, epidemic, or other calamity or catastrophe); and also so as to provide for and insure funds for full and perfect betterments and maintenance, as nearly as can be, of all buildings and properties requiring maintenance and betterment (and additions even, if very desirable, but, all ordinary repairs to buildings shall be paid for monthly, and be a part of current expenses, as are taxes, insurance and commissions, independent of, and in no event be drawn from, the reserve fund, if avoidable; so that my properties shall never be allowed to deteriorate and suffer for want of good care. That is to say in brief, my trustee shall divide the net income into five parts, reserving and reinvesting at least one-fifth part, and distributing not exceeding the four-fifths to and between the boys as above and as hereinafter directed.

"And if either of my sons, viz.: Carlton C. Coleman or Robert L. Coleman, should die without legal issue him surviving, but should leave a widow him surviving, then (after the death of my said wife) five per cent. of the net incomes of the whole trust property shall (during the life of my other son) be paid to her; and all the balance of the share and interest in my estate of the son so first dying shall go for the benefit of his brother surviving him to the same trust hereby created, subject, however, to the further provisions hereinafter in this will contained with reference to and for the benefit of the respective widows of my said sons, respectively, if either shall leave a lawful wife him surviving.

"While I have in the above set apart twenty (20) per cent. or one-fifth of the net income of my property to be retained, reserved and reinvested, by my trustees during the said trust; yet to cover contingencies of the *possible* needs of the beneficiaries under adverse circumstances, and to give them the benefit of more of my estate, if they should really need it, I make this a *modifying*, yet positive, provision, that: If at the end of five years either or both of my sons should require or desire it, and so express their desires in writing, my trustee is authorized and directed to pay to each or either one of them for his account, a sum equal to five per cent. of his or their share or shares of all the properties held by the trustee; and, at or about the end of each five years thereafter, through their lifetime, they, the said sons, shall be enabled and authorized to draw from the principal, as well as interest accumulated an additional five per cent., or one-twentieth part of the whole of *their* share of property then remaining and existing and of reserved interest, which will, to that extent, be equal to one per cent. per annum, and so far reduce the bulk of the estate as well as the accumulated reserve fund (if any there be *then* remaining unused). This is independent of, and separate from the forty per cent. or four-tenths of the *annual net income* which they shall have been receiving from year to year; *but if one of my sons should make withdrawals under this provision and the other should not, then I request and direct my trustee to open a separate account with my son who has not so withdrawn this allowed portion, and reinvest it and all such, for the separate account of his individual self, or his heirs and representatives, managing this account and its accumulations, in same manner and same terms as any other ward client, the other brother having no rights, share or interest therein except perhaps as an ultimate heir thereto.*" (These italics ours.)

Then follow various directions to the trustee concerning the management of the property, and the will proceeds:

"The reservations or future distributions of my property have extended thus far mainly to my sons (and in part to the surviving widow of

the son first dying) but after the death of both of my said sons I give, devise and bequeath all the remainder of said trust estate immediately and at once in absolute fee simple and without limitation, restraint or restriction or trust or condition of any kind, as follows, to wit: One twentieth or five (5) per cent. thereof each to the widows (then living) of my said sons, if either of them shall leave a wife him surviving and such wife shall be living after the death of both of my said sons (but this provision is personal to such widow or widows and on the condition that neither they nor either of them can take unless living after the death of both of my said sons and that no one can take for them, or either of them, by right of representation), and all the rest, residue and remainder (and those words 'rest, residue and remainder' mean and shall mean in every case and instance what remains of said trust estate after such payment to said living widows, or widow, if any; and if there be no such living widows or widow, then such words mean and shall mean all said trust estate) to the heirs of my said sons (per stirpes and not per capita) born in ceremonial wedlock; and I direct the immediate and unlimited grant, transfer and delivery by such trustee, or its successors as and when above provided."

Then follow provisions for the distribution of the estate in the event of both sons dying "without such heirs as are hereinabove mentioned surviving them."

It will be noted that the testator left his entire estate in trust for the term of the lives of his widow and two sons and the survivor of them. Of the income, 20 per cent. was to be set aside throughout the term of the trust, as a reserve fund for the protection of the estate. The remaining 80 per cent. was to go to the widow during her life; and thereafter one-half thereof to each of said sons, "or their heirs and proper representatives." Upon the termination of the trust, the entire estate (except in the contingency of surviving widows of the testator's sons, which did not arise) is to go "to the heirs of my said sons (per stirpes and not per capita) born in ceremonial wedlock." The question here involved arises directly under the portion which we have italicized of the "modifying, yet positive provision" above set forth.

In 1906, acting under authority of this provision, Robert L. Coleman applied to the trustee in writing for 5 per cent. of one-half of the trust fund. This was promptly paid to him by the trustee, in the sum of $10,000, and at the same time the trustee transferred a like amount from the trust fund to a special trust fund for the benefit of William T. Coleman, Jr. This same procedure was repeated twice thereafter, at approximate five-year intervals, with the result that the trustee has paid over to Robert L. Coleman $30,000 from the trust fund, and has transferred therefrom a like amount to a special trust fund for William T. Coleman, Jr. Thereafter the latter applied to the trustee to pay over to him the $30,000 so held by it, and it, being uncertain as to its duty in the premises, filed in the superior court its petition for instructions. All of the interested parties appeared in response thereto, and presented their respective contentions by appropriate pleadings. A hearing was had, resulting finally in the orders from which these appeals are prosecuted, wherein the trial court determined that William T. Coleman, Jr., was entitled to the fund in controversy.

All of the parties hereto, being desirous that this controversy shall be determined solely upon the merits and in accordance with the intention of the testator as expressed in his will, have stipulated that the determination thereof shall be wholly freed from and uninfluenced by any questions of estoppel or waiver or res judicata arising out of any past actions of the parties or the trustee, or any preceding orders of the trial court; and we shall so consider it.

If Carlton C. Coleman had been living at the times of the several 5 per cent. withdrawals by Robert L. Coleman, there could be no doubt as to the duty of the trustee to make a like withdrawal for the benefit of Carlton upon each such occasion. Appealants' contention is that this provision was made by the testator solely for the personal benefit and protection of his two sons, and that no other person can rightly claim any benefit therefrom, or any right thereunder; that the words of donation therein are found in the direction "to open a separate account with my son"; and that the direction to "reinvest it and all such for the separate account of his individual self, or his heirs and representatives," should be construed as if it read "and his heirs and representatives," and that so construed it is merely analogous to the habendum clause in a deed, descriptive of the interest of the grantee in the property so conveyed to him.

The respondent contends that the phrase, "for the separate account of his individual self, or his heirs and representatives," relates to and defines the purpose of the entire direction to the trustee embodied in the italicized words; that by the expression "reinvest it" the testator meant "transfer it from the general trust fund into a special trust fund, for the benefit of such other brother, or if he be dead, then for the benefit of his heirs and representatives." So construed, the words of donation, being found in the expression "reinvest it," inure to the benefit of the other brother, if living, and to his heirs, if he be dead.

Counsel on both sides have furnished the court with a most able, exhaustive, and searching analysis of the words, phrases, and provisions of the will. Numerous authorities are cited, but, as has been frequently reiterated "except for the establishment of general principles, very little aid can be procured from adjudged cases in the construction of

wills." This is particularly true when, as here, the will was drafted by a layman without direct assistance from a lawyer. It does not seem highly probable, for instance, that the testator, a layman, by the use of the phrase, "or his heirs," intended thereby merely to create an habendum clause which would operate solely to define as absolute the estate thus bequeathed to his son in money or securities. This becomes more apparent when we note that in making provision for possible surviving widows of his sons the testator added the following explanation:

"But this provision is personal to such widow or widows and on the condition that neither they nor either of them can take unless living after the death of both of my sons and that no one can take for them, or either of them, by right of representation."

The general rules of interpretation of wills were well summarized by the present Chief Justice, speaking for this court in Estate of Peabody, 154 Cal. 173, 97 Pac. 184, as follows:

"The important thing is the intention of the testator. Section 1317. This is to be ascertained from the words of the will, taking into view the circumstances under which it was made. Section 1318. All parts of the will are to be considered in relation to each other so as to form, if possible, a consistent whole. Section 1321. Words are to be taken in their ordinary grammatical sense, unless a clear intent to use them otherwise is apparent and that sense can be ascertained. Section 1324. Technical words are not to be taken in their technical sense if it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense. Section 1327. 'A technical construction of words and phrases, although prima facie the one which should prevail, will not go to the extent of defeating any obvious general intention of the testator, since wills are often prepared by those wholly unacquainted with the precise technical force of legal formulas.'"

Considering the entire will in the light of the foregoing rules, we note that the income during the term of the trust was to be divided equally between the two branches of the family represented by the two sons, and that this rule of division should apply after the death of one son the same as before; that upon the termination of the trust the corpus of the estate is to be equally divided between these two branches of the family, "per stirpes and not per capita." There is no room for doubt that the testator understood the difference between a division per stirpes and a division per capita. Neither is there any room for doubt that he understood and had in mind while drafting this will that a bequest might go to the heirs or representatives of a deceased legatee, if a contrary intention was not made apparent in the will. He made such contrary intention clearly apparent in his provision for the sons' widows, but he did not do so in the provision here under consideration.

Remembering that this will was drafted by a layman, a business man, the construction contended for by respondent seems the more natural, reasonable, and in accordance with "common sense." When we consider further that it harmonizes completely with the "obvious general intention of the testator," and that the construction suggested by appellants would be quite out of harmony therewith, we are impelled to the conclusion that the decision of the trial court was correct.

Section 1322 of the Civil Code does not appear to be applicable here, because this is not a case of "a clear and distinct devise or bequest," as affected "by any other words not equally clear and distinct, or by inference or argument from other parts of the will."

Appellants make certain criticisms of the language used in the formal order appealed from, which are well founded. The phrase, "said Robert L. Coleman having no rights, share or interest therein or thereto," should be modified by the insertion immediately following it of the words, "except perhaps as an ultimate heir thereto," as found in the will. The words of paragraph 7 thereof, "that the said decree of final distribution herein be modified and supplemented accordingly," are not a necessary part of the order, and might well have been omitted therefrom. But in view of the stipulation entered into by all parties interested herein no error can be justly claimed here because of their inclusion.

It is ordered that the "formal order" appealed from be modified by the insertion therein of the words above indicated; that as so modified it stand affirmed; that the two informal orders appealed from be affirmed; that respondent have and recover his costs of appeal herein.

We concur: SHAW, C. J.; WASTE, J.; LENNON, J.; LAWLOR, J.; RICHARDS, Justice pro tem.

189 Cal. 659

## GARIBALDI v. ZEMANSKY, Registrar of Voters. (S. F. 10399.)

(Supreme Court of California. Sept. 25, 1922.)

**1. Elections ⟸170—On ballot to elect five justices of the peace, there should be one blank under name of majority candidate, and four blanks under names of remaining nominees.**

Though Primary Election Law, § 23, does not provide for blank spaces under the names of majority candidates, required to be printed separately under a designation to vote for a number equal to the candidates receiving a majority at the primary, the General Election Law (Pol. Code, §§ 1196, 1197, 1203, 1205, 1206, 1211) not only provides for printing on the ballot blanks equal to the number of offices to be filled, but for instructions to voters to write the name of a person not on the ballot in the blank space provided, so that it is essential to print a blank space wherein the voter may write in the name of his choice for every office, and the Constitution provides as to officers therein named that the election shall be on the first Tuesday after the first Monday in November, the same day on which Code Civ. Proc. § 85, provides justices of the peace shall be elected, and hence there should be blank spaces under the names of majority candidates equal to their number, and under the second group a number of blanks equal to the number of offices to be filled after deducting the number in the majority group, and so, where, at a primary election to nominate five justices, one only received a majority, and eight others the next highest vote, there should be one blank under the name of the majority candidate, and four blanks under the names of the remaining nominees.

**2. Elections ⟸173—Majority candidate or candidates required to be separately grouped on ballot not to be so designated by words over name or names in such group.**

Though Primary Election Law, § 23, designates candidates receiving a majority as majority candidates, and provides for separately grouping such candidates on the ballot at the general election, the words "Majority Candidate," "Majority Candidates," or "Majority Group," should not be printed over the name or names in such group.

In Bank.

Application for writ of mandate by Virgil J. Garibaldi, to be directed to J. H. Zemansky, as Registrar of Voters, City and County of San Francisco, requiring him to print a blank space on the ballot following the name of Frank T. Deasy, majority candidate for Justice of the Peace, and omit from the ballot over the latter's name the words "Majority Candidate." Writ granted.

Robert W. Harrison, of San Francisco, for petitioner.

George Lull, of San Francisco, for respondent.

PER CURIAM. [1] Mandamus. At the primary election held on August 29, 1922, five justices of the peace were to be nominated in the city and county of San Francisco. Frank T. Deasy only received a majority of the vote cast at the election for justices of the peace, and James G. Conlin, A. T. Barnett, Thomas F. Prendergast, Rolla B. Watt, Frank W. Dunn, James Carroll, Joseph Golden, and M. J. Sullivan received the next highest vote.

Section 23 of the Primary Election Law of 1921 (St. 1921, p. 1217), provides that the candidate or candidates receiving a majority of all the votes cast under such circumstances shall be printed separately under a designation, "Vote for One," or two, or more; such number to be equal in number to the candidates receiving a majority vote. If one candidate receives a majority vote, the direction is to "Vote for One"; if two, to "Vote for Two," and so on. The Primary Election Law makes no special provision in regard to blank spaces under the names of the persons receiving a majority vote at the primary, and no form of ballot to be used at the general election is printed therein, conforming to the amendments of 1921. Therefore, if the Primary Election Law was alone considered, it might justify the conclusion that there should be no blank spaces under the names of the majority candidates; but the General Election Act not only provides for the printing upon the ballot of blanks equal to the number of offices to be filled, but also specifically provides that the instructions to voters shall direct that, where the voter wishes to vote for the person whose name is not printed upon the ballot, he shall do so by writing the name in the blank space thereon provided. Sections 1196, 1197, 1203, 1205, 1206, and 1211, Pol. Code. In order that these directions may be followed, it is essential that there shall be printed on the ballot a blank space wherein the voter may write in the name of his choice for every office. The effect of the Primary Election Law (section 23), so far as the method of voting is concerned, is to designate separate offices equal in number to the majority candidates, leaving the remainder of the justices (minority candidates) to be elected to separate and distinct offices.

Another consideration leads to the same conclusion. The Primary Election Law devises a scheme for the nomination of candidates who are to be voted upon at the general election. If the voter is deprived of writing in a name of a candidate in opposition to the candidate nominated at the primary election, the effect is to make the nomination an election; whereas, the Constitution provides, with reference to the offices therein named, that the election shall be on the first Tuesday after the first Monday in November, and

the law providing for the office of justice of the peace provides that they shall be elected on the first Tuesday after the first Monday in November. Section 85, Code Civ. Proc. It follows that there should be blank spaces under the names of majority candidates equal to the number of such candidates, and that under the second group there shall be printed a number of blanks equal to the number of offices to be filled after deducting the number in the majority group. In this case there should be one blank under the name of Frank T. Deasy, and four blanks under the names of the remaining nominees.

[2] The petitioner claims that the respondent intends to print the words "Majority Candidate," "Majority Candidates" and "Majority Group" over the names receiving the majority of all the votes cast; that is to say, in this case, over the name of Frank T. Deasy. It is true that the statute designates the candidates receiving a majority of the votes cast at the primary as "majority candidates"; but it is apparent that this language is used as a matter of convenience in expressing the intention of the Legislature, and not for the purpose of designating them as such upon the ballot. After designating the majority candidates or majority group, the statute provides as follows:

"Said group on the ballot being preceded by the designation of the office and the words 'Vote for ——,' the blank being filled by a number equal to the number of names in such 'majority group'; and in addition to the 'majority group' there shall be printed on the ballot in a separate group, and separated from such 'majority group.' * * *"

According to this provision the name of Frank T. Deasy should be preceded by the designation of the office, to wit, "Justice of the Peace," and the words "Vote for One."

Let the writ issue as prayed for.

WILBUR, Acting C. J., LENNON, LAWLOR, and WASTE, JJ., and RICHARDS, Justice pro tem., concur.

---

189 Cal. 625

## AKLEY et al. v. BASSETT et al. (L. A. 6904.)

(Supreme Court of California. Sept. 22, 1922. Rehearing Denied Oct. 19, 1922.)

**1. Judgment ⟸394—Court may vacate judgment inconsistent with findings, but cannot on motion to vacate change findings of fact.**

While the Superior Court may, on motion, under Code Civ. Proc. § 663, vacate a judgment inconsistent with, and not supported by, the findings of fact, that section merely authorizes the substitution of the judgment that should have been given as a matter of law upon the facts found, and the court cannot, on such motion, change any findings of fact.

**2. Deeds ⟸128—Rule in Shelley's Case inapplicable to remainder to grantee's heirs under state law.**

A deed to the grantee for life, with remainder to his legal heirs according to the state law in fee simple but not to his testamentary heirs and devisees so as to contradict, impair, avoid, or vary the remainder, *held* not within the rule in Shelley's Case, which was in force in California only until January 1, 1873, when it was abolished by Civ. Code, § 779.

**3. Appeal and error ⟸907(3)—Findings held conclusive on appeal on judgment roll alone.**

Where an appeal is on the judgment roll alone, the appellate court must accept the findings, notwithstanding that the record contains evidence thereon not in itself sufficient to support them.

**4. Judgment ⟸485—Collateral attack proper, where admitted facts show judgment void.**

Where the parties admit facts which show that a judgement in a former suit is void, or if they are established without objection, then the case is similar to one wherein the judgment is void upon its face and is subject to attack.

**5. Infants ⟸89—Defective service on minor held not cured by appointment of guardian ad litem.**

Code Civ. Proc. § 411, subd. 3, providing the manner in which service may be made upon a minor under 14 years, residing within the state, and also upon her father, mother, or guardian, or other person designated by the statute, being mandatory, failure to make complete service could not be cured by the appointment of a guardian ad litem, nor by the appearance of the persons enumerated, other than the minor, in their own behalf.

**6. Adverse possession ⟸74—Claim under decree of distribution of estate of grantee in deeds conveying full ownership held color of title.**

Where an occupant of land succeeded thereto under a claim founded on the title of his father, who had a deed implying full ownership, and under a decree of distribution in the father's estate, his entry and claim rested upon color of title within the five years' statute of limitation, under Code Civ. Proc. § 322.

**7. Tenancy in common ⟸15(5)—When possession of tenant in common adverse to other cotenants stated.**

When a tenant in common is in possession of the whole premises, and exercises acts of ownership of an unequivocal character, overt and notorious, and of such nature as, by their own import, to impart information and notice to his cotenants that an adverse possession and disseisin are intended to be asserted against them, his possession is adverse.

**8. Tenancy in common ⟸14—Act of cotenant in exclusive possession manifesting intent to hold exclusively is an actual ouster.**

Any act of a cotenant in the exclusive possession, which manifests an intention on his part to hold exclusively for himself is equivalent to an actual ouster.

---

**9. Tenancy in common ⟸15(1)—When tenant in common acquires title by prescription stated.**

A tenant in common who enters into actual possession under color of title, and who, with his predecessors in interest, has maintained possession and exercised acts of ownership openly and notoriously, claiming as against other tenants and paying taxes assessed thereon for more than five years prior to the commencement of an action against him, thereby acquires title by prescription under the statute of limitations.

**10. Tenancy in common ⟸14—Rule of ouster by tenant in common inapplicable, where possession not instituted as such tenant.**

When one enters avowedly as tenant in common with others, his possession is the possession of the others, so long as the tenancy in common is not disclaimed, and to constitute ouster there must be acts giving notice to the world of an intent to exclude the cotenants, but such rule is not applicable, where possession was neither avowedly begun as a tenant in common nor instituted under a deed defining his title as such.

**11. Remainders ⟸17(3)—Possession of life tenant's grantee held ouster of remaindermen.**

Where a life tenant conveyed realty to one who entered into possession and exercised acts of ownership, claiming the entire land for himself, such entry and possession passing to the grantee's heir constituted an ouster of all persons claiming an interest as remaindermen and was such a disseisin as to set the statute of prescription in motion against them, at and from the time they had a right of entry.

**12. Life estates ⟸8—Life tenant cannot make his own or his grantee's possession adverse to remaindermen during life estate.**

A life tenant cannot, by his dealings with a life estate, make his own or his grantee's possession adverse to the remaindermen, so as to start the statute of limitations against them during the life estate.

**13. Tenancy in common ⟸15(4)—Effect of ouster of infant stated.**

Ouster of an infant by a cotenant sets the statute of limitations running in favor of the disseisor, but protection is given the infant by the provision of the statute that the adverse holding must continue from that date until the expiration of five years from his attaining majority.

**14. Partition ⟸44—Limitations available to establish interest in property.**

The statute of limitations may be resorted to in an action of partition, so far as it establishes an interest in the property, notwithstanding that the action for partition between tenants in common is not barred by lapse of time.

**15. Adverse possession ⟸3—Statutory provisions as to title by prescription construed.**

Code Civ. Proc. §§ 318, 319, prescribing seizin within five years before the commencement of an action as a necessary condition to its maintenance, affect only the remedy but not the right itself, while Civ. Code, § 1007, pertaining to the acquisition of title by prescription, confers a substantive right.

**16. Limitation of actions ⟸77—Time within which disseized minor must bring action stated.**

Where a tenant in common was ousted from possession while a minor, such tenant had, under Code Civ. Proc. §§ 318, 319, and 328, five years after his right accrued within which to bring an action either for the recovery of the land or for the land or possession thereof, or for the rents and the profits, and, under section 351, such period is extended by the time of defendant's absence from the state.

**17. Tenancy in common ⟸38(5)—Delay of 17 years held laches barring action for recovery of possession.**

Where a dispossessed tenant in common might have instituted a suit for recovery of possession in 1901, but failed to bring action until 1918, the cause of action was barred by laches.

**18. Partition ⟸10—Action equitable in nature under Code.**

Under the Code an action of partition is in its nature and essence equitable.

**19. Equity ⟸75—Good faith and diligence must be shown after great lapse of time without assertion of claim.**

It devolves on one seeking the aid of equity, where the complaint discloses a great lapse of time without assertion of any claim, and after long-continued acquiescence in acts hostile to the claim, to show circumstances indicating good faith and reasonable diligence.

**20. Appeal and error ⟸1009(1)—Whether remedy barred by laches question for trial court.**

A party is not to be held barred from his remedy for a wrong, on the ground that he has been guilty of laches, unless his delay in bringing action has been of such length and under such circumstances that it would be inequitable to enter into an inquiry as to the validity of his claim, or to allow such remedy, and the question is in the first instance for the trial court and, if his conclusion is supported by evidence, an appellate court will not interfere therewith.

**21. Equity ⟸88—Laches need not be pleaded.**

The defense of laches need not be pleaded, but when it appears from the evidence that the seeker of relief in equity has been guilty of laches, the court will deny such relief sua sponte.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Josephine M. Akley and others against Charles N. Bassett and another. On motion of plaintiff named, a judgment in favor of defendant named was set aside and judgment of partition ordered, and, from the order granting the motion and from the substituted judgment, defendant named appeals. Order and judgment reversed.

Millard Patterson and Donald Barker, both of Los Angeles (Wm. H. Neblett, of Los Angeles, of counsel), for appellant.

Robert B. Murphy, Daniel Hunsaker, and Hunsaker, Britt & Cosgrove, all of Los Angeles, for respondent.

WASTE, J. This action was commenced by the respondent Josephine M. Akley and several others for the partition of 814 acres of land, situated about 15 miles from the city of Los Angeles, being a part of the Rancho La Puente, and to recover from the defendant Charles N. Bassett, who is the appellant here, their respective proportionate shares of the rents, issues, and profits of the alleged common property, received and retained by him.

The defendant appeals from an order of the trial court, granting the motion of the plaintiff Josephine M. Akley to set aside the judgment theretofore entered against her and in favor of defendant Bassett, and entering another and different judgment, and from the judgment entered following such order.

The findings of fact and conclusions of law, as first made, the records, pleadings, and files of the cause on which the motion below was considered, the "amended and corrected conclusions of law," on which the different judgment was based, and the judgment itself—all constituting the judgment roll in the cause—are brought here on a stipulated and duly allowed bill of exceptions, from which we have collated the pertinent facts.

By a deed dated October 11, 1870, and recorded March 27, 1873, William Workman and wife deeded the property in question to Joseph M. Workman "for and during the term of his natural life; and upon the decease of him," the said Joseph M. Workman, "unto his legal heirs, according to the laws of the state of California respecting descents and distributions, and their heirs and assigns to and for their sole use, benefit, and behoof, in fee simple absolute forever; but not to the testamentary heirs and devisees of (Joseph M. Workman) in such manner as to contradict, impair, avoid, or vary the * * * declared and limited remainder." Joseph M. Workman, who was the father of Josephine M. Akley, the respondent on this appeal, on March 1, 1895, by a grant deed conveyed the property here in question to O. T. Bassett, father of Charles N. Bassett, the appellant. Immediately after the delivery of said deed to O. T. Bassett, he commenced an action entitled Bassett v. Thornton et al., in the superior court of Los Angeles county, against the plaintiff here and others, to quiet title to the land. The respondent was at that time a minor under the age of 14 years. She had no guardian legally appointed, but her father and mother were both alive. A copy of the summons in the action of Bassett v. Thornton was delivered to the respondent personally, but none was served in her behalf, or at all, on any guardian, or on her father or mother, as required by section 411 of the Code of Civil Procedure, relating to service of summons on a minor litigant. At no time did respondent's father or mother or any guardian of her person or estate appear in said action in her behalf. It appears from the record that the court trying the cause made an order reciting that respondent and other defendants were minors, and appointing C. K. Holloway their guardian ad litem, to appear and defend the action in their behalf.

Thereafter, on the 25th day of June, 1895, judgment was entered in Bassett v. Thornton, adjudging and decreeing that said O. T. Bassett was the owner in fee simple absolute of the land, and that none of the defendants to that action, including plaintiffs here, had any estate or interest therein. They were, by the terms of the judgment, forever barred from asserting any claim in or to the said lands and premises adverse to O. T. Bassett. No appeal was perfected from said judgment, and in due time it became final. O. T. Bassett died intestate, January 1, 1898, leaving appellant surviving him as his sole heir at law. Such proceedings were thereupon had and taken for the administration of the estate of said O. T. Bassett that on the 20th day of October, 1900, the land described in the complaint in this action was distributed to this appellant, who has not parted with the interest or title derived thereby. Joseph M. Workman, father of the respondent, died March 13, 1901.

When O. T. Bassett acquired the title to the land, by the deed from respondent's father, he entered into immediate possession and at once proceeded to develop the tract for subdivision and sale. He occupied, tilled, and cultivated the land, dug wells, erected pumping plants for artificial irrigation of the soil, planted much of the tract to walnut trees, and to fruit trees of diversified kinds, and various crops, requiring artificial irrigation. The work of improvement was carried on openly and notoriously, and wide publicity was given thereto. Bassett also had prepared and filed for record a map designating the property as "Map of O. T. Bassett's Subdivision of the Workman Tract, being a part of the Rancho La Puente, etc.," with an indorsement thereon that he was the owner of the tract, and that the same was surveyed and subdivided at his request. Within three or four years after appellant succeeded to the estate of his father he began to sell different parcels of the land, and has sold to innocent purchasers, for value, all but 285.45 acres of the tract. These purchasers have erected dwelling houses on their respective holdings, and generally have gone forward with intensive improvement and development of the property. Such was

the condition of affairs, and the relation of the parties (except that respondent Josephine M. Akley became of legal age January 13, 1901), when this action was commenced on the 24th day of June, 1918.

The original complaint is in the usual form for partition actions, and therein the respondent alleged that each of the plaintiffs and the defendants Charles N. Bassett and Ida L. Kelso were and had been since March 13, 1901, the date of the death of Joseph M. Workman, the owners in fee simple, and in possession, of the premises described, as tenants in common; that the defendant Charles N. Bassett had "collected, received, obtained, and kept" all of the "rents, issues, and profits" of said real property in an amount "in excess of the sum of $1,000,000"; that said defendant Charles N. Bassett "has not resided in or been within the state of California since January 1, 1902, for periods of time aggregating four years"; and that he never appointed an agent upon whom process could be served. The complaint prayed that the interests of the parties be ascertained, that all adverse claims be determined and that the property be partitioned according to the rights of the parties; that the defendant Charles N. Bassett be compelled to account for the amount of the rents, issues, and profits "received from said real property," and that judgment be entered therefor against him.

On the 6th day of November, 1918, the defendant Charles N. Bassett filed his answer, the contents of which are not disclosed by the record, other than that it set up as defense the judgment in Bassett v. Thornton, obtained in 1895, and already referred to. Josephine M. Akley, whom we shall hereafter refer to as the respondent, thereupon filed an amendment to the complaint, alleging, in addition to the matters contained in the original pleading, certain facts tending to show that, as to her, the judgment in Bassett v. Thornton was wholly null and void, and not binding upon her, in that she was never served with process in the action, and the court never obtained jurisdiction over her in said cause. She further pleaded facts purporting to excuse her delay in bringing the action; also her total lack of knowledge until May, 1917, of said action of Bassett v. Thornton, or of the judgment rendered therein, or of her interest in the property, or of any facts connected therewith sufficient to put her upon inquiry, or of any facts at all connected with said matters; also the circumstances under which she then acquired knowledge thereof and why she did not learn of the same sooner, and the acts and steps taken by her subsequent thereto, and the absence of the defendant Bassett from the state of California. It was further alleged that defendant Bassett had sold to "innocent purchasers for value" all of said land except 285.45 acres, and that, in so far as such purchasers were concerned, the plaintiffs were not attempting to set aside said judgment, and waived, as to them, all right to the land they had bought. The prayer of the complaint was amended by requesting that the judgment in Bassett v. Thornton "be set aside and declared wholy null and void and of no effect whatsoever in so far as the plaintiff Josephine M. Akley is concerned," and that the defendant Charles N. Bassett be restrained from introducing said judgment in evidence against respondent, or claiming any rights thereunder as against her.

The defendant Bassett, whom we shall hereafter refer to as the appellant demurred to the complaint as amended, specifying as grounds of demurrer a want of sufficient facts, uncertainty and ambiguity, the bar of certain sections of the Code of Civil Procedure, and that the laches of respondent precluded any right of recovery by the action. The demurrer was overruled, and appellant filed his answer. He denied, among other matters, respondent's alleged ownership in the property and the invalidity of the judgment in Bassett v. Thornton, and set up a number of affirmative defenses. These are: The conveyance of the property to his father by deed from Joseph M. Workman and wife, and the subsequent facts relating to, the history of, and the judgment in, Bassett v. Thornton, and the succession of the land to appellant through his father's estate; title to the land, as against certain of the plaintiffs other than the respondent, in O. T. Bassett, through mortgage foreclosure proceedings, and purchase at such sale by said Bassett, November 11, 1895; claim of title by adverse and exclusive possession, supported by allegations of continuous occupancy, improvement, cultivation, and use of the land, the payment of all taxes, and absence of any claim on the part of the plaintiffs or any of them; estoppel of the plaintiffs, through acquiescence after knowledge of the possession of the land by appellant's father, O. T. Bassett, appellant's succession in interest thereto, and of the sale by him of various parcels of the land, and of extensive and expensive improvements of the same by the Bassetts, and by the purchasers at such sales, without assertion of any right at any time by the plaintiffs; estoppel of the plaintiffs by reason of an agreement entered into in Bassett v. Thornton, dismissing the appeal in that action, and the acceptance of the benefits by the parties thereto, including the respondent. The bar of various provisions of the statute of limitations is also pleaded by way of separate defense.

After the trial and submission of the issues thus presented, the court made its findings and conclusions of law. Judgment was entered that appellant is the owner in fee simple absolute of the land in question, and that none of the other parties to the land,

including the respondent, have any right, title, interest or estate whatsoever therein. Respondent, Josephine M. Akley, alone moved the court to vacate and set aside the judgment and to enter another and different judgment, under the provisions and procedure found in sections 663 and 663a of the Code of Civil Procedure. The motion was granted. By its "amended and corrected conclusions of law," another judge, sitting in place of the one who tried the case and made the findings, the lower court decided that the respondent and the appellant are tenants in common of the real property involved in the controversy, the former being declared to be the owner in fee simple of an undivided one-ninth interest, and the latter the owner of like title to the remaining eight-ninths of the land. It ordered judgment in partition, and allotment of the several portions of the property, quality and quantity relatively considered, according to the respective rights of respondent and appellant. It also directed judgment in favor of respondent against the appellant, in the sum of $109,302, with interest from the date of the commencement of the action, as respondent's share of the rents, issues, and profits derived from the land. The appeal from the order granting respondent's motion, and from the substituted judgment, brings the action of the trial court before us for consideration and review.

[1] While the superior court has jurisdiction on a proper motion made under section 663 of the Code of Civil Procedure, to vacate a judgment as entered, which is inconsistent with, and not supported by the findings of fact, that section merely authorizes the substitution of the judgment that should have been given as a matter of law upon the facts found, and the court cannot, on such motion, change any finding of fact. Dahlberg v. Girsch, 157 Cal. 324, 326, 107 Pac. 616; Hole v. Takeawa, 165 Cal. 372, 376, 132 Pac. 445. Consequently, in the determination of this appeal we are restricted to the case made by the findings of fact in the lower court, considered in the light of the pleadings and the issues made thereby. If the first judgment was the correct legal conclusion upon the facts so found, the trial court had no right to vacate it and substitute a different judgment therefor. We are therefore brought to an analysis of the comprehensive and specific findings of the trial court.

As the foundation of her claim to an interest in the property in question, the respondent alleged, and the court found, that she succeeded to, and became the owner of, an undivided two-eighteenths interest in the land on the 13th day of March, 1901, upon, and by reason of, the death on that date, of her father, Joseph M. Workman, the grantee under the deed from William Workman. Appellant challenges this position, and asserts that, under the rule in Shelley's Case, the deed, which is set out in full in the findings, should have a construction favorable to him. His contention is that the deed, if delivered before January 1, 1873, vested in Joseph M. Workman a fee simple absolute in the land, his heirs taking no estate or interest in the property during his life, leaving him free to dispose of it to appellant's father, as if the deed contained no words purporting to transfer to him less than the fee. There are two reasons why appellant's contention must fail. The first is that he attempts to place an improper construction upon the language of the deed from William Workman to plaintiff's father, the material portions of which are as follows:

"The party of the first part, for and in consideration of the natural love and paternal affection by him borne toward the party of the second part, and for the worldly advantage and better maintenance and support of him, the party of the second part, and in provision for the lawful heirs of him, the party of the second part, *hath* given, granted, transferred, assigned and conveyed, and hereby *doth* give, grant, transfer, assign, convey and confirm unto the said party of the second part, *with remainder as hereinafter specified and admitted* the following described parcel of land: * * *

"To have and to hold the above granted and described premises with the appurtenances and the rents, issues and profits thereof *unto* the party of the second part, to and for his use and benefit, *for and during the term of his natural life; and upon the decease of him, the party of the second part, unto his legal heirs,* according to the laws of the state of California respecting descents and distribution, and their heirs and assigns to and for their sole and only use, benefit and behoof, *in fee simple absolute forever; but not* to testamentary heirs and devisees of the party of the second part, in such manner as to contradict, impair, avoid or vary the hereby declared and limited remainder." The words italicized by us were underlined in the original deed.

[2] The fundamental reason for the rule in Shelley's Case is so well stated, and the cases in which the use of apt language has taken deeds out of its application are so concisely reviewed, in Gordon v. Cadwalader, 164 Cal. 509, 513, 130 Pac. 18, that we refer to the opinion of the present chief justice in that case on this point, and refrain from discussing the subject more at length.

We are satisfied that the terms of the instrument remove it from the application of the rule in Shelley's Case, even though it had been delivered prior to January 1, 1873. Its language clearly indicates an intention on the part of the grantor to limit a life estate in Joseph M. Workman, and to vest a full estate in his legal heirs, according to the laws of the state of California respecting descents and distribution. Montgomery v. Sturdivant, 41 Cal. 290, 298; Gordon v. Cadwalader, supra. O. T. Bassett took no greater interest in the property than his grantor, Joseph M. Workman, had. It follows, therefore, that

the deed from Joseph M. Workman to appellant's immediate predecessor did not serve to divest respondent of her future interest in the property, which vested upon the death of her father, on March 13, 1901.

The second answer to appellant's contention is that the rule in Shelley's Case was only in force in this state until January 1, 1873, when it was abolished by section 779 of the Civil Code. Gordon v. Cadwalader, supra. Although the instrument bears date, and was acknowledged, on October 11, 1870, the finding in this action is "that delivery of said deed was made to said Joseph M. Workman on the day of its recordation, to wit: March 27, 1873." In Bassett v. Thornton, the judgment roll of which action is embodied in the findings here, the court found that the deed was delivered "prior to the 1st day of January, 1873." Appellant takes the position that the matter of the recordation of the deed was therefore res adjudicata. We are not now concerned with the contention, for, whether that be so or not, the instrument, whenever delivered, is not subject to the construction appellant would have us place upon it.

For another reason, however, it is necessary for us to consider the adjudication in Bassett v. Thornton, the effect of which was to declare O. T. Bassett the owner in fee simple absolute of the real property, and that the defendants to the action, including the respondent had no estate or interest therein. Anticipating that the appellant would plead that judgment as a bar to her right to recover in this action, the respondent alleged that as to her, although she was nominally and to all intents a party to the action, the judgment therein was "wholly null and void, and of no force and effect whatsoever, and not binding upon" her, as she was not served with process, and the court never obtained any jurisdiction over her. The facts alleged by her in support of her contention, and found by the trial court to be true, are, briefly, these:

On March 1, 1895, said action of Bassett v. Thornton was commenced in the superior court of Los Angeles county, respondent, among others, being a defendant. On March 2, 1895, there was delivered to her, in person, a copy of the complaint and summons in said action, but, although she was at that time but little over 12 years of age, no copy of said summons and complaint were then, or at any time, served upon or delivered to either her father, or mother, or to any guardian of her person or estate, or to any of the persons designated in subdivision 3 of section 411 of the Code of Civil Procedure, which provides the manner in which summons may be served upon a minor under the age of 14 years, residing within the state. None of the persons designated in that section ever appeared in the action of Bassett v. Thornton on behalf of respondent or for themselves, and she was not served with process in said action, otherwise than by delivering to her personally of a copy of the complaint and summons as before stated. During the pendency of the cause, the court made an order purporting to appoint C. K. Holloway as guardian ad litem of respondent and two other minor defendants. An answer was thereupon filed in the action by the defendants, the three minors purporting to appear and join therein by their guardian ad litem. After evidence introduced, and submission of the cause, the court gave its decision and entered judgment, the effect of which, as already stated, was to declare the plaintiff Bassett the owner in fee of the property, the foundation for the judgment, as shown by the findings in the action, being the delivery of the deed from William Workman to Joseph M. Workman, followed by open, notorious, adverse possession in him for 25 years, and his subsequent conveyance to O. T. Bassett, appellant's father.

[3, 4] Although the findings in the judgment roll of Bassett v. Thornton contain a recital that respondent and the other minor defendants in the action "had been duly and regularly served with summons," the trial court in this cause, after finding the facts narrated above, further found, as alleged by the respondent, that the purported service was not sufficient to confer jurisdiction over respondent's person, or jurisdiction to appoint said C. K. Holloway as her guardian ad litem. Under the rules applying to the consideration of appeals on the judgment roll alone, we are bound to accept the findings in the present case as establishing that there was no service of summons upon, or duly authorized appearance in Bassett v. Thornton on behalf of this respondent. The fact that the record contains some evidence bearing upon such finding which is not in itself sufficient to support it cannot be considered. Winterburn v. Chambers, 91 Cal. 170, 185, 27 Pac. 658; Hill v. City Cab, etc., Co., 79 Cal. 188, 191, 21 Pac. 728; Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, 696, 75 Pac. 564. We dismiss appellant's objection, that respondent may not attack a judgment, regular on its face, by citing the former decisions of this court to the effect that the rule is not that a judgment, which is void, will be enforced as if it were valid, but that it cannot be shown to be void except in certain ways. But if the parties admit the facts which show that the judgment is void, or if they are established without opposition, then, as a question of law upon such facts, we do not see why the case is not like that where the judgment is void upon its face. Hill v. City Cab, etc., Co., supra; People v. Harrison, 107 Cal. 541, 546, 40 Pac. 956; Lake v. Bonynge, 161 Cal. 120, 133, 118 Pac. 535. In the present case, as in the Hill Case, the find-

ings establish the fact that there was no service of summons upon, or authorized appearance by, or in behalf of the respondent. The provision of the Code, supra, requiring personal service of summons upon respondent, then under 14 years of age, and also upon her father, mother, guardian, or other person designated by the statute, was mandatory. Without such completed service the court acquired no jurisdiction over her person for any purpose. As such service was not had, the defect was not cured by the appearance of any one of such persons other than the minor, in his or her own behalf. The court had no right in such case to appoint a guardian ad litem for respondent, and the acts of such guardian as to her were void and of no effect. Gray v. Palmer, 9 Cal. 616, 637, 638; McCloskey v. Sweeney, 66 Cal. 53, 4 Pac. 943; Johnston v. S. F. Sav. Union, 63 Cal. 554, 562; Redmond v. Peterson, 102 Cal. 595, 599, 36 Pac. 923, 41 Am. St. Rep. 204; Chambers v. Jones, 72 Ill. 275, 278; McMurtry v. Fairley, 194 Mo. 502, 512, 91 S. W. 902; 30 Cyc. 223. The judgment in Bassett v. Thornton being void as to respondent, the trial court was correct in holding that her interest in the property involved in this action was in no way affected thereby.

The respondent became of legal age January 13, 1901. The death of her father, at which time her remainder interest in the property vested, occurred March 13th of the same year. This action was not commenced until the 24th day of June, 1918, or more than 17 years after the disability of non-age was removed, and after the respondent was in position to assert her claim to an interest in the land. In an endeavor to meet the claim of adverse possession, and title by prescription in appellant, and a defense based upon her own laches, respondent alleged, by way of an excuse for such a long period of inactivity, that, until about one year before commencing this action, she did not know, nor was she ever informed of any fact that would lead her to suspect that she owned any right, title, interest, or estate in the property, and did not know that the judgment in Bassett v. Thornton had been entered against her. Other facts purporting to explain the delayed discovery, and setting forth what respondent finally did in the way of initiating this action, are pleaded. She also alleged the absence of appellant from the state for the greater portion of the 17-year period. These allegations, other than appellant's absence, were traversed by the appellant, who set forth the facts upon which he relied to establish title by prescription in himself, and to show laches on the part of respondent.

[5] In response to the issue of adverse possession the trial court found that O. T. Bassett, appellant's father, entered upon the land under claim of title founded upon the deed from William Workman to Joseph M. Workman, dated October 11, 1870, the deed from Joseph M. Workman and Josephine M. Workman, his wife, to O. T. Bassett, dated March 11, 1895, and the decree in Bassett v. Thornton, quieting his title as against respondent and others, and that his successors in interest, including this appellant, entered upon said lands under claim of title deraigned through him. Therefore, as the appellant succeeded to the land under a claim founded on the title of his father, who had a deed which implied full ownership, and under the decree of distribution in the father's estate, his entry and claim rest upon color of title. Owsley v. Matson, 156 Cal. 401, 402, 104 Pac. 983. Section 322 of the Code of Civil Procedure provides that:

"When it appears that the occupant or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property, under such claim, for five years, the property so included is deemed to have been held adversely. * * *"

[6-8] Respondent replies that, as the deed from her father did not convey to appellant's father the remainder interest, to which she succeeded on her father's death, in 1901, and as that right was not affected by the judgment in Bassett v. Thornton, she is a tenant in common with appellant to the extent of her interest in the land, and that title by adverse possession may not be obtained by one tenant in common against another. This position is untenable. When a tenant in common is in possession of the whole premises, and exercises acts of ownership of an unequivocal character, overt and notorious, and of such nature as, by their own import, to impart information and notice to his cotenants that an adverse possession and disseisin are intended to be asserted against them, his possession is adverse. Any act of the cotenant in the exclusive possession, which manifests an intention on his part to hold exclusively for himself, is equivalent in law to an actual ouster. 1 Cal. Jur. 544; Feliz v. Feliz, 105 Cal. 1, 5, 38 Pac. 521. A tenant in common, who enters into the actual possession of land under claim and color of title, and who, with his predecessor in interest, has maintained possession, and exercised acts of ownership openly and notoriously, claiming the same adversely to other cotenants who are of age, and to all the world, and paying taxes assessed thereon for more than five years prior to the commencement of an action against him, thereby acquires a title by prescription under the statute of limitations. Gregory v. Gregory,

102 Cal. 50, 53, 36 Pac. 364; Winterburn v. Chambers, 91 Cal. 170, 184, 27 Pac. 658; Freeman on Cotenancy and Partition, § 221.

[9, 10] The rule is that when one enters avowedly as tenant in common with others, his possession is the possession of the others, so long as the tenancy in common is not disclaimed. In such cases, to constitute the ouster there must be acts of the most open and notorious character, clearly giving notice to the world, and to all having occasion to observe the condition and occupancy of the property, that the intention is to exclude, and does exclude the cotenant. The rule thus stated, however, has no application to a case where the possession of the person in question was neither avowedly begun as a tenant in common, nor instituted under a deed or instrument which defined his title as such. Bath v. Valdez, 70 Cal. 350, 358, 11 Pac. 724; Frick v. Sinon, 75 Cal. 337, 339, 17 Pac. 439, 7 Am. St. Rep. 177; Elder v. McClaskey, 70 Fed. 529, 538–540, 17 C. C. A. 251. In this case appellant's father, his predecessor in title, entered into the open and notorious possession of the entire tract under a deed which purported to convey the whole, and the entire interest in the whole, of the property in fee simple, and maintained his interest thereunder. Appellant, in turn, went into possession, and, at the time Joseph M. Workman, the life tenant, died, and the right of respondent accrued, he was maintaining possession, under the decree of distribution in his father's estate, which likewise by its terms purported to vest in him the whole estate, and title in and to the whole property. The entry by appellant's predecessor was the assertion of an exclusive right in severalty, and equivalent to an express declaration that he entered "claiming the whole to himself." The entry and possession, which passed to appellant, was an ouster of all persons claiming an interest in the land, and was such a disseisin as set the statute of prescription in motion against them, at and from the time they had a right of entry. Frick v. Sinon, supra. It is immaterial that the fee-simple deed from Joseph M. Workman to O. T. Bassett, under which the entry was made, actually carried with it only the title to a life estate, or an undivided interest. The extent of the estate purporting to be conveyed characterized the entry and subsequent possession, and showed beyond doubt that they were made under a claim to the whole, and were with the intent to oust all others asserting an interest. Bath v. Valdez, supra. It would seem, therefore, that appellant's possession was never in privity with respondent, as her tenant in common, or in subordination to her claim. Elder v. McClaskey, supra, 70 Fed. 539 and 542, 17 C. C. A. 251.

[11] Respondent takes the position that neither the possession, nor the acts of appellant, or his immediate predecessor, before the death of her father in 1901, at which time her rights accrued, should have the effect of ousting her. It is true that the possession of respondent's father, the tenant for life, was not adverse to her as remainderman. Such life tenant could not, by his dealings with the life estate, make his, or his grantee's possession, adverse to respondent, so as to start the statute of limitations against her during the life estate (Pryor v. Winter, 147 Cal. 554, 559, 82 Pac. 202, 109 Am. St. Rep. 162; McMurtry v. Fairley, 194 Mo. 502, 510, 91 S. W. 902), but, after such life estate terminated, the possession, unless in some way qualified, did become adverse, and the statute of limitations began to run at that time (Mann v. Mann, 141 Cal. 326, 330, 74 Pac. 995). Consequently the facts pertaining to the prior occupation and possession are material elements in determining the question, now presented, whether the possession of the appellant was adverse after the life tenant died. There was no change in the claim, or character of the possession after the life estate fell in. It continued as before, and we can only know its nature by reference to the circumstances under which it began and was perpetuated. Therefore the deed from Workman to Bassett, and the decree of distribution in the latter's estate, prior to the falling of the life estate are of first importance in showing whether the possession taken under them was intended to be, and was in fact, adverse when continued after the time at which respondent's right of entry accrued.

"There can be no doubt of the correctness of this view, on principle, and the authorities fully support it." Taft, J., in Elder v. McClaskey, supra, 70 Fed. 539, 17 C. C. A. 262.

[12] The fact that the respondent did not become of age until January 13, 1901, does not make any difference in the consideration of the question before us. An infant can be ousted from his possession either by a stranger or a cotenant. The ouster sets the statute of limitations running in favor of the disseisor, but protection is given the infant by the provision of the statute that the adverse holding must continue from that date until the expiration of five years from his attaining his majority. The sufficiency of the notice on the part of the disseisor, at the time it is given, is not to be diminished by anything occurring subsequent thereto. The knowledge that the infant would have had from the notice, if he had been capable of comprehending the same, is imputed to him as of the date of the notice as fully as if he were an adult, but the effect of such knowledge is suspended until his majority. Winterburn v. Chambers, supra.

What the appellant, and his predecessor in title, did by way of entering upon, and maintaining possession of the land, and in asserting complete and exclusive ownership, both before and after respondent's right of

entry accrued in 1901, is comprehensively set forth in the trial court's findings, the substance of which we recited when stating the various separate defenses pleaded by appellant. We think it unnecessary to repeat those facts here, or to quote extensively from the findings. As an ultimate fact the court found that such ouster by, and possession in, appellant, and his predecessors in title, extending over a period of nearly 25 years, 17 of which passed after the respondent was in position to assert her claim to an interest in the property, imparted constructive notice and knowledge to the respondent and her coplaintiffs, of the adverse nature of appellant's claim. It also found that neither respondent, nor any of the other parties hereto, other than appellant, had been, or were seized, or possessed, of the land within 5 years before the commencement of the action. Its conclusion first adopted was that, by reason of the facts so found, and of such occupancy and possession by the appellant, all of said claimants, other than appellant, are barred from any recovery in this action, and that the appellant "has acquired title to said real property under the provisions of section 1007, Civil Code." If that conclusion is not deprived of support by other facts found, the possession and occupancy of appellant, continued for a period far exceeding the statutory period of 5 years, was, undoubtedly, not only sufficient to bar respondent, and those who like her asserted some legal title, but it was also sufficient to vest a title in fee simple in appellant against all other claimants. Civ. Code, § 1007; Owsley v. Matson, supra, 156 Cal. 404, 104 Pac. 983; Wutchumna Water Co. v. Ragle, 148 Cal. 759, 764, 84 Pac. 162; Woodward v. Faris, 109 Cal. 12, 18, 41 Pac. 781.

[13-15] Respondent points out other findings, which she contends, are inconsistent with and entirely destroy the effect of the finding of prescriptive title in appellant. The first of these is that appellant is a resident of the state of Texas, and during the whole period of time since respondent's rights accrued, has only been in the state of California on infrequent visits, remaining here in the aggregate some 3½ years, and has never designated an agent in the state upon whom summons may be served. Other findings are that "this action is not barred by the provisions of section 318 of the Code of Civil Procedure," and that specific allegations of the answer, wherein appellant pleaded the bar of other sections of the statute of limitations, including section 319 of the Code of Civil Procedure, as a defense to respondent's cause of action, are untrue. It is the law in this state that the statute of limitations may be resorted to in an action of partition, so far as it establishes an interest in the property. And this is in no way inconsistent with the general rule that the action for partition between tenants in common is not barred by the lapse of time. Adams v. Hopkins, 144 Cal. 19, 28, 77 Pac. 712. The only provisions of the Code that seem to have any application to this phase of the case are sections 318 and 319 of the Code of Civil Procedure and section 1007 of the Civil Code. The two former prescribe seizin within a period of 5 years before the commencement of the action as a necessary condition of the right to maintain the same. They affect only the remedy, i. e., the action, or means given by the law for the recovery of a right, but not the right itself. On the other hand, section 1007 of the Civil Code, pertaining to the acquisition of title by prescription, which is correlated with, and must be construed with, the sections of the Code of Civil Procedure relating to adverse possession (People's Water Co. v. Anderson, 170 Cal. 683, 684, 151 Pac. 127), confers a substantive right (Billings v. Hall, 7 Cal. 1, 4; Alhambra, etc., Water Co. v. Richardson, 72 Cal. 598, 600, 14 Pac. 379; Adams v. Hopkins, supra, 144 Cal. 27, 77 Pac. 712). Respondent and those claiming with her had five years after their rights in the property accrued within which to bring an action, either for the recovery of the land or possession thereof, or for the rents and profits out of the same (Code Civ. Proc. §§ 318, 319, and 328; Winterburn v. Chambers, supra), and that period was extended by the time the defendant was out of the state (Code Civ. Proc., § 351; San Diego Realty Co. v. Hill, 168 Cal. 637, 639, 143 Pac. 1021; Foster v. Butler, 164 Cal. 623, 628, 130 Pac. 6).

[16] But the defendant's absence from the state did not deprive the respondent and the others of a remedy. They might have invoked the authority of the court, and, upon service of process by publication in the manner prescribed by the statute, brought an action to determine the adverse claims to the property (Perkins v. Wakeham, 86 Cal. 580, 25 Pac. 51, 21 Am. St. Rep. 67; Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918), or to partition the real estate, as was finally done by the bringing of this action (Pennoyer v. Neff, 95 U. S. 714, 727, 738, 24 L. Ed. 565; Seculovich v. Morton, 101 Cal. 673, 677, 36 Pac. 387, 40 Am. St. Rep. 106). Section 757 of the Code of Civil Procedure, relating to suits in partition, expressly provides that summons in such actions may be served on nonresident parties, as in other cases. Respondent and others were in position, immediately upon the death of their ancestor, in 1901, to institute the action. They permitted the years to slip by at the peril of being caught in the exact position in which they are now placed by the findings of the trial court. In order to maintain the action, which, by reason of the other facts, they were permitted to commence, it was incumbent upon them to show that they or their ancestor had been seized, or possessed of the property or premises, in question, within 5 years before the commencement of the action.

Code Civ. Proc. §§ 318, 319; Cannon v. Stockmon, 36 Cal. 535, 540, 95 Am. Dec. 205; Adams v. Hopkins, supra. They were not so seized or possessed, and when such facts appeared at the trial, the inevitable finding resulted that they were "barred from any recovery of the real property, the subject of the action," because, as the court also found, the title had in the meantime passed to the appellant by prescription, under section 1007 of the Civil Code.

[17-20] For another reason we think the first judgment entered in the court below was right. The trial court found that the respondent did not make her demand within a reasonable time and that, as a consequence her cause of action was barred by her laches. This determination is unquestionably correct. The commencement of this action after such a lapse of time, irrespective of the statute of limitations, is in our judgment, the presentation of a stale demand. Casserly v. County of Alameda, 153 Cal. 170, 173, 94 Pac. 765. In this state a suit in partition under our Code is, in its nature and essence, equitable. The action, though regulated to a great extent by the statute, partakes more fully, both in respect to the remedies provided and the mode of procedure, of the principles and rules of equity than those of law. Gates v. Salmon, 35 Cal. 576, 585, 593, 95 Am. Dec. 139; Goodale v. Fifteenth District Court, 56 Cal. 26, 29; Emeric v. Alvarado, 64 Cal. 529, 619, 2 Pac. 418; Emeric v. Alvarado, 90 Cal. 444, 456, 27 Pac. 356; Woodward v. Superior Court, 95 Cal. 272, 276, 30 Pac. 535. It devolves on one seeking the aid of a court of equity, where the complaint discloses a great lapse of time without the assertion of any claim, and after long-continued acquiescence in acts hostile to the claim, to show the circumstances indicating good faith and reasonable diligence on his part. Kleinclaus v. Dutard, 147 Cal. 245, 250, 81 Pac. 516; Cahill v. Superior Court, 145 Cal. 42, 46, 78 Pac. 467; Gregory v. Gregory, 102 Cal. 50, 53, 36 Pac. 364; Unger v. Mooney, 63 Cal. 586, 596, 49 Am. Rep. 100. The respondent failed to establish a sufficient equitable reason why she waited so long before asserting a claim to an interest in the land. The trial court found her specific allegations in support of her contention in that behalf to be untrue, and that there was no justification for the long delay in bringing this action. The only inference that can be drawn from the findings is that the respondent had sufficient knowledge and information, both as to the deed executed by William Workman to her father and of the action of Bassett v. Thornton, to fully comprehend and understand her own rights in the matter, long prior to the time set by her, and that, if she did not have that understanding, she did have information sufficient to put her, as a person of ordinary prudence, on inquiry as to her interest in the property. The trial court therefore reached the only possible conclusion that the plaintiffs in the action, including this respondent and the defendant Ida Kelso, are precluded by the application of the doctrine of laches from any recovery. Chapman v. Bank of California, 97 Cal. 155, 159, 31 Pac. 896; Seculovich v. Morton, supra. A party is not to be held barred from his remedy for a wrong alleged to have been done to him on the ground that he has been guilty of laches, unless his delay in bringing action has been of such length and under such circumstances that it would be inequitable to enter into an inquiry as to the validity of his claim or to allow such remedy. Whether such is the situation is a question in the first instance for the trial court, and, if its conclusion thereon can reasonably be held to find sufficient support in the evidence, an appellate court should not interfere therewith. Suhr v. Lauterbach, 164 Cal. 591, 593, 130 Pac. 2. The specific facts found in this case are ample, in our judgment, to support the further finding by the trial court that the long delay on the part of the respondent in initiating the action was prejudicial to the appellant.

[21] Respondent has urged that the defense of laches should not be recognized in this case for the reason that the defense was not pleaded. In answer, it is only necessary to say that "it is well settled that the defense of laches need not be pleaded, but, when it appears from the evidence that the seeker of relief in equity has been guilty of laches, the court will deny such relief sua sponte." Stevinson v. San Joaquin, etc., Co., 162 Cal. 141, 143, 121 Pac. 398.

Appellant seeks also to invoke the defense of estoppel against respondent, in that he alleged, and the court found, that, after respondent became of age, she received and accepted her share of certain proceeds arising out of an agreement of settlement and dismissal of an appeal taken in the case of Bassett v. Thornton. The finding on the point is so unsatisfactory on the essential elements entering into the application of the doctrine of estoppel that we may well consider the contention to be without support.

From the foregoing it must appear that the judgment and decree first entered by the trial court, to the effect that the plaintiffs in this action, including respondent, have not, and defendant Ida Kelso has not, nor has either or any of the plaintiffs, or said Ida Kelso, any right, title, or interest in the land and premises eventually concerned in the litigation, but that the appellant is the owner in fee simple of all of such property, was right and was the only judgment and decree that can properly stand on the findings and proper conclusions of law. The lower court was in error when it granted the motion of the respondent to vacate and set it aside and to substitute the judgment finally entered in its place and stead.

As an order reversing the order and judg-

ment appealed from, without other direction, will leave the original conclusion of law and judgment in force, it is not necessary to make any order directing a new conclusion of law or the entry of another judgment. Dahlberg v. Girsch, 157 Cal. 324, 332, 107 Pac. 616.

The order vacating the original judgment and amending the conclusion of law upon which the same was based is reversed, as is the judgment entered in pursuance of said order.

We concur: SHAW, C. J.; WILBUR, J.; LENNON, J.; LAWLOR, J.; RICHARDS, Justice pro tem.; MYERS, Justice pro tem.

---

189 Cal. 573

## MOTOR TRANSIT CO. et al. v. RAILROAD COMMISSION OF CALIFORNIA et al. (S. F. 10099.)

(Supreme Court of California. Sept. 19, 1922. Rehearing Denied Oct. 19, 1922.)

**1. Carriers ⟸10—Railroad Commission has only power given by Constitution and statute.**

The sole source of the Railroad Commission's power to act on a complaint that an auto stage company is operating without a certificate of necessity and convenience, is to be found in the constitutional and statutory provisions creating and controlling its jurisdiction and authority.

**2. Carriers ⟸10—Commission authorized to hear and determine complaint against auto stage company.**

Under the constitutional provisions relative to the powers of the Railroad Commission, Public Utilities Act, §§ 60 and 61(a), relative to complaints and orders by the Commission, and Auto Stage and Truck Transportation Act, §§ 4 and 7, adopting the provisions of the Public Utilities Act, the Commission had power to hear and determine a complaint that an auto stage company was carrying on a business for which it had no certificate of public necessity and convenience.

**3. Carriers ⟸10—Commission's jurisdiction limited to complaints germane to subject of regulation and control.**

Public Utilities Act, § 60, made applicable to auto stage companies, by the Auto Stage and Truck Transportation Act, does not give the Commission power to hear all complaints affecting public utilities, but, in view of section 7 of the last-mentioned act, only jurisdiction to hear and determine such complaints as are germane to the subject of regulation and control of such public utilities.

**4. Carriers ⟸10—Statute requiring certificate of convenience and necessity held a regulatory statute.**

Auto Stage and Truck Transportation Act, § 5, requiring a certificate of public convenience and necessity as a condition precedent to the construction or extension of a plant or line of the utilities to which it applies, is a regulatory statute within the constitutional and statutory provisions authorizing the Railroad Commission to supervise and regulate public utilities.

**5. Carriers ⟸10—Commission cannot enforce contracts, but jurisdiction not defeated because of contract.**

The Railroad Commission is not empowered to enforce private contracts between individuals, but the fact that an order in pursuance of its power and under its duty to regulate public utilities and compel the performance of their duties to the public incidentally requires the doing of an act which carries out the terms of a private contract, does not divest it of jurisdiction.

**6. Constitutional law ⟸81—Regulation is proper exercise of police power.**

Statutes for the regulation of public utilities are a proper exercise by the state of its police power.

**7. Constitutional law ⟸81—Established utilities subject to police power when exercised.**

As soon as the police power is exercised for the regulation of public utilities, all phases of operation of established utilities become at once subject to the police power thus called into operation.

**8. Carriers ⟸10—Commission authorized to hear complaints against companies operating before enactment of statute.**

Under the Auto Stage and Truck Transportation Act, the Railroad Commission has power to hear and dispose of complaints against companies securing their operative rights prior to May 1, 1917, notwithstanding the provision excepting, from the requirement that a certificate of public necessity and convenience be obtained, those transportation companies actually operating at the time the act became effective.

**9. Carriers ⟸10—Injunctive order by Commission held authorized.**

Under Public Utilities Act, § 61, authorizing the Railroad Commission, after hearing any complaint, to make and file its order, an order requiring a transportation company to cease operating as such between certain points, was not an unauthorized exercise of its injunctive powers, it being enforceable if necessary by court proceedings, under section 75.

**10. Carriers ⟸10—That Commission cannot enforce orders does not prevent it from making them.**

That the Railroad Commission has no power to enforce its orders cannot be successfully urged as a denial of the power to make the order, when such power is expressly given it by statute.

**11. Carriers ⟸10—Certificate of convenience and necessity required of companies commencing operation after date of original act.**

In view of Auto Stage and Truck Transportation Act, § 5, requiring auto stage companies to obtain certificates of public necessity and convenience, but excepting companies then operating, the amendatory act (St. 1919, p. 459, § 3), relieving from the necessity of securing

such certificate companies operating in good faith at the time that act becomes effective, does not confer a franchise on companies then operating illegally without compliance with the original act, and only rights acquired prior to May 1, 1917, may be exercised without such certificate.

12. Carriers ⟸10—Agreement held admission that auto stage company had not done local service between certain points.

An agreement, by an auto bus company not to apply to the Railroad Commission for permission to handle local traffic between certain points on its through line, was an admission that no such local service had been held out by it prior to May 1, 1917, as otherwise under the statute no application for permission would have been necessary.

13. Carriers ⟸10—Evidence in proceeding before Commission held to show local service not rendered prior to statute requiring certificate.

Evidence in a proceeding before the Railroad Commission, on complaint against an auto bus company for carrying on a local business between intermediate points on its through line without a certificate of public necessity and convenience, *held* to support findings of the Commission that such local service was not rendered prior to May 1, 1917.

14. Carriers ⟸10—Auto bus company operating through service not entitled to render local service without certificate.

Under Auto Stage & Truck Transportation Act, § 5, excepting transportation companies actually operating in good faith at the time the act became effective, from the necessity of obtaining a certificate of public convenience and necessity, a company, operating a through service prior to the date the act became effective, has no right to extend its service to intermediate points without such certificate.

15. Courts ⟸89—Decisions of commission not stare decisis.

Orders of the Railroad Commission, which are conclusive between the same parties only for the purpose for which they are made and not binding in subsequent proceedings, cannot bind different parties under the rule of stare decisis.

In Bank.

Certiorari proceeding by the Motor Transit Company and another against the Railroad Commission of the State of California and another. Writ dismissed.

H. W. Kidd and A. W. Ashburn, both of Los Angeles, for petitioners.

Clyde Bishop, of Santa Ana, and Hugh Gordon and William W. Clary, both of San Francisco, for respondents.

LENNON, J. Petitioners in this proceeding seek to have reviewed by this court an order of the Railroad Commission directing the cessation of service by the petitioner Motor Transit Company "as a transportation company for the transportation of persons or property for compensation between the termini of Santa Ana and Anaheim and intermediate points." The hearing before the Commission arose out of a complaint by one auto stage company against the alleged unlawful operations of a competing auto stage company between the cities of Anaheim and Santa Ana.

The "A. R. G. Bus Company," prior to May 1, 1917, operated an automobile stage service between Los Angeles and San Diego, over a regular route passing through the cities of Anaheim, Orange, and Santa Ana. On January 24, 1920, it sold and transferred its business and operative rights to petitioner O. R. Fuller, who subsequently, on November 27, 1920, with the approval of the Railroad Commission, sold the business and rights so acquired to Motor Transit Company. Respondent A. B. Watson, under the name of Crown Stages, operates a local passenger service between Santa Ana and Los Angeles, the operative rights between Santa Ana and Anaheim and intermediate points having been acquired by virtue of operations prior to May 1, 1917, and those between Anaheim and Los Angeles by purchase of the rights of the Valley Stage Line. The routes of the two companies practically parallel each other between Los Angeles and Santa Ana.

On May 7, 1920, respondent Watson filed with the Railroad Commission a complaint against Fuller, the then owner of the competing line, setting forth that the latter was undertaking to transport local passengers between Los Angeles and Santa Ana and intermediate points without having sought or obtained from the Railroad Commission a certificate of public necessity and convenience, thereby violating the provisions of chapter 213, § 5, Statutes of 1917 (Stats. 1917, p. 330) as amended in 1919 (Stats. 1919, p. 457, § 3), and praying that the Commission make an order discontinuing said unauthorized service. The statute just referred to provides that—

"No transportation company shall hereafter begin to operate any automobile, * * * auto stage, for the transportation of persons * * * for compensation on any public highway in this state without first having obtained from the Railroad Commission a certificate declaring that public convenience and necessity require said operation, but no such certificate shall be required of any transportation company as to the fixed termini between which or the route over which it is actually operating in good faith at the time this act becomes effective."

The commission found that the predecessor in interest of the Motor Transit Company, viz., the A. R. G. Bus Company, had not in good faith operated a local business between Santa Ana and Anaheim prior to May 1, 1917; that its published tariffs and time schedules did not contemplate such local service; that the principal owner and manager

of its said predecessor had executed, in the name of that company, a written agreement under date of May 4, 1918, not to "apply to the Railroad Commission for permission to handle any local traffic between Anaheim and Santa Ana or intermediate points"; that the right to inaugurate such local service was not subsequently conferred upon the Motor Transit Company by any certificate of public convenience and necessity issued by the Railroad Commission, and that the operations complained of were unauthorized and in violation of the provisions of the statute. Stats. 1917, c. 213, p. 330, as amended; Stats. 1919, c. 280, p. 457. Upon these findings the Commission based its order directing the defendants in said proceeding to desist operating as a transportation company between the termini of Santa Ana and Anaheim and intermediate points.

Petitioner contends that the respondent Commission was in any event without jurisdiction of the subject-matter embodied in the complaint presented in the proceeding before the Commission and that, if the Commission did have such jurisdiction, it exceeded the same by making an order which in its nature and effect was injunctive. The latter contention involves the main objection presented upon this proceeding and is rested primarily upon the argument that, inasmuch as the Public Utilities Act does not expressly confer the power to make orders, injunctive in character, the Commission was without power to make the order complained of here.

[1, 2] The sole source of the Commission's power to act in the proceeding at all is to be found in the constitutional and statutory provisions which create and control the jurisdiction and authority of the Commission. The constitutional provisions pertinent to the point presented provide, among other things, that—

"The Commission shall have the power * * * to hear and determine complaints against railroad and other transportation companies * * * shall have and exercise such power and jurisdiction to supervise and regulate public utilities * * * as shall be conferred upon it by the Legislature. * * *"

Pursuant to these constitutional provisions, the Legislature enacted the "Public Utilities Act" (Stats. 1911, Ex. Sess., p. 18; Stats. 1915, p. 115) and the so-called "Auto Stage and Truck Transportation Act" (Stats. 1917, c. 213, p. 330; Stats. 1919, c. 280, p. 457). The regulation of auto stages was not included in the provisions of the Public Utilities Act as originally enacted nor as subsequently amended (Stats. 1911, Ex. Sess., p. 18; Stats. 1915, p. 115), but the "Auto Stage and Truck Transportation Act" in terms vested in the Railroad Commission the power and authority to supervise and regulate every transportation company in this state. Stated more precisely in the language of the latter act:

"The Railroad Commission of the state of California is * * * vested with power and authority to supervise and regulate every transportation company in this state. * * * The Railroad Commission shall have power and authority, by general order or otherwise, to prescribe rules and regulations applicable to any and all transportation companies." Stats. 1917, ch. 213, § 4, p. 333.

By specific reference to the Public Utilities Act, the Commission is given power to hear and determine complaints against transportation companies in exactly the same manner and to the same extent as it has of complaints against other public utilities. This power is conferred by section 7 of the "Auto Stage and Truck Transportation Act," which provides that—

"In all respects in which the Railroad Commission has power and authority under the Constitution of this state or this act, applications and complaints may be made and filed with the Railroad Commission, process issued, hearings held, opinions, orders and decisions made and filed, petitions for rehearing filed and acted upon, and petitions for writs of review or mandate filed with the Supreme Court of this state, considered and disposed of by said court, in the manner, and under the conditions and subject to the limitations and with the effect specified in the Public Utilities Act."

It obviously follows that sections 60 and 61 (a) of the Public Utilities Act, as originally enacted and still in force, which prescribe the power of the Commission to hear and determine complaints against public utilities make and measure the power of the Commission to proceed in the instant case. These sections provide that—

"Complaint may be made by the Commission of its own motion or by any corporation or person * * * by petition or complaint in writing, setting forth any act or thing done * * * by any public utility including any rule, regulation or charge heretofore established or fixed by or for any public utility, in violation * * * of any provision of law or of any order or rule of the Commission."

"At the time for any hearing before the Commission, * * * the complainant and the corporation or person complained of * * * shall be entitled to be heard and introduce evidence. * * * After the conclusion of the hearing the Commission shall make and file its order, containing its decision."

Evidently the Commission proceeded under the power given by section 60, above quoted, of the Public Utilities Act, to entertain complaints against any transportation company for any "act or thing done * * * in violation * * * of any provision of law" and found upon the facts presented pursuant to the allegations of the complaint before it that the Motor Transit Company was operating a local service in violation of section 5 of the "Auto Stage and Truck Transportation Act" (Stats. 1917, c. 213, p. 333), which, as be-

fore stated, provides, in substance, that no auto stage shall be operated on the highways of this state without a permit from the Commission, unless such company was actually operating in good faith along such highway prior to May 1, 1917. These statutory provisions, when read and considered together, we think empowered the Commission to hear and determine the controversy presented to it in the instant case.

[3] It may be conceded, as is contended, that section 60 is not to be literally construed to give the Commission power to hear all complaints affecting public utilities. Clearly it was not the purpose of the statute to provide the Commission with power to adjudicate all controversies between litigants in the ordinary sense. It is not claimed, for instance, that this section would authorize the Commission to hear and determine a charge of libel made against a public utility. The measure of the jurisdiction of the Commission is to be found in a consideration of the power granted, which must be read and construed with relation to and in conjunction with the context and purpose of the statute in its entirety. Section 7 of the "Auto Stage and Truck Transportation Act" (Stats. 1917, p. 335), giving the Commission power to hear and determine complaints against transportation companies, provides that such power shall be exercised "In all respect in which the Railroad Commission has power and authority under the Constitution of this state or this act." The power and authority so conferred upon the Commission under the Constitution and the Public Utilities Act is the power to supervise and regulate. The Commission, therefore, is limited in its jurisdiction to hear and determine only such complaints as are "germane to the subject of the regulation and control of public utilities." Pacific Telephone, etc., Co. v. Eshleman, 166 Cal. 640, 691, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 22; City of Pasadena v. Railroad Commission, 183 Cal. 526, 534, 192 Pac. 25, 10 A. L. R. 1425.

[4] Clearly section 5 of the "Auto Stage and Truck Transportation Act" (Stats. 1917, c. 213, p. 333) requiring a certificate of public convenience and necessity as a condition precedent to the construction or extension of the plant or line of certain enumerated utilities, of which the petitioner is one, is a regulatory statute. It is in the interest of the public that the service rendered by public utilities be adequate and of good quality and the rates as low as possible commensurate with good service and a reasonable return to the owner. The certificate of public convenience and necessity is the means whereby protection is given to the utility rendering adequate service at a reasonable rate against ruinous competition. The person or corporation obtaining a certificate must operate at the times and in the manner prescribed by such certificate, thus furnishing uniform and efficient service to the public. If any one else would be at liberty to operate without such a certificate he might operate at his own pleasure and only under favorable conditions, thus making it impossible for the holder of a certificate to successfully carry on his business. It is the public interest in efficient service which is being safeguarded by the requirement of a certificate. Oro Electric Corp. v. Railroad Commission, 169 Cal. 466, 475, 147 Pac. 118; Public Utilities v. Garviloch, 54 Utah, 406, 181 Pac. 272, P. U. R. 1919E, p. 182. Such requirement is part of the regulation of transportation companies in the interest of the public. This, therefore, being a regulatory statute, the Commission, in hearing and determining that the petitioner was violating the provisions of that statute, was acting within its jurisdiction to hear and determine complaints "germane to the subject of the regulation and control of public utilities."

[5] This disposes of petitioners' contention that the Commission is by its order in effect enforcing a private contract between individuals which, of course, the Commission is not empowered to do. Western Ass'n of Short Line Railroads v. Railroad Commission, 173 Cal. 577, 162 Pac. 391, 1 A. L. R. 1455. The fact that an order of the Commission, given in pursuance of the Commission's power and under the Commission's duty to regulate public utilities and compel the performance of their duties to the public, incidentally requires the petitioners to do an act which carries out the terms of a private contract, does not, of course, operate to divest the Commission of its jurisdiction.

[6-8] Nor is there any merit in petitioner's contention that, because of the establishment of petitioners' operations prior to May 1, 1917, they are not subject to the regulations of the Commission. Statutes for the regulation of public utilities are a proper exercise by the state of its police power. As soon as the power is exercised, all phases of operation of established utilities, become at once subject to the police power thus called into operation. Producers' Transportation Co. v. Railroad Commission, 251 U. S. 228,[1] Law v. Railroad Commission, 184 Cal. 737, 195 Pac. 423, 14 A. L. R. 249. The statute is applicable not only to those public utilities coming into existence after its passage, but likewise to those already established and in operation. The "Auto Stage and Truck Transportation Act" (Stats. 1917, c. 213) is a statute passed in pursuance of the police power. The only distinction recognized in the statute between those established before and those established after the passage of the act is in the method of the creation of their operative rights. A certificate of public convenience and necessity is required for any new operation, but no such certificate is required of any trans-

[1] 40 Sup. Ct. 131, 64 L. Ed. 239.

portation company for the operation which was actually carried on in good faith on May 1, 1917. This distinction in the creation of their operative rights in no way affects the power of the Commission to supervise and regulate them. Obviously the power of the Commission to hear and dispose of complaints is as effective against companies securing their operative rights prior to May 1, 1917, as against those subsequently securing such rights under a certificate of public convenience and necessity.

[9] Granting, as must be done in view of what has been said, that the Commission had jurisdiction of the subject-matter in controversy here, it follows that the order given by the Commission, requiring the Motor Transit Company to refrain from doing the act found by the Commission to have been done in violation of a provision of law, is not an unauthorized exercise by the Commission of injunctive powers. The statute by its express terms authorizes the Commission "to make and file its order." Stats. 1911, Ex. Sess., § 61, p. 53. As held in Holabird v. Railroad Commission, 171 Cal. 691, 154 Pac. 831, this section authorizes the Commission to make whatever order may be necessary in the exercise of its jurisdiction.

As a practical matter of procedure such an order is proper. If the order so given by the Commission is obeyed, then no further legal steps are necessary. It is only when such order is disregarded that it becomes necessary for the Commission to institute an action in the courts to secure its enforcement. Until such order is given there is no basis upon which the Commission can ask the aid of the courts.

The statute, instead of conferring upon the Commission the means of directly enforcing such orders, has provided (Public Utilities Act, § 75) for the institution by the Commission of court proceedings, or for the issuance of process by the court to carry out and make effective the orders of the Commission. As was said in Yolo Water & Power Co. v. Superior Court, 43 Cal. App. 332, 341, 185 Pac. 195, 199:

"The purpose and intent in enacting section 75 is obvious. The Public Utility Act invests the Board of Railroad Commissioners with large powers in the control of public utilities, and gives it powers to fine and punish for contempt. But the Commission is not a court and has not complete court machinery. It was seen that cases might arise where punishments for contempt and fine would not accomplish the objects sought, that writs of mandamus and injunction might be needed, and such writs the Commission had no power to issue. It might become necessary for it to avail itself of the equity powers of the courts. Without express authority granted by the Legislature to so do, the question of its right to bring suit might be raised in any litigation arising. Anticipating such contingency, express power was conferred upon the Commission to avail itself of court processes and writs, so that its power in this regard might not be questioned."

[10] Of course, the mere fact that the board has no power to enforce its orders cannot be successfully urged as a denial of the power to make the order, when that power is expressly given it by the statute. Turner Creamery Co. v. Chicago, Milwaukee & St. Paul Ry., 36 S. D. 310, 154 N. W. 819, P. U. R. 1916A, 1083; Cincinnati, New Orleans, etc., v. Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935. New York has a similar method of enforcing the orders of its Public Service Commission, and the courts of that state have, without questioning the power of the Commission to make such order, sustained their validity by the issuance of writs of mandamus and injunctions to enforce them. Public Service Commission v. New York & Queens Gas Co., 103 Misc. Rep. 703, 170 N. Y. Supp. 1009; Public Service Commission v. Brooklyn Heights Railroad, 105 Misc. Rep. 254, 172 N. Y. Supp. 790; Public Service Commission v. International Railway, 106 Misc. Rep. 364, 174 N. Y. Supp. 708.

The petitioner strongly relies upon the case of White Bus Co. v. Railroad Commission (L. A. 5856) to support its position that the Commission had no jurisdiction to make an order injunctive in character. The Commission, in that case, refused to take jurisdiction of a threatened violation of the law. Upon an application for certiorari to review this order this court dismissed the proceeding,[1] thus confirming the refusal of the Commission to take jurisdiction. In view of the fact that the Commission has only the authority expressly delegated to it by statute and no power to control mere threatened violations of the statute has been conferred, the Commission, of course, had no jurisdiction to enjoin such threatened violation. On the other hand, the statute having expressly conferred upon the Commission the power and the duty to take jurisdiction of actual violations, obviously the case last above cited and relied upon by petitioner has no weight as a precedent in the instant case.

[11] It is the further contention of the petitioner that "Auto Stage and Truck Transportation Act" (Stats. 1917, c. 213, § 5), having been subsequently amended by the Statutes of 1919 (Stats. 1919, c. 280, § 3), the latter statute must govern and control the rights of petitioners. In the former statute no certificate was required of those operating in good faith prior to May 1, 1917. The latter statute relieves from the necessity of securing such a certificate companies operating in good faith "at the time this act becomes effective" (June 22, 1919). Manifestly, those companies commencing operations subsequent to May 1, 1917, without the certificate of pub-

[1] Dismissed without opinion.

lic service and convenience required by the statute were violating the statute, and we cannot hold it to have been the intention of the Legislature to confer a franchise upon auto stage companies by virtue of their operation prior to the date the amendment went into effect, when such operation, by the very terms of the former statute, would have been illegal. We are therefore constrained to hold that any rights to maintain local service without a certificate of public convenience and necessity must have been acquired prior to May 1, 1917. This being so, the order in question was not in excess of the Commission's jurisdiction and must be upheld, if there be sufficient evidence to support the finding of the Commission that petitioners were not on said date maintaining a local service.

[12, 13] That there is sufficient evidence in this regard admits of no question. While the proof is not overwhelming, it is amply sufficient to support the findings. There was practically no affirmative evidence to show that the A. R. G. Bus Company, predecessor in interest of the petitioner, actually operated a local service between Santa Ana and Anaheim prior to May 1, 1917. Neither do the published schedules and time-tables show such operation. On the other hand, there was affirmative evidence that petitioners' predecessor in interest did not, prior to May 1, 1917, undertake to render local service between Anaheim and Santa Ana. This evidence is the agreement executed by E. S. Goode, general manager of the A. R. G. Bus Company, in behalf of the company, not "to apply to the Railroad Commission for permission to handle any local traffic between Anaheim and Santa Ana and intermediate points." This is an admission that no local service had been held out by such company, as otherwise, under the terms of the statute, no application for permission to the Commission would have been necessary. There is also in evidence the testimony of Mr. Goode that only occasional passengers were carried locally, and that only when there was a vacant seat, showing that the business undertaken and held out to the public was a through and not a local business. Without analyzing in more detail the evidence presented, taken in its entirety it is sufficient, in our opinion, to support the findings of the Commission.

[14] Finally, it is the contention of petitioners that the operation of through service prior to May 1, 1917, necessarily gave them a vested right to maintain the local service in question, and this right having been conferred by the Legislature, the Commission was not only without power to deprive them thereof, but exceeded its jurisdiction in determining and directing that only such service as was in actual operation prior to said date could be continued without a certificate of public convenience and necessity. This contention cannot be maintained. The primary purpose of the Legislature in enacting this statute was not to confer a franchise upon the operating companies but to give into the power of the Commission for regulation and control in the interest of the public the operation of auto stages for transportation. It did this by requiring every auto transportation company to secure from the Commission a certificate of public convenience and necessity. It relieved from the necessity of obtaining such certificate the companies actually operating in good faith at that time. The purpose in so exempting such companies was to refrain from interfering with the operations as then carried on—in other words, to confirm in these operators the rights they were at that time exercising. But such exemption was, obviously, only to the extent of the operations then conducted. To hold that by the operation of a through line on that date petitioners were given a franchise to operate to any extent that they, in their judgment, might see fit, limited solely by the restriction that the operations must be between the same termini and over the same route, would be to materially decrease the power of the Commission over these lines and thus overlook the primary purpose of the enactment which was to give to the Commission, in the interest of the public, the fullest power possible to regulate the operation of auto stage companies.

[15] Incidentally involved in the contentions hereinbefore discussed is the contention that the decision of the Commission in a prior proceeding, wherein it was held that the right of one of two competing auto bus companies to carry through passengers between San Diego and Los Angeles included the right without the issuance of a certificate of public convenience and necessity to take and carry local passengers between Anaheim, an intermediate point, and Los Angeles, was in the nature of stare decisis and, therefore, should have controlled and concluded the decision of the Commission in the instant case. In the case of Stratton v. Railroad Commission, 186 Cal. 119, 126, 198 Pac. 1051, 1054, it is said:

"The Commission is not a judicial tribunal in the strict sense. * * * The Commission is essentially an administrative and legislative tribunal, and not a court. * * * The peculiar effect of a determination of fact operating to conclude the question for other purposes than those of the very proceeding in which the determination is made is confined to strictly judicial determinations alone."

Orders of the Commission being conclusive between the same parties only for the purpose for which they are made and not being binding upon the same parties in subsequent proceedings, certainly, such orders cannot be said to be binding upon different parties, and orders of the Commission, not

attaining the status of res adjudicata, obviously, cannot be held to rise to the dignity of stare decisis.

The writ is dismissed.

We concur: SHAW, C. J.; WASTE, J.; LAWLOR, J.; WILBUR, J.; MYERS, Justice pro tem.; RICHARDS, Justice pro tem.

---

58 Cal. App. 753

## MILLER & LUX, Inc., v. SAN JOAQUIN AGR. CO. et al. (Civ. 4094.)

(District Court of Appeal, First District, Division 2, California. Aug. 14, 1922. Hearing Denied by Supreme Court Oct. 13, 1922.)

**1. Covenants ⟸68—Payment of expenses of litigation as to irrigated lands held covenant running with land.**

Where, by quitclaim deeds, several parties defined and apportioned water rights, the contract providing that the expense of litigation caused by diversion of water should be ratably contributed by the parties in proportion to the amounts of land severally irrigated by them, and that the stipulations and agreements should inure to the heirs and assigns of each of the parties, and the deeds thereunder provided that the grantee should perform all the terms of the contract, the covenant as to the expenses of litigation was one running with the land, in view of Civ. Code, § 1460.

**2. Covenants ⟸84 — Effect of partition on covenants running with land stated.**

Where a deed to two persons contained a covenant running with the land as to payment of expenses of litigation in regard to water rights, and the two grantees partitioned the land, the covenant bound each grantee only as to the particular lands to which the fee vested wholly in him under Civ. Code, § 1466, so that, where such expense was incurred, each was liable for his pro rata, based on lands retained.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Miller & Lux, Inc., against the San Joaquin Agricultural Company and another, to recover money expended in the conduct of certain litigation. From a judgment allowing recovery in a sum less than that sued for, plaintiff appeals. Reversed.

Edward F. Treadwell, of San Francisco, and Gail C. Larkin, of Los Angeles (Joseph C. Sharp, of San Francisco, of counsel), for appellant.

Walter H. Linforth, of San Francisco, for respondents.

STURTEVANT, J. The plaintiff commenced an action against the defendants based on a common count for money paid. In its complaint it sued for $705.06. It was awarded a judgment for $404.40. Being dissatisfied with the amount of its judgment, the plaintiff has appealed, and has brought up the judgment roll and a bill of exceptions.

The controversy arose out of the expenditure of moneys expended in certain litigation, the results of which were of interest to all of the parties concerned. The plaintiff conducted the litigation from the beginning to the end. During a part of the time the predecessors in interest of the defendant J. W. Goodwin were parties to the litigation and shared in the expenses. Later, when the defendant J. W. Goodwin became the owner of certain of the properties, he was substituted for his predecessor, and he remained a party to the litigation until the same was terminated. The liability of the defendant J. W. Goodwin is claimed to rest on two different theories, one that he was so liable by reason of an alleged covenant running with the land, and the other theory is that he was liable on an implied contract. In view of the conclusion which we have reached on the first theory, it will not be necessary for us to consider the second theory. A part of the expenses were incurred when J. W. Goodwin and Luther J. Holton owned the land as tenants in common. On February 5, 1916, those two men entered into partition deeds. As from that date on the defendant Goodwin claims that the expenses should be divided, and that Goodwin should not be charged more than one-half thereof; whereas, the plaintiff contends that, under the provisions of section 1659 of the Civil Code, Goodwin and Holton would be jointly and severally liable for the whole. Of course, the liability of the defendant, measured as based on an alleged covenant running with the land, is quite different from his liability on an implied contract.

We will consider the case in the first place under the theory that the plaintiff's rights rest on an alleged covenant running with the land. On the 4th day of June, 1901, the predecessor in interest of the defendants, and numerous other parties, entered into a contract which is set forth in the bill of exceptions. For the purpose of this opinion it is sufficient to state that the said contract is of such a nature that it is, in effect, a quitclaim deed by certain of the parties to certain other parties, including the predecessor in interest of the defendants, and in general, is and constitutes a limitation, definition, and apportionment of the rights of the several parties to the use of the waters of the Fresno river and the San Joaquin river. One of the paragraphs of that contract provides:

"If hereafter any person shall attempt to divert any water from either of said rivers to the

prejudice of the parties hereto, the expenses of any litigation caused thereby shall be ratably contributed by the parties hereto in proportion to the amounts of land severally irrigated by them from such river. Each and every of the stipulations and agreements herein contained shall bind and inure to the benefit of the successors, heirs, and assigns of each and every of the parties hereto, in the same manner as if they had therein been expressly named."

[1] The deed conveying title to Luther J. Holton contained a provision to the effect that he agrees to perform all of the terms of the above-mentioned contract. The deed from Holton to Goodwin provides that the same is made subject to the stipulations contained in the deed to Holton. Taking these conveyances together, we think that the contention of the plaintiff is sound when it contends that the parties had created a covenant running with the land. Civ. Code, § 1460. When thereafter the fee to parts of these lands was conveyed to Goodwin and Holton the covenant became binding on both of those owners. Civ. Code, § 1465.

[2] When thereafter, on the 5th day of February, 1916, Goodwin and Holton entered into partition deeds, and Goodwin parted with title to certain lands, and Holton, on the other hand, parted with title as to the remaining lands theretofore owned by the two, the covenant running with the land bound each grantee in the partitioned lands as to the particular lands to which the fee vested wholly in the grantee and at the same time the covenant ceased to run against the lands title to which had been wholly transferred. The last proposition is expressly declared by statute. Section 1466 of the Civil Code provides:

"No one, merely by reason of having acquired an estate subject to a covenant running with the land, it liable for a breach of the covenant * * * after he has parted with it or ceased to enjoy its benefits."

That statute was, of course, a part of the contract as much as though it had been expressly written into it. Under the provisions of the alleged covenant running with the land, and the calls of the statute read in connection therewith, it may be conceded, for the present purposes, that Holton and Goodwin were jointly and severally liable to the plaintiff while they together held the title as tenants in common; but, upon the partitioning being had, it is equally clear that each of those owners became severally liable for his pro rata based on lands retained and at the same time each of them became discharged as to any liability to the plaintiff for any of the obligations that might thereafter arise between the plaintiff and either of said grantors of or concerning the interest in the lands title to which passed by the partition deeds. In other words, the express contract, by its own terms, immediately became a several contract.

By the partitioning had, Holton took 1,050 acres and Goodwin took 8,070 acres—Holton took 11.51 per cent. and Goodwin took 88.48 per cent. Each became liable thereafter for a share of the obligations in the same proportion, viz. Holton for $103.30, and Goodwin for $725.51. It follows that the judgment in favor of the plaintiff should have been for a sum equal to at least $705.06, the amount which the plaintiff claimed in its complaint; but the amount awarded by the trial court was only $404.40.

It follows that the judgment should be reversed; and it is so ordered.

We concur: LANGDON, P. J.; NOURSE, J.

---

59 Cal. App. 1

## PELLISSIER v. WHITTIER WATER CO. et al. (Civ. 4229.)

(District Court of Appeal, First District, Division 2, California. Aug. 30, 1922.)

**1. Waters and water courses ⟸257(1)—Water user not entitled to injunction pending trial of case to determine rate.**

Plaintiff, in action to determine rate to be charged for water furnished plaintiff by defendant, *held* not entitled to an injunction pendente lite pending the determination of the action, as his damage can be accurately measured by any overcharge which he may pay.

**2. Injunction ⟸1—Should not be granted except to prevent great and irreparable injury.**

The remedy by injunction is summary, peculiar, and extraordinary, and should not be issued except for the prevention of great and irreparable injury.

**3. Injunction ⟸1, 17—Rests in discretion of the court; proper only where damage cannot be ascertained.**

Relief by injunction rests in the sound discretion of the court, and will be granted ordinarily only where there can be no adequate pecuniary compensation, because it is difficult or impossible to ascertain the damages resulting from an act.

**4. Appeal and error ⟸954(1)—Order granting or refusing preliminary injunction will not be reversed, in absence of abuse of discretion.**

An order of the trial court granting or refusing a preliminary injunction will not be reversed on appeal, in the absence of an abuse of discretion.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by F. F. Pellissier against the Whittier Water Company and others. From an

order denying application for temporary injunction, plaintiff appeals. Affirmed.

Frederick W. Smith and D. L. Di Vecchio, both of Los Angeles, and G. R. Miller, of Whittier, for appellant.

James S. Bennett, of Los Angeles, for respondent Whittier Water Co.

Farrand & Slosson, of Los Angeles, for respondent California Domestic Water Co.

LANGDON, P. J. This is an appeal by the plaintiff from an order denying his application for a temporary injunction restraining the defendants, or either of them, pending the determination of the merits of his action, from shutting off plaintiff's water supply or disconnecting his water lines from defendants' conduit or ditch, so long as plaintiff pays to said defendants the sum of $120 a year for an amount of water not to exceed an average of two miner's inches perpetual flow for use upon plaintiff's property. Plaintiff also asked that his right to said amount of water at said price be settled and determined by the court, and, thereupon, that the defendants be permanently restrained from interfering therewith.

Briefly, the allegations of the complaint are that plaintiff's predecessors in interest in certain land described in the complaint granted to the predecessors in interest of the defendants a right of way over said land for the conduit or ditch which supplies that and other property with water; that in consideration of the grant of said right of way, the grantees agreed that they would always allow the use of water for said land now owned by plaintiff, upon the lowest terms and most favorable conditions that the water was allowed to others. By virtue of the right secured by said contract to plaintiff as successor in interest to said grantors, and by virtue of a further right which he alleges arose by reason of a subsequent contract between himself and one of the predecessors in interest of the present defendants, plaintiff claims to be entitled to water for use on his land at the rate of $120 a year, which amount he has tendered to the defendant Whittier Water Company. The said company insists that plaintiff pay for water at the rate of 5 cents for 100 cubic feet, which charge is more than twice what plaintiff contends he should pay for the same under existing contracts.

Plaintiff alleges that the defendant Whittier Water Company has notified him that, unless he immediately pay to said company the whole sum purported by said defendant company to be due from said plaintiff to said company, said defendant company will immediately cut off his water connection in said conduit or ditch, and will furnish plaintiff with no further water.

Among other allegations, the defendant Whittier Water Company, in its answer, states that the charge for water furnished to plaintiff is the usual and customary charge made by said defendant for domestic and industrial service of water as the same has been and was on file with the Railroad Commission of the state of California; that the question of extent of jurisdiction of said Railroad Commission over the rates charged and the amount of rates to be charged for water service by defendant Whittier Water Company to plaintiff and the lands of plaintiff, is now pending and undetermined before said Railroad Commission of the state of California.

The only question presented by this appeal is whether, pending the trial of the cause, the plaintiff is entitled to have a preliminary injunction restraining defendants from shutting off his water supply so long as he pays to said defendants for said water an amount less than the amount that would be due the defendants under the rate fixed by the Railroad Commission for service to the public generally. It is entirely clear from the pleadings and affidavits in the record that the defendant Whittier Water Company is not threatening to deprive the plaintiff of water in the event he pays for same the usual and customary charge at the rate on file with the Railroad Commission of the state of California. Plaintiff may, in due course, secure a determination of his alleged right to a preferential rate for water; and in the event that matter is decided in his favor, his damages are definite and certain; he would be entitled to recover the amount of the overcharge theretofore made by said defendant, which, according to the record, would be about $20 a month. As to the defendant California Domestic Water Company, it is alleged:

"That the title to the right of way for said conduit or ditch and the title to said conduit or ditch extending through plaintiff's lands became and now is vested in the defendant California Domestic Water Company, with certain rights therein vested in the defendant Whittier Water Company; but plaintiff is informed and believes, and upon information and belief alleges, that all rights of the defendant Whittier Water Company in and to said conduit or ditch and in and to said right of way for the same, are now about to terminate and cease."

It is further alleged that—

"Plaintiff has demanded of Whittier Water Company that it continue the service of water to plaintiff under the terms agreed upon, and has also "demanded of the defendant California Domestic Water Company, which said company is the legal owner of said conduit or ditch, that said company furnish him with water from said conduit or ditch and continue the service of water heretofore received by plaintiff for his needs upon said 'home place'; the said company has notified plaintiff that it will furnish him no water from said conduit or ditch either now or after the expiration of said defendant Whittier Water Company's right

in and to said conduit or ditch, either at the rate agreed upon between plaintiff and the East Whittier Land and Water Company, or at any other rate, or at all; and plaintiff alleges that said defendant California Domestic Water Company will, upon the expiration of the defendant Whittier Water Company's rights in and to said conduit or ditch disconnect plaintiff's lines from said conduit or ditch and will, if said lines should now be disconnected by said Whittier Water Company, refuse to furnish plaintiff with water for his needs upon said 'home place' unless enjoined from so doing by order and decree of this court."

The California Domestic Water Company denied that the rights of the defendant Whittier Water Company in and to said conduit or ditch and said right of way were about to terminate and cease. It alleged that the East Whittier Land & Water Company, one of the successors in interest of the original grantees of the right of way, had conveyed to defendant California Domestic Water Company by deed the ditch and right of way involved here, but by said instrument said grantor reserved to itself the entire carrying capacity of said ditch and flume in excess of a capacity sufficient to carry 800 inches of water in a continuous stream; that after the conveyance to the said California Domestic Water Company, the East Whittier Land & Water Company conveyed all of its right, title, and interest in and to the aforesaid ditch to the defendant Whittier Water Company, and on the 26th day of April, 1913, said defendant Whittier Water Company was the owner of the interest in said ditch and flume reserved by the said the East Whittier Land & Water Company in its said deed to defendant California Domestic Water Company; that on the 26th day of April, 1913, said Whittier Water Company conveyed all of its right, title, and interest in and to said ditch and flume to defendant California Domestic Water Company; that said defendant California Domestic Water Company ever since has been and is now the owner of said ditch and flume.

The ultimate questions, raised upon this state of facts, as to the obligation of California Domestic Water Company, as the present owner of the ditch and right of way, to furnish plaintiff water in accordance with the terms of the instrument on which he relies, are not presented to us upon this appeal; that matter will be examined into on its merits by the trial court when a trial is had.

Upon the question of the necessity or propriety of a preliminary injunction against defendant California Domestic Water Company, we find the following allegations in the answer of said defendant: That the California Domestic Water Company has never delivered to plaintiff any water whatsoever on account of plaintiff's alleged rights and claims under said deed referred to in plaintiff's complaint; that the California Domestic Water Company has never delivered to plaintiff any water at all; that at all times since October 15, 1902, the said East Whittier Land & Water Company, and its successor, the Whittier Water Company, have delivered water to the said plaintiff; that at all times since its incorporation in 1902 the California Domestic Water Company has been a mutual water company; that all of the water owned and developed by said company is needed for the use of its stockholders, and all thereof has been for many years past used by its stockholders for beneficial purposes. It is further alleged that by a certain instrument, bearing date of April 26, 1919, the California Domestic Water Company leased to said Whittier Water Company, for a period of three years, the right to transport through the ditch involved here a certain amount of water; that the rights and privileges secured to said Whittier Water Company by said instrument expire on April 26, 1922; that the California Domestic Water Company is willing that the Whittier Water Company continue to transport said amount of water through said ditch for the purpose of supplying its customers and all persons to whom it may have delivered water heretofore, including the plaintiff, provided it pays to said California Domestic Water Company the reasonable value of the use of such portion of said conduit necessary to transport said amount of water.

[1-4] It appears from the foregoing that the California Domestic Water Company has never furnished water to plaintiff, and does not deny to the Whittier Water Company the right to transport its water through the ditch and supply the plaintiff, provided it pays the reasonable value of such a privilege, and the Whittier Water Company has alleged that it will continue to supply plaintiff with water through said ditch, provided he pays the rate established by the Railroad Commission. The plaintiff, therefore, while awaiting a determination of his rights in a trial of the action on its merits, can suffer no irreparable injury. His damage, if any, can be accurately measured by any overcharge which he may pay for water. Such a state of facts does not warrant the issuance of an injunction pendente lite. The remedy by injunction is summary, peculiar, and extraordinary, and it ought not to be issued except for the prevention of great and irreparable injury. Relief by injunction must always rest in the sound discretion of the court, governed by the nature of the case, and will be granted, ordinarily, only where there can be no adequate pecuniary compensation because it would be difficult or impossible to ascertain the damages resulting from an act, as in such a case the legal remedy fails. But where damages can be accurately measured and will fully compensate for any loss

that may be suffered by plaintiff, as in the present case, an injunction is not proper. Unless there is a clear abuse of discretion, this court will not overthrow the order of a trial court in granting or refusing a preliminary injunction. Miller & Lux v. Madera Canal, etc., Co., 155 Cal. 59, 62, 99 Pac. 502, 22 L. R. A. (N. S.) 391.

The order appealed from is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

directing them to declare petitioner elected a director of said district, and requiring issuance of a certificate of election. Writ denied.

Elmer W. Armfield and Arthur B. Eddy, both of Woodland, for petitioner.

W H. Carlin, of Marysville, for respondent.

PER CURIAM. An application was made to the Supreme Court for a writ of mandate, commanding the directors of the Honcut-Yuba irrigation district to declare petitioner elected to the office of director of division 1 of said district, and commanding one F. M. Turner, secretary of said board of directors, to issue to petitioner a certificate of election to such office. The Supreme Court ordered the alternative writ to issue, and made it returnable before this court. The parties appeared and agreed upon the facts as follows: The Honcut irrigation district is a duly organized and existing irrigation district. The individual defendants named as directors were the duly elected, qualified, and acting directors thereof. The defendant Turner is the duly appointed, qualified, and acting secretary of the board of directors. The district is divided into five divisions, numbered 1 to 5, inclusive, and in the petition for organization the prayer was, and the supervisors so ordered, in establishing the district and fixing its boundaries, that the election of directors in the district be at large. Charles F. Cox and C. N. Hill were the directors of divisions 1 and 5 respectively. On June 27, 1922, an election was held in the district for the purpose of determining whether or not said Cox and Hill should be recalled from office. At said election a majority of the votes cast at large in the district and the majority of the votes cast in divisions 1 and 5 favored the recall of said directors. At said election petitioner was a duly nominated and qualified candidate for the office of director representing division 1, and J. L. Jackheck was also a candidate for said division. At said election in the district at large petitioner received 20 votes, and Jackheck received 54 for said office of director of division 1. In division 1 petitioner received 7 votes and Jackheck none, there being no other candidate for said division; on July 3, 1922, the board of directors canvassed the returns of said election and ascertained the result as above stated. After such canvass petitioner demanded of said board and each member thereof that they declare him elected to the office of director of division 1, and thereupon demanded of said secretary that he make out and deliver to petitioner a certificate of election to said office. The said board and members thereof declined and refused to declare petitioner elected to said office, and the secretary likewise refused to issue to him a certificate of election.

88 Cal. App. 757

## ABBEY v. BOARD OF DIRECTORS OF HONCUT-YUBA IRR. DIST. et al.

(Civ. 2509.)

(District Court of Appeal, Third District, California. Aug. 19, 1922.)

**1. Waters and water courses ⟸227—Directors of irrigation district composed of five divisions may be elected at large, if so ordered by board of supervisors.**

Under Irrigation District Act, § 5, as amended by St. 1915, p. 1368, directors of an irrigation district composed of five divisions can be elected at large, if it is so ordered by the board of supervisors in response to request in petition for establishment of the district.

**2. Statutes ⟸197—"And" may be substituted for "or," and vice versa.**

Whenever necessary to arrive at the evident intent of a statute, courts will substitute "and" for "or," and vice versa.

[Ed. Note.—For other definitons, see Words and Phrases, First and Second Series, And; Or.]

Application by E. W. Abbey for writ of mandate, prayed to be directed to Board of Directors of Honcut-Yuba Irrigation District,

[1] The main discussion relates to the question whether the directors of an irrigation district composed of five divisions can be elected at large if it is so ordered by the board of supervisors, or must they be elected by the electors of each division separately, notwithstanding such order. Confessedly, the solution of this question depends upon the proper construction of section 5 of the Irrigation District Act (St. 1897, p. 255) as amended by Stats. 1915, p. 1368, as follows:

"If, on said final hearing, the boundaries of the proposed district are defined and established, said board shall make an order dividing said district into five divisions, as nearly equal in size as may be practicable, which shall be numbered first, second, third, fourth and fifth, and one director shall be elected for each division by the electors thereof; provided, that if so requested in said petition, the board may order that there shall be only three divisions in said district, and that only three directors be elected, and that the directors may be elected by the district at large, or by divisions, as such petition shall provide, but in any event such directors shall be elected to represent separate divisions and shall be residents of the respective divisions they are elected to represent."

In our opinion section 5 of the act under consideration plainly authorizes the board of supervisors to order that the directors of an irrigation district of five divisions shall be elected at large. The proviso contained in section 5 permits two departures from the general requirements of the preceding parts of the section: (1) The establishment of three instead of five divisions, with one director for each division; (2) the election of directors by the district at large. There is nothing in the language of the proviso indicative of an intent to limit such election at large to districts of three divisions. One of the exceptions must necessarily precede the other in the wording of the proviso, and it is unimportant which is stated first. If the position of the exceptions were transposed, the latter then preceding the former, it would hardly be contended that the board could not provide for the election of directors at large in districts of five divisions.

The conclusion that the Legislature intended to authorize the election of directors at large, whether three or five, is fortified by other provisions of the act and by the history of the legislation on the subject. In the amendment of 1891 to the Wright Act, it is provided that—

"The board of supervisors may, if so requested in the petition, order that there may be either three or five directors, as said board may order, for such district, and that they may be elected by the district at large." Stats. 1891, p. 142.

The amendment further provides that, upon presentation of a proper petition, the board of directors may "order that on and after the next ensuing general election for the district, there shall be either three or five directors, as said board may order, and that they shall be elected by the district at large, or by divisions, as so petitioned and ordered." It is conceded that either of these provisions authorized the election of five directors at large.

[2] In defining the duties of the board of supervisors in the organization of a district, section 5 of the act of 1897 provided:

"That if so requested in said petition, the board may order that there shall be only three divisions in said district, and that only three directors be elected, or that they be elected for the district at large."

If the meaning of this provision is to be determined in strict accordance with its grammatical construction, it does not authorize the election at large of directors in a district of three divisions, because the use of the word "or" in such connection presents a choice. Webster defines the word as:

"A particle that marks an alternative as, you may read or may write—that is, you may do one of the things at your pleasure, but not both. It corresponds to *either*. You may ride *either* to London *or* to Windsor. It often connects a series of words or propositions, presenting a choice of either."

Under a strict grammatical construction, the provision would authorize the election of directors at large in a district of five divisions, else it would have no application, but not in a district of three divisions. But, of course, statutes are not to be construed with any such nicety of discrimination as to the use of words in obvious disregard of the legislative intent as gathered from the whole act. Whenever necessary to arrive at the evident intent of a statute, courts will substitute "and" for "or," and vice versa. Washburn v. Lyons, 97 Cal. 314, 32 Pac. 310; Geiger v. Koblika, 26 Wash. 171, 66 Pac. 423, 90 Am. St. Rep. 733; Union Ins. Co. v. United States, 6 Wall. 759, 18 L. Ed. 879. Section 28 of the act of 1897 provides that—

Upon presentation of a proper petition as therein provided, the board of directors may "order that on and after the next ensuing general election for the district, there shall be either three or five directors, as said board may order, and they shall be elected by the district at large, or by divisions, as so petitioned and ordered."

No one would contend that this section does not authorize the election of five directors at large. From a consideration of the whole act, it clearly appears that it was the intent to authorize provision for the election of directors at large in districts of three divisions as well as in those of five. If these conclusions are well founded, then from 1891 to 1915 it was permissible to provide, either by the board of supervisors in the organization of a district or by the board of

directors thereafter, for either three or five directors, and that in either case they be elected at large or by divisions. A legislative intent to change the procedure consistently in operation for a period of 24 years ought not to be presumed, in the absence of clear language indicating such intent.

In 1915, the Legislature, in one act, amended sections 5 and 28. Stats. 1915, p. 1367. Section 5 as so amended, and as it now stands, directs that the board of supervisors, in the organization of a district, divide it into five divisions, and that one director be elected by each division, and then provides:

"That if so requested in said petition, the board may order that there shall be only three divisions in said district, and that only three directors be elected, and that the directors may be elected by the district at large, or by divisions, as such petition shall provide."

The word "and" is defined by Webster as:

"A particle which expresses the relation of connection or addition."

In the clause providing for the election of directors at large, the word "and" is undoubtedly used to express the relation of addition, and not that of connection in the sense that the clause which it introduces is limited in its application to the preceding clause. The substitution of "and" for "or," as the latter word appeared in the statute of 1897, eliminates all question as to whether a choice was intended. From the use of the word "they" in the corresponding clause of the statute of 1897 it might be argued that the pronoun related only to its nearest antecedent. The amendment of 1915 removes all doubt by substituting "the directors" in place of the pronoun in the earlier statute. The expression "that *the directors* may be elected by the district at large" is couched in language so broad and comprehensive that it cannot, in any sense, be said to be limited to the "three directors" mentioned in the preceding clause.

By the same act section 28 was amended to provide:

"In any district the board of directors thereof must, upon a presentation of the petition therefor, by a majority of the holders of title, or evidence of title, of said district, evidenced as above provided, order that on and after the next ensuing general election for the district, there shall be either three or five directors, and that they shall be elected by the district at large, or by divisions as such petition shall provide."

Clearly, under section 28 as so amended, the directors of a district of five divisions were required, upon presentation of the petition provided for, to order the election of directors at large. If it were conceded that the language of section 5 is uncertain or ambiguous, the certain provisions of section 28, enacted at the same time and in the same act, are such as to remove the uncertainty or ambiguity. The Legislature must be presumed to have intended a consistent and harmonious scheme for the government of irrigation districts organized under the act, and no reason can be assigned for denying, in one section, the authority to provide, on proper petition, for the election of directors at large in the organization of a district of five divisions and in the next section *requiring* the directors to so provide upon presentation of a similar petition.

"It is well settled that in the construction of statutes, for the purpose of ascertaining the legislative intent, regard is to be had not so much to the exact phraseology in which that intent has been expressed, as to the general tenor and scope of the entire legislative scheme embodied in the act. Mere philology often sticks in the bark, and so becomes an obstruction rather than an aid to a correct exposition of the meaning of the statute." Palache v. Pacific Ins. Co., 42 Cal. 418, 430.

"A statute should always be so construed, if reasonably possible, as to give each part thereof the meaning and effect which, from the act as a whole, appears to have been intended. A narrow or restricted meaning should not be given to a word, if it would result in an evasion of the evident purpose of the act, when a permissible, but broader, meaning would prevent the evasion and carry out that purpose." In re Reineger, 184 Cal. 97, 103, 193 Pac. 81, 83.

If a semicolon were substituted for the comma after the clause "that only three directors be elected," it would be obvious that the provision for the election of directors at large was intended to apply to districts of five divisions as well as those of three. Punctuation is not usually a controlling factor in the interpretation of statutes.

"For the purpose of arriving at the true meaning of a statute, courts read with such stops as are manifestly required." United States v. Lacher, 134 U. S. 624, 10 Sup. Ct. 625, 33 L. Ed. 1080.

The fact that section 28 has been amended since 1915 is not material in arriving at the legislative intent in the act of that year. The intent of the proviso in section 5, as amended in 1915, and which has not since been changed, could not be affected by subsequent amendments of other sections not inconsistent with the proviso. The legislative scheme, as disclosed by the amendatory act of 1915, and by prior legislation on the subject, seems plain. If so requested in the petition for the formation of the district, the supervisors were and are given authority to order the election of directors at large, whether three or five. If not so ordered, then it was within the power of the board of directors, upon the presentation of a similar petition, to order the election of such directors at large. Whether construed in strict accordance with its own terms, or in the light of "the general tenor and scope of the entire legislative scheme embodied in the act," section 5, in our opinion, authorizes the board

of supervisors to provide for the election of directors at large, whether the number of divisions in the district be three or five.

The order to show cause is discharged, and the writ denied.

59 Cal. App. 280

## PEOPLE v. PEARSON. (Cr. 892.)

(District Court of Appeal, Second District, Division 2, California. Oct. 4, 1922. Rehearing Denied Nov. 3, 1922.)

**1. Rape ⟸51(1)—Evidence held to justify verdict of guilty.**

In a rape prosecution, evidence of prosecutrix and admission of defendant justified a verdict of guilty.

**2. Witnesses ⟸266—Refusal to rule on questions before they were asked not error.**

In a rape prosecution, where defendant's attorney stated he intended to cross-examine prosecutrix as to opportunity which she may have had to become pregnant through intercourse with some one other than defendant, the court's refusal to rule on questions before they were asked was not a curtailment of the cross-examination, and, where no objection was sustained to any question, the answer to which contradicted facts related by prosecutrix, there was no error.

**3. Criminal law ⟸789(4)—Instruction on reasonable doubt correct statement of law.**

An instruction that "it is sufficient if you believe beyond a reasonable doubt from all the evidence in the case the crime charged was committed" was a correct statement of the law.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Simon Pearson was convicted of rape, and he appeals. Affirmed.

Arthur C. Verge, O. V. Willson, and J. B. Joujon-Roche, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CRAIG, J. [1] Defendant was convicted of rape. The complaining witness, a girl of 15 years, is a niece of defendant's wife. There is no dispute as to the fact that on the morning of the 1st day of July, 1921, while the complaining witness was visiting in the home of her aunt and the defendant, the aunt arose early and left the house to go for some coffee. When she left the niece was asleep. The complaining witness testified that when she awoke the defendant was in her bed, and that she was wet about her private parts, and that afterwards they were sore; that she felt the soreness inside the genital organs. Later, when she failed to menstruate, the services of a physician were secured. Two physicians testified that in their opinion the evidence which they found showed that she had been pregnant; that a miscarriage or abortion had taken place, and that the pregnancy lasted from about four to six months. A written statement signed by defendant was introduced in evidence, in which he admitted that he had gotten into the bed of the complaining witness while she was asleep and during the absence of his wife from the house. The details of the contents of this writing need not be recited here, but it constituted an admission by the defendant that he attempted an act of sexual intercourse with the complaining witness, and did everything necessary to do this except to accomplish penetration. This admission, with the evidence of the girl and the physicians, is sufficient to justify the jury in returning a verdict of guilty. It follows that the court was correct in denying the defendant's motion to advise the jury to acquit.

[2] Appellant insists that the trial court erroneously curtailed the cross-examination of the prosecuting witness. From a statement made by counsel for the defendant it appears that he intended to cross-examine concerning any opportunity which the prosecutrix may have had to become pregnant through intercourse with some one other than the defendant. Counsel attempted to make an offer of proof, and stated that he desired to cross-examine the witness with reference to her relations with other boys. However, the record shows that the court repeatedly informed counsel that no ruling would be made except as questions were asked and objections made thereto. Near the conclusion of the discussion upon this matter the court said:

"I am not going to designate how to try your case. You go ahead and try it, and I will rule on the facts as they come. * * * Now, as to any question that you might ask other than the general question, I can't rule on it until your question is asked, and then I will rule on it."

The court did not sustain an objection to a question the answer to which could directly or inferentially contradict the facts related by the complaining witness. For all that appears in the record, had the questions contemplated been asked, objections to them doubtless would have been overruled.

[3] There was no error in giving the instruction:

"It is sufficient if you believe beyond a reasonable doubt from all the evidence in the case that the crime charged has been committed."

That that is a correct statement of the law is elementary.

Appellant complains concerning the refusal to give certain other instructions, but from a careful examination of the entire charge to the jury we are satisfied that no error was committed in this regard, and that the charge as a whole informed the jury correctly upon all of the points requested, although in somewhat different language from that suggested. We find no merit in the other allegations of error contained in the appellant's brief.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

189 Cal. 675

**BIAGGI v. RAMONT et al. (Sac. 3168.)**

(Supreme Court of California. Oct. 9, 1922.)

**1. Appeal and error ⟸933(4)—General order granting new trial presumed on appeal not to have been based on insufficiency of evidence.**

In view of Code Civ. Proc. § 657, providing several causes upon which motion for new trial can be based, where the general order granting a motion for new trial did not designate therein any reason for the action, it will be presumed on appeal that the motion was not based on insufficiency of evidence.

**2. Appeal and error ⟸714(6)—Certificate of judge that granting motion for new trial was for insufficiency of evidence not considered when dehors record.**

Where, on appeal from an order granting new trial, a certificate of the judge was presented which stated that the motion was granted because of insufficiency of evidence and an application was made for an order causing the transcript to be returned to the trial court to permit a nunc pro tunc order correcting the record to recite what actually took place, the certificate, being dehors the record, cannot be considered.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

**3. Appeal and error ⊜659(1)—Method of correcting omission in record of statement as to reason for granting new trial stated.**

Where the order granting a motion for new trial did not state that it was granted for insufficiency of evidence, the proper way to present the matter would be by a nunc pro tunc order made by the trial court, which could have been incorporated in the transcript of the record on appeal on a motion for diminution of the record.

**4. Appeal and error ⊜440—Right of lower court to correct clerical omissions not suspended by appeal.**

The right of the lower court to correct clerical omissions is not suspended or impeded by an appeal.

**5. Appeal and error ⊜867(2)—Omission of record to state that new trial was granted for insufficiency of evidence precludes consideration of question on appeal, unless evidence insufficient in law.**

In view of Code Civ. Proc. § 657, providing for new trial for several causes, where an order granting a new trial did not designate any reason for such action, the Supreme Court is precluded from considering whether the evidence was sufficient to sustain the verdict, unless it is insufficient in law and without conflict in any material point.

**6. Taxation ⊜745—Tax deed from collector to the state only deed authorized at time of tax sale.**

Where at the time of a tax sale, Pol. Code, § 3771, provided that property delinquent for taxes should be sold to the state, section 3776 provided that the collector should make a certificate of such delinquent sale, section 3780 provided that the owner might make redemption within five years or at any time prior to entry or sale by the state, and section 3785 provided that, if no redemption was made, the collector must make the state a deed of the property, a deed made by the collector "to the highest bidder" was void.

**7. Taxation ⊜696—Law at time of tax sale governs right of redemption.**

The law existing at the time of a tax sale governed the sale and regulated the right of redemption.

**8. Trial ⊜337—Fact that jury disregarded instructions as to evidentiary weight of recitals in deed did not make the verdict against law.**

The fact that the jury disregarded instructions as to the evidentiary weight of recitals in a deed improperly admitted in evidence does not make the verdict against law.

**9. Quieting title ⊜47(1)—Where execution of quitclaim deed disputed, instruction on prima facie presumptions arising from certificate of acknowledgment should have been given.**

Where in action to quiet title defendant claimed by quitclaim deed, which the grantor disputed, but his testimony was uncertain and not free from suspicious circumstances, an instruction on the prima facie presumptions of law arising from a certificate of acknowledgment, and that an identity of person is to be presumed from an identity of name, should have been given (Code Civ. Proc. §§ 1948, 1963, subd. 25).

**10. Deeds ⊜121—Quitclaim deed transfers title.**

A quitclaim deed is as efficient to transfer title as a grant, bargain, and sale deed.

**11. Appeal and error ⊜977(3)—Order granting new trial conclusive on appeal, unless abuse of discretion appears.**

On appeal from an order granting a new trial, the action of the trial court will not be disturbed, if upon any hypothesis it can be sustained, and is conclusive unless an abuse of discretion appears.

In Bank.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action to quiet title by George Biaggi against W. F. Ramont and others. Judgment for plaintiff, and from an order granting a new trial, plaintiff appeals. Affirmed.

W. R. Biaggi and H. A. Gabriel, both of San Jose, for appellant.

Dennett & Zion, of Modesto, for respondents.

WASTE, J. [1] This is an appeal from an order granting a new trial. The plaintiff, out of possession, brought an ordinary action to quiet title. The defendants Ramont, husband and wife, answered, alleging ownership in fee simple, possession and right of possession in themselves, and set up certain proceedings under sales for delinquent taxes, whereby they claimed to have acquired title to the property. The cause was tried with a jury. The only special issue requested was refused by the court, and the jury returned a general verdict "for the plaintiff." No findings were made, and the only judgment entered was that plaintiff recover his costs. Defendants thereupon made a motion for a new trial, specifying as grounds insufficiency of the evidence, that the verdict was against law, and errors in law occurring at the trial. The court granted the motion, and the clerk entered a general order to that effect, without designating therein any reason for such action. Consequently, on the face of the record as presented here, it will be presumed that the motion was not based on the insufficiency of the evidence to support the verdict. Code Civ. Proc. § 657.

[2, 3] Respondents assert that as a matter of fact the court granted the motion for a new trial because of the insufficiency of the evidence, among other reasons, and so stated at the time, but that the fact was not made to appear through an erroneous entry of the order by the clerk. They present here a certificate of the judge who tried

the case, which so states, and make application for an order causing the transcript to be returned to the trial court to permit a nunc pro tunc order to be made, correcting the record so that it shall recite what actually took place. Such a certificate is dehors the record, and may not be considered. The proper way to have presented the matter, had either party deemed it of importance, would have been by a nunc pro tunc order made by the trial court, which could have been incorporated in the transcript here on a motion for a diminution of the record. Newmire v. Schacht, etc., Truck Co., 22 Cal. App. 308, 310, 134 Pac. 336.

[4, 5] The right of the lower court to correct the clerical omission of the clerk was not suspended or impeded by the appeal. Boyd v. Burrel, 60 Cal. 280, 284; Fay v. Stubenrauch, 141 Cal. 573, 575, 75 Pac. 174. Nor was the court precluded from correcting the entry merely because the record itself did not show that it was incorrect. Kaufman v. Shain, 111 Cal. 16, 21, 43 Pac. 393, 52 Am. St. Rep. 139. Because of the provision of section 657, supra, we are precluded from considering the question whether or not the evidence is sufficient to sustain the verdict, unless it is insufficient in law, and without conflict in any material point. Read v. Pac. Electric Ry. Co., 185 Cal. 520, 197 Pac. 791.

The plaintiff relied on title in himself, acquired in 1919, by a grant, bargain, and sale deed from "Anton Alves," who purchased the property from George Perley in 1889. The proper chain of title from the United States patent down to Alves is contained in the record. The respondents introduced in evidence, over the objection of the plaintiff, the record of a certificate of sale of real estate, showing that the property was sold to the state of California by the tax collector of Stanislaus county, July 1, 1910, because of nonpayment by Alves of the state and county taxes for the year 1909. The record of the certificate contained the following additional notations:

"State and County Taxes for fiscal year 1910 and 1911 not paid. See Vol. ... page 1, Roll of 1910. State and County Taxes for fiscal year 1911 and 1912 not paid. See Vol. ... page 1 Roll of 1911. State and County Taxes for fiscal year 1912 and 1913 not paid. See Vol. .... page 1 Roll of 1913. Redeemed this 3rd day of July 1915 by R. C. Payne by payment to County Treasurer of the sum of $16 no/100."

There was also introduced the record of a tax deed from the tax collector, purporting to convey the property to R. Crossman Payne, and dated July 2, 1915. On February 27, 1918, Payne, by grant, bargain and sale deed, conveyed the property to the defendant W. F. Ramont, and there was introduced in evidence a purported quitclaim deed from Anton Alves to the same defendant, dated November 27, 1918.

On the foregoing record the case presented is one in which the appellant rests upon a good chain of title and conveyance to himself, and the respondents claim by reason of a purported tax title from the state, and a purported quitclaim deed from the delinquent owner, who is also plaintiff's grantor. The plaintiff made timely objection in the court below to the introduction of the records showing the various steps in the acquisition of the tax title by the respondents. The objections were overruled, and the records were admitted, but no evidence was introduced to vary or contradict their recitals in any particular. In determining that the verdict is, or is not, against law, we are first led to a consideration of the question whether or not the certificate of sale for delinquent taxes, the assessment roll, and the purported tax deed are, in themselves, sufficient evidence of title in respondents.

[6, 7] It at once appears that the deed from the tax collector is void on its face. The property was sold to the state of California on July 1, 1910, for the nonpayment of taxes for the year 1909. No deed was ever executed by the tax collector to the state, and the state has never deeded the property to any one. At the time of the sale, section 3771 of the Political Code provided that all property delinquent, upon which the taxes, penalties, and costs had not been paid, should, by operation of law and the declaration of the tax collector, be sold to the state. Stats. 1895, p. 327. Section 3776 provided that the tax collector should make out a certificate of such delinquent tax sale, and specified what it should contain. Under section 3780 a redemption of the property sold might be made by the owner, or any party in interest, within five years from the date of the sale to the state, or at any time prior to the entry or sale by the state. Stats. 1895, p. 328. Section 3785 provided that if no redemption was made within such five-year period, the tax collector, or his successor, *must make the state a deed of the property* (the italics ours), the instrument to contain certain recitals. Stats. 1909, p. 921. The law existing at the time of the sale governed the case, and regulated the right of redemption. Johnson v. Taylor, 150 Cal. 201, 205, 88 Pac. 903, 10 L. R. A. (N. S.) 818, 119 Am. St. Rep. 181; Walsh v. Burke, 134 Cal. 594, 66 Pac. 866; Main v. Thornton, 20 Cal. App. 194, 196, 128 Pac. 766. The instrument introduced in evidence by the respondents is not "a deed to the state," the only conveyance authorized by the law (section 3785, supra) in force when the sale was made in 1910. It would seem that the tax collector attempted to make a deed of the property "to the highest bidder," under section 3771 of the Political Code, as amended

in 1913 (St. 1913, p. 557) and in the form presented by section 3785b, which was added to the Code the same year (St. 1913, p. 558). As a result respondents introduced in evidence a void deed, which showed no title or interest in themselves, under their purported tax title, sufficient to defeat the title and claim of the appellant. Jones v. Luckel, 174 Cal. 532, 534, 163 Pac. 906; McArthur v. Goodwin, 173 Cal. 499, 160 Pac. 679; Bublitz v. Reeves, 40 Cal. App. 75, 180 Pac. 28. Aside from the foregoing conclusion it may be well to note that the deed is not in proper form in any event. Pol. Code, §§ 3785, 3785b. It seems to be the form prescribed for conveyances from the state in those cases in which the state has become the owner of property which has been sold for taxes, and the deed to the state has been filed with the controller. Pol. Code, §§ 3897, 3898.

[8] Respondents complain that the jury returned a verdict not in accord with the instructions of the court. "The only evidence before the jury," they say, "except plaintiff's and defendants' chain of title, and evidence as to the identity of Alves, were the records of the tax sales above mentioned. These, the court instructed the jury, were prima facie evidence of the facts set forth, and since no other evidence of any kind was introduced, or offered, the jury clearly violated the instructions of the court, and brought in a verdict contrary thereto, and contrary to law, and evidently the court so held by setting aside the verdict and granting a new trial." Aside from giving a general instruction as to the burden of proof, the number and credibility of witnesses, requested by the respondents, the trial judge, at the instance of the appellant, read to the jury certain sections of the Political Code relating to the evidentiary effect and conclusiveness of the recitals in tax deeds, and to the resale of lands sold to the state. The reading of these sections could in no degree have prejudiced respondents' cause. The tax deed introduced in evidence was void, but the jury was no doubt led by the giving of the instruction to believe that the court was of the opinion that the instrument was valid. The fact that the jury disregarded instructions as to the evidentiary weight of recitals in a deed improperly admitted in evidence does not make the verdict against law. Tousley v. Pac. El. Ry. Co., 166 Cal. 457, 462, 137 Pac. 31.

[9, 10] Certain errors of law are relied upon by the respondents to justify the order granting a new trial. Considerable doubt was injected into the record as to whether the "Anton Alves" who executed a quitclaim deed of the property to respondent Ramont in 1918 was the same person who executed the grant, bargain, and sale deed of the same property to the appellant in 1919. Respondents requested the trial court to submit to the jury, as a special issue, the question whether or not the deed purporting to "grant" the property to Ramont was "executed by the Anton Alves who owned the property," and in that connection they requested an instruction on the question of the presumptions of law arising from certificates of acknowledgments, and from identity of names. The court refused to submit the special issue, which as framed did not literally conform to the fact, and did not give the instruction. The special issue could have been easily corrected by changing the word "grant" to "quitclaim," and, notwithstanding the discretion vested in trial courts as to giving or refusing special issues, we think the question might well have been submitted to the jury. The plaintiff deraigned title through Anton Alves by a deed from the latter made in *1919*. The defendants claimed through a tax title which was void on its face. But defendants also claim through a quitclaim deed from Anton Alves made in *1918*. They produced that deed in evidence, regular on its face, duly acknowledged and certified by a notary public. A quitclaim deed is as efficient to transfer title as a grant, bargain, and sale deed. Graff v. Middleton, 43 Cal. 341, 344; Myers v. City of Oceanside, 7 Cal. App. 87, 93, 93 Pac. 686. If the Anton Alves who executed and acknowledged defendants' deed was the same Anton Alves who owned the land in question, it necessarily follows that title is in the defendants and not in the plaintiff. Thus the question of identity was the vital question in the case.

Plaintiff produced one Anton Alves as a witness, who testified that he was the man who owned the land; that he executed the deed to plaintiff in 1919, and that he did not execute the deed to defendants in 1918. But his testimony was uncertain and unsatisfactory, and not free from suspicious circumstances. The jury under proper instructions might have discredited and disbelieved it.

[11] In this state of the case the court should have given an instruction as requested by defendants, on the prima facie presumptions of law arising from a certificate of acknowledgment, and that an identity of person is to be presumed from identity of name. Code Civ. Proc. §§ 1948, 1963, subd. 25. On an appeal from an order granting a new trial the action of the trial court will not be disturbed if upon any hypothesis it can be sustained. Its action is conclusive upon this court, unless an abuse of discretion is made to appear. Gordon v. Roberts, 162 Cal. 506, 508, 123 Pac. 288; Union Lumber Co. v. Webster, 15 Cal. App. 165, 113 Pac. 891.

No other error of law found in the record presents a cause for a new trial, and we will presume that the court below reached the conclusion that it had failed to instruct the

jury on a vital matter upon which an instruction had been requested.

The order granting a new trial is affirmed.

We concur: WILBUR, Acting C. J.; LAWLOR, J.; SLOANE, J.; RICHARDS, Justice pro tem.

---

189 Cal. 682

**Ex parte PEPPERS. (Cr. 2461.)**

(Supreme Court of California. Oct. 9, 1922.)

**1. Criminal law ⊜13—Act regarding shipment of frosted oranges held too vague to form basis of criminal prosecution.**

St. 1921, p. 1239, § 10, providing that oranges shall be considered unfit for shipment when frosted to the extent of endangering the reputation of the citrus industry, if shipped, is too vague, indefinite, and uncertain to form the basis of a criminal prosecution.

**2. Constitutional law ⊜62—Act held void as delegating legislative authority to administrative board.**

St. 1921, pp. 1235, 1241, §§ 4, 15, 16, empowering the director of agriculture and his agents to declare oranges unfit for shipment when frosted to the extent of endangering the reputation of the citrus industry, is void, as delegating to an administrative board the legislative power of determining what acts or omissions of an individual are unlawful.

In Bank.

Application by T. H. Peppers for a writ of habeas corpus, to be directed to the sheriff of Los Angeles County to secure release from custody on a charge of violation of "the California Fruit and Vegetable Standardization Act." Writ granted.

Leonard, Surr & Hellyer, of San Bernardino, for petitioner.

Thos. L. Woolwine, Dist. Atty., and T. C. Becker, both of Los Angeles, U. S. Webb, Atty. Gen., and Jno. W. Maltman, Deputy Atty. Gen., for respondent.

RICHARDS, Justice pro tem. Application for writ of habeas corpus. The applicant was charged by a complaint in the justices' court of Los Angeles township, county of Los Angeles, with the violation of the provisions of an act of the Legislature approved June 3, 1921, known as "the California Fruit and Vegetable Standardization Act" (St. 1921, p. 1234). The complaint was in three counts, by the first of which the applicant was charged with a misdemeanor in having offered for shipment to a common carrier at Downey, within said county, three boxes of oranges which had not been inspected or passed upon by the county horticultural commission of said county or any of his deputies, as is required by the rules and regulations established by the director of the state department of agriculture, respecting shipments of oranges, then in full force and effect. By the second count in said complaint the applicant herein was charged with having committed a misdemeanor consisting in having willfully and unlawfully packed, shipped, and offered for shipment at Downey, in said county, three boxes of oranges, which oranges were not virtually free from serious defect in this, that the contents of said boxes of oranges contained 15 per cent. or more of oranges showing marked evidence of frost injury, to wit, drying in 20 per cent. or more of the exposed pulp as shown on a transverse through the center, and having a water-soaked appearance showing on two or more segments, and having the presence of crystals and crystalline deposits on two or more segments as defined in and provided by the rules and regulations established by the director of the state department of agriculture respecting shipments of oranges, then in full force and effect. By the third count in said complaint it was charged that the applicant herein had committed a misdemeanor by having willfully and unlawfully packed, shipped, and delivered for shipment to a common carrier at Downey, in said county, three boxes of oranges which were "unfit for shipment in this, that said oranges were frosted to the extent of endangering the reputation of the citrus industry, if shipped."

It is the contention of the applicant herein that as to the first count in said complaint the prosecution cannot be maintained for the reason that while the act of 1921 empowered the director of agriculture of the state of California "to define, promulgate and enforce such rules and regulations as may be deemed necessary to carry out the provisions of this act," there was not enacted any provision declaring that a violation of such rules and regulations should be a crime, and hence that the applicant could not be successfully prosecuted for a violation of such rules and regulations under the authority of In re Potter, 164 Cal. 735, 130 Pac. 721. The respondent concedes the force of said contention under said authority, but still insists that the said rules and regulations of the state director of agriculture may be read, construed, and held effective in definition and aid of the provision of the statute claimed to have been violated in the other two counts of said complaint. Whether or not this would be true depends upon whether the provision of the statute claimed to have been violated by the other two counts of the complaint is not of itself too vague, indefinite, and uncertain to either furnish, standing alone, the basis for a criminal prosecution, or to be susceptible of being aided by the rules and regulations of the department of agriculture. If it is found to be so, the other two counts in said complaint must also fail.

---

In this view of the case the questions raised upon this application involve the interpretation to be given to the provisions of the act in relation to the shipment of oranges, claimed to be defective through having been frosted, and involve also the scope of the powers and functions of the state director of agriculture, with special reference to the shipment of oranges in alleged violation of these provisions of said act.

The California Fruit and Vegetable Standardization Act is declared in its title to be "an act to promote the development of the California fruit, nut and vegetable industry in state and interstate markets, and to protect the state's reputation in these markets by establishing standards and standard packages for certain fruits, nuts and vegetables specified therein, and to prevent deception in the packing and sale of fruits, nuts and vegetables, to provide for the certification of fruits and vegetables including the payment of fees; to prescribe penalties for violation of the provisions hereof," etc. Stats. 1921, c. 719, p. 1234. By section 4 of said act "the director of agriculture is hereby empowered, * * * to enforce all the provisions of this act." By section 15 of said act "the director of agriculture is empowered to define, promulgate and enforce such rules and regulations as may be deemed necessary to carry out the provisions of this act"; the provisions of said act having particular reference to oranges are embraced in that portion of section 10 thereof which reads as follows:

"Oranges shall be deemed properly matured for shipment or sale under the provisions of this act when the juice contains soluble solids equal to or in excess of eight parts to every part of acid contained in the juice, the acidity of the juice to be calculated as citric acid without water of crystallization; provided, that the oranges have attained at least twenty-five per cent. yellow or orange color before picking, and oranges which are substantially or at least seventy per cent. colored at the time of picking shall be deemed properly matured for shipment or sale, irrespective of analysis of the juice. When packed, shipped, delivered for shipment, offered for sale or sold, oranges shall be virtually free from insect and fungous diseases and other serious defects. Oranges shall be considered unfit for shipment when frosted to the extent of endangering the reputation of the citrus industry, if shipped. The foregoing provisions shall not apply to shipments of oranges to foreign countries other than the Dominion of Canada, during any season, provided such shipments are made after the first day of November."

[1] The particular portion of the foregoing provisions of said act brought in question by the applicant's attack upon the two remaining counts in said complaint is the provision therein that—

"Oranges shall be considered unfit for shipment when frosted to the extent of endangering the reputation of the citrus industry, if shipped."

It is the applicant's contention that the above-quoted clause in said act is too vague, indefinite, and uncertain, standing alone, to furnish the basis of a criminal prosecution such as is sought by the third count of said complaint; and that it is also too vague, indefinite, and uncertain to furnish the basis for such a definition thereof by the department of agriculture, as is alleged in, and attempted to be enforced by, the second count of said complaint. We are of the opinion that both of these contentions must be sustained. Considering the said clause in said act by itself and unaided by the attempted definition of the department of agriculture, it will be seen that it does not purport to forbid the shipment of all the frosted oranges. It thus concedes that oranges may be frosted and may still be the proper subject of shipment and consumption without in any way "endangering the reputation of the citrus industry." What defect then shall render certain of such oranges unfit for shipment as "endangering the reputation of the citrus industry"? What is the reputation of the citrus industry? Is it for the production and shipment of oranges of a certain standard of color, or of sweetness, or of juiciness, or of palatability? How is the producer whose oranges have been touched with frost to know, from the terms of this act, whether or when he will be violating it in offering his fruit for shipment? By what standard is the complainant to reach the conclusion that the provisions of this clause of the act are being violated by one shipper and not by another? What limitation is therein placed upon the power of the magistrate or of the jury to arbitrarily determine that one shipper of frosted oranges has violated the statute, and that another, shipping precisely the same quality of oranges, has not? The vice of this sort of legislation is quite aptly pointed out in the case of U. S. v. Reese, 92 U. S. 214, 23 L. Ed. 563, in which the court says:

"If the Legislature undertakes to define a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind: Every man should be able to know with certainty when he is committing a crime. * * * It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and see who could be rightfully detained, and who should be set at large."

In the case of Louisville, etc., Railroad Co. v. Commonwealth, 99 Ky. 132, 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. Rep. 457, wherein the court was considering the validity of an act providing that a railroad company should not charge more than a reasonable or just rate of fare for the transportation of

passengers, the court, in holding the act void for uncertainty, said:

"There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate his conduct; and it seems clear to us to be entirely repugnant to our system of laws to punish a person for an act, the criminality of which depends, not upon any standard erected by the law which may be known in advance but on one erected by a jury. And especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime."

In the case of Hewitt v. Board of Medical Examiners, 148 Cal. 590, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750, in which the question of the validity of a statute empowering the board of medical examiners to revoke the certificate of a physician for unprofessional conduct and which defined unprofessional conduct in part to consist in "all advertising of medical business in which grossly improbable statements are made," this court said:

"The right which a person possesses under the Constitution and the laws to practice his profession as a physician and surgeon cannot be made to depend upon a provision of a statute as vague, uncertain, and indefinite as is the provision we have been considering. If a physician's license is to be revoked for 'grossly improbable statements'; if he is to be thereby deprived of his means of livelihood, of his right to practice a profession which it has taken him years of study and a large expenditure of money to qualify himself for, on the ground that he has made 'grossly improbable statements' in advertising his medical business—it is requisite that the statute authorizing such revocation define what shall constitute such statements so that the physician may know in advance the penalty he incurs in making them. It is an easy matter for the Legislature to declare what statements in the advertisement of medical business shall be deemed 'grossly improbable,' and it must do so, and not leave it to a board of medical examiners after the publication is made to determine in its judgment whether the statements were or were not 'grossly improbable,' and according to its particular view of the matter revoke or refuse to revoke the license. The right to practice medicine cannot be made to depend upon such a vague, uncertain, and indefinite provision."

Many other cases might be cited dealing with the essential infirmity of this sort of legislation, but we think these will suffice to show that the clause of this act under consideration is entirely too vague, indefinite and uncertain to form the basis of a criminal proceeding. This disposes of the third count of the complaint assailed in this proceeding.

[2] The second count thereof is sought to be upheld by the respondent herein upon the ground that the Legislature has lawfully transferred to the department of agriculture, acting through its executive officer, the director of agriculture, the power to define the meaning of said act as to the clause in question so as to render enforceable its terms. The provisions of the act relied upon as sustaining this contention are section 4 thereof, which reads: "The director of agriculture is hereby empowered * * * to enforce all the provisions of this act"; section 15 thereof, which provides that, "The director of agriculture is empowered to define, promulgate and enforce such rules and regulations as may be deemed necessary to carry out the provisions of this act," and section 16 thereof, which provides that, "The director of agriculture and his duly authorized agents or employés may investigate and certify to shippers, and other interested parties the quality and condition of fruit, vegetables and other farm products under such rules and regulations as he may prescribe." Conceding for the sake of argument, but not deciding, that the foregoing provisions of said act do embody a legislative attempt to confer upon the department of agriculture the power to make more certain the clause of said act declaring that "oranges shall be * * * unfit for shipment when frosted to the extent of endangering the reputation of the citrus industry, if shipped," it is our conclusion that the Legislature had no power to thus delegate to an administrative board or officer its exclusive power and function of determining what acts or omissions on the part of an individual are unlawful. People v. Parks, 58 Cal. 624; Ex parte Cox, 63 Cal. 21; Board of Harbor Commissioners v. Redwood Co., 88 Cal. 491, 26 Pac. 375, 22 Am. St. Rep. 321; Hewitt v. Board of Medical Examiners, supra. There is nothing said in Ex parte Daniels, 183 Cal. 636, 192 Pac. 442, which conflicts with these views; if, as we have held, the language of the act declaring that "oranges shall be considered unfit for shipment when frosted to the extent of endangering the citrus industry, if shipped," is too vague, indefinite, and uncertain to form the basis of a criminal action, it follows that the act in question has not defined what shall constitute such a defect in frosted oranges as would render their shipment unlawful; not having done so, it is clear that any attempt on the part of an administrative board or officer so to do would be an act of legislation, and, as such, beyond the constitutional powers of such board or officer.

The application is granted, and the petitioner discharged.

We concur: WILBUR, Acting C. J.; WASTE, J.; LENNON, J.; LAWLOR, J.

58 Cal. App. 632

## LOS ANGELES COUNTY v. LUSCHER et al.
(Civ. 3866.)

(District Court of Appeal, Second District, Division 2, California. July 28, 1922.)

**1. Bail ⊂⊃89(1)—Allegations in action for forfeited bail held sufficient to establish that accused had notice of his trial.**

In an action to recover bail for the failure of one accused of a felony to appear, an allegation that on a certain day accused "was duly and regularly arraigned, * * * and the trial * * * was then and there set down for the 30th day of January, 1920," is a sufficient allegation that the accused was notified of the time and place of his trial; Pen. Code, § 977, requiring that one accused of a felony must be personally present in court at the time of his arraignment.

**2. Bail ⊂⊃92 — Finding of consideration for bail bond held sufficient.**

A finding in an action on a bail bond that the accused was released "solely by reason and in consideration of the making execution and filing of said bond" is not open to attack merely because there was a cash bail of $250 which was part consideration for the release; it being evident that the word "solely" is surplusage.

**3. Bail ⊂⊃93 — Judgment joint and several against cosigners on bail bond valid in absence of limitation to joint liability only.**

A judgment jointly and severally against cosigners of a bail bond which does not indicate that it is limited only to a joint liability is valid under Civ. Code, § 1659, providing that such instruments are presumed to carry a joint and several liability.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by the County of Los Angeles against L. C. Luscher and E. P. Woods. From a judgment for the plaintiff, first-named defendant appeals. Affirmed.

Louis G. Guernsey and F. E. Davis, both of Los Angeles, for appellant.

A. J. Hill, County Counsel, of Los Angeles, and J. H. O'Connor and Roy W. Dowds, Deputies County Counsel, for respondent.

WORKS, J. [1] This is an action to recover on a bail bond executed by defendant to secure the appearance of one Ray J. Ford in court in response to a felony charge. Ford did not appear at the time set for his trial, and the court thereupon made its order declaring the bond forfeited. Judgment herein went for plaintiff against both defendants, jointly and severally, for the amount of the bond, which was $1,000. Defendant Luscher appeals.

The first point made by appellant is that the complaint fails to state a cause of action because it is barren of allegation that Ford was ever notified of the time and place of his trial. The assailed pleading contains the averment:

"That on the 10th day of November, 1919, the said Ray J. Ford was duly and regularly arraigned, * * * and on the said 10th day of November, 1919, * * * did enter a plea of 'Not guilty,' * * * and the trial of the said Ray J. Ford * * * was then and there set down * * * for the 30th day of January, 1920."

Section 977 of the Penal Code provides that one under a felony charge must be personally present in court at the time of his arraignment. Therefore the allegation that Ford was arraigned is equivalent to an allegation that he was present at the time the arraignment occurred. As the cause was "then and there set down" for trial on a given date, he had direct notice of the fact. The complaint is sufficient.

[2] Appellant's next contention is that there was no consideration for the execution of the bail bond. This legal question is presented in the form of a claim that a certain finding of the trial court is not supported by the evidence. The finding is to the effect that the release of Ford from custody, which occurred immediately after the giving of the bond, "was solely by reason and in consideration of the making, execution, and filing of the said bail bond. * * *" It appears that, after the bond was executed, appellant's cosigner and codefendant in this action was unable to qualify upon it. He was required upon that account to deposit the sum of $250 with the court, and the bond was thereupon approved, and Ford was released. It is now contended that the release was in consideration of the execution of the bond and of the deposit of the $250 together, and that it was not "solely" by reason of the execution of the bond. If the payment into court of the amount named is to be regarded as a deposit of cash bail in lieu, partially, of bail bond—a point which we neither examine nor decide—and if the release of the prisoner was because of bond and deposit of cash together, we cannot see how the point made by appellant is good. The use of the word "solely" in the finding, which followed the averments of the complaint, plainly may be regarded as surplusage, for there was a consideration for the bond if the release occurred partially because of its execution, and there is no doubt under the evidence that it did. The point made by appellant is not well taken.

[3] The only remaining contention of appellant is that the trial court erred in rendering judgment jointly and severally against the defendants; the insistence being that the obligation was a joint one. It is enough to say as to this question that there is no lan-

guage in the bond pretending to make it the joint obligation of the signers. Under the provisions of section 1659, Civil Code, such an instrument is presumed to carry a joint and several promise.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

(58 Cal. App. 764)

## PLACER COUNTY et al. v. LAKE TAHOE RY. & TRANSPORTATION CO. et al.
(Civ. 2434, 2437; Sac. 3280, 3285.)

(District Court of Appeal, Third District, California. Aug. 23, 1922. Hearing Denied by Supreme Court Oct. 19, 1922.)

**1. Public lands ⟸39(3)—Effect of filing of declaratory statement to locate town site stated.**

While the filing of a declaratory statement is not necessary to the location of a town site, yet, under Act Cong. March 2, 1867, it is proper to take that course as the initial step for making a town-site entry in preference over the making of a cash payment as the first step looking to the pre-emption of lands for such purpose, the effect of such statement being to vest an inceptive right in actual or bona fide settlers upon such lands.

**2. Public lands ⟸41—Burden held upon occupant of public commons to overcome prima facie case made by introduction of map showing dedication.**

In a suit by the judge of the superior court as trustee for public commons to quiet title thereto, where a map made by a surveyor under authority of the Legislature was introduced, showing the commons designated as such, the map constituting prima facie evidence of the contents thereof, the burden was upon defendant to overcome such prima facie case.

**3. Public lands ⟸41—Actual occupancy prior to location of town site not shown.**

In a suit by the judge of the superior court as trustee to quiet title to a block of land alleged to be public commons, evidence introduced by defendant *held* insufficient to show actual occupancy by its predecessor in title at the time of the location of the town site, under Act Cong. March 2, 1867, so as to except such occupancy from the land dedicated.

**4. Estoppel ⟸110—Defense unavailable where not pleaded.**

In a suit by the judge of the superior court as trustee for public commons included in a town-site location, defendants could not avail themselves of the doctrine of estoppel where not pleaded.

**5. Public lands ⟸41—Evidence held insufficient to show right of railroad company in public commons.**

In a suit by the judge of the superior court, as trustee for public commons under a town-site location, brought against a railroad company which claimed a franchise from the county board of supervisors to maintain its tracks along a certain turnpike, evidence *held* not to sustain the burden on defendant of showing that the track passing through the commons was within the grant.

**6. Fixtures ⟸4—Whether personalty affixed to land becomes part thereof question of intent.**

The question as to whether personal property affixed to land becomes a part thereof is largely one of intention to be determined by general tests, including the adaptation of the personal property to the use or purpose to which that part of the realty to which it is connected is appropriated.

**7. Fixtures ⟸26—Railroad tracks and buildings held personalty.**

Where a railway company lays its tracks and erects buildings for the proper conduct of its transportation business over and across land under a claim of right, such property cannot be held to become a part of the realty, but will at all times retain the character of personalty.

**8. Adverse possession ⟸8(1)—Title cannot be acquired as against public.**

Where ground is reserved for or dedicated to public purposes, title thereto cannot be acquired as against the public by adverse possession.

Appeal from Superior Court, Sacramento County; Fred V. Wood and J. J. Trabucco, Judges.

Action by the County of Placer and others against the Lake Tahoe Railway & Transportation Company and others to quiet title and for an injunction. From the judgment, both parties appeal. Reversed in part and affirmed in part in the District Court of Appeal, and hearing denied in Supreme Court.

J. B. Landis and W. B. Lardner, both of Auburn, and Meredith, Landis & Chester, of Sacramento, for plaintiffs.

Raglan Tuttle, of Auburn, and H. F. Droste, of San Francisco, for defendants.

HART, J. This is a controversy over a block of land, known and designated as block 6 of the town of Tahoe City, Cal., and which is alleged and found by the court to be public commons.

It is alleged that the defendants are and have been for many years wrongfully and without right in possession of and occupying certain portions of said block, claiming the ownership thereof in fee. The prayer of the complaint is that said block of land be adjudged and decreed to be and is and constitutes public commons of said town of Tahoe City, "for the use and benefit and enjoyment of the inhabitants thereof and the public in general"; that the defendants nor any of them have any right, title, interest or estate therein, and that they and each of them and their agents, etc., be forever restrained and debarred from asserting any right, title or in-

terest therein or thereto, and that the judge of the superior court in and for the county of Placer be adjudged to be the legal owner of said land and that he holds and owns the same as trustee "and is entitled to exclusive possession thereof in trust for the several use and benefit of the occupants of said Tahoe City town site, jointly, and collectively."

The defendants railway company, Tahoe Mercantile Company, and Mercantile Trust Company, etc., answered the complaint, interposing specific denials and certain alleged special defenses. It is alleged by the trust company that defendant railway company became and was at the time of the commencement of the action indebted to said trust company in the sum of $500,000, and that, to secure the payment of said indebtedness, defendant railway company executed and delivered to defendant trust company a mortgage, dated October 1, 1901, and duly recorded, covering all the real property described in the complaint and all personal property of said railway company; that said indebtedness has not been paid, and that the same has been ever since the date thereof, and now is, a valid and subsisting lien upon said real and personal property, etc. Defendant railway company alleges that for more than 15 years last past, said defendant has been actually engaged in the business of transporting passengers for hire for the general public, by means of a steam railroad, between the towns of Truckee, in Nevada county, Cal., and said Tahoe City; that its line of tracks and its switches cross the said block 6, and that for many years it has used and is now using said tracks and switches in connection with its business as a common carrier; that likewise it has been for many years, and is now, using the buildings (8 in number) and the real property on which they stand (being a part of block 6) in connection with its business of transporting goods and passengers for hire for the general public, and as a common carrier. And by all the defendants it is alleged that the cause of action stated in the complaint is barred by sections 315, 318, and 343 of the Code of Civil Procedure.

Defendant Tahoe Mercantile Company filed a cross-complaint, setting up its ownership of the part of said block 6 to which it claims title, the same bordering upon the lake and embracing several hundred feet, the shore line being approximately 217 feet and the right angle lines 126 and 150 feet, respectively, alleges that, without right, the plaintiffs claim to own some interest in said land, and asks that it be adjudged that plaintiffs have no interest therein.

The judgment decrees that said block constitutes a public commons of said city, but that the defendant Tahoe Mercantile Company was the owner of an equitable interest in a certain described part of said block; that the defendant Lake Tahoe Railway & Transportation Company (for many years using a part of said block for its tracks, buildings, etc.) has no right, title, interest, or estate of any nature or kind in said block or in any part thereof; that the last-named defendant be, and it is by the decree, required "to forthwith remove all tracks, water pipes and buildings erected or used by it and now located in said public commons"; that "J. E. Prewett, as judge of the superior court of the state of California, in and for the county of Placer, as said judge, and as trustee, holds, owns and is entitled to the exclusive possession of said part of said block 6 in trust for the several use and benefit of the occupants of said Tahoe City town site and of the public generally under the provisions of an act of Congress entitled 'an Act for the Relief of the Inhabitants of Cities and Towns upon Public Lands,' approved March 2, 1867 (14 Stat. L. 541)" and in accordance with the provisions of a certain act of the Legislature of the state of California, approved March 30, 1868 (Stats. 1867–68, p. 692). The decree enjoins all the defendants from using or occupying any of said block in any manner or from asserting title thereto or an interest therein, or any part thereof, except that part to which it is adjudged that the defendant Tahoe Mercantile Company has an equitable title.

There are two appeals: (1) By the plaintiffs from that part of the judgment adjudging the Tahoe Mercantile Company is the owner of an equitable interest in and title to a part of said block 6, and also from that part which in effect adjudges that the defendant railway and transportation company has the right to remove from said block its tracks, water pipes, and buildings erected and maintained thereon by said defendant. (2) An appeal by the defendants railway company and Mercantile Trust Company of San Francisco, from so much of the judgment as adjudges and decrees that said defendant railway company has no right, interest, estate, or title in or to the portions of said block occupied and used by said railway company.

The land within the boundaries of which block 6 is embraced is, as seen, situated in Placer county, and borders on the southwestern boundary of Lake Tahoe being described as the "southeast quarter of section 6, township 15 N. of Range 17 E., Mt. Diablo base and meridian" and for some years prior to and on or about the 11th day of July, 1868, was "surveyed public domain of the United States." During all the years of 1868 to 1872 a number of persons settled and resided upon and occupied said land, and said land constituted an unincorporated town known as Tahoe City. In the year 1868 the Honorable D. W. Spear, the then county judge of the county of Placer, in pursuance of a request made in the form of a petition by the requisite number of the resident

householders of said town, caused the said land to be surveyed and plats, maps, and field notes made, and proceeded, as the statutes require, to have a patent to said land issued to him as such county judge, and for the purposes in such statutes set forth. The survey of said land was made by one Sam Bethel, a deputy United States surveyor, who made a map of said land and thereon delineated and designated all streets, alleys, public squares, and public commons, etc., as the same existed at the time and which had been theretofore dedicated to a public use, and also the precise boundaries and area of each and every lot or parcel of land claimed by any person. Said map was made in triplicate and certified under oath by Bethel as a map of Tahoe City, etc. This map was regularly filed for record in the office of the county recorder of Placer county. On said map the land in the block involved in this controversy is marked and designated as "public commons." On the 11th day of July, 1868, said D. W. Spear, as county judge, proceeding according to the provisions of the federal statute of 1867, filed in the United States land office at Sacramento a declaratory statement of the purpose of the inhabitants of said Tahoe City to enter said land as a town site. The record shows that a contest was pending before the general land office at Washington between the town site of Tahoe City and one Thomas Bittencourt and several other pre-emption claimants, and that the department, after a hearing, not only disallowed and rejected the claims of Bittencourt et al., but also disallowed and rejected said town-site application on the ground that it was made to appear in and by said application that said town site did not contain the number of inhabitants in actual occupancy and use of the proposed town site, which is required by the said act of Congress of 1867 as the prerequisite to the establishment of any portion of the public domain as a town site. An order was later made, however, granting the town-site applicant a further hearing on his application, and on August 2, 1871, the commissioner of the general land office addressed a letter to the register and the receiver of the United States Land Office at Sacramento, in which it was stated that the Secretary of the Interior, while affirming the conclusion of the commissioner in the Bittencourt pre-emption applications, had "modified the ruling of this office, in this: That the proper authorities can now enter said town site (of Tahoe City) under the act of 1867, notwithstanding the fact that said town site contained less than 100 inhabitants."

On December 5, 1871, Spear, county judge, as such, in trust for the inhabitants of said town of Tahoe City made a cash entry (No. 682) of the land as a town site for said town. The register and the receiver of the United States land office at Sacramento were notified of this entry by the general land office on the 24th day of June, 1872, and that the same was passed for patenting, "in accordance with the entry as authorized by letter of August 2, 1871." On September 10, 1872, a patent from the United States was issued for said town site to said D. W. Spear, county judge, etc., as such judge, in trust for the several use and benefit of the occupants of said town site of Tahoe City, said patent being certificate No. 682, and based on said cash entry No. 682.

As before intimated, the court found that block 6 constituted a public commons with the exception of a fractional portion, of which it found that the defendant Tahoe Mercantile Company is the equitable owner; that the defendant Lake Tahoe Railway, etc., Company has no interest of any kind or nature in said block 6, or any portion thereof; that the railway company was indebted to the defendant trust company in the sum of $500,000, as alleged, and that said debt or any portion thereof has never been paid, but that the latter company does not have, and never has had, a valid lien on the real property in block 6, claimed by said railway company, as security for the payment of said indebtedness or for any purpose.

The rights of the defendant trust company, in so far as they are affected by this litigation, are, of course, merged in those of defendant railway company, since manifestly whether the lien claimed by the former upon the portion of block 6 claimed by the railway company is or is not valid depends entirely upon whether the latter's claim of ownership of said property is or is not valid.

The defendant mercantile company bases its claim of ownership of the fractional portion of block 6, to which the court decided that it owns the equitable title, upon the alleged occupancy and use of said parcel of said block by one John C. Chesrown.

The defendant Lake Tahoe Railway, etc., Company claims its right to the portions of said block occupied and used by it under a purported franchise from the board of supervisors of Placer county, granting it the right to run and maintain its tracks along and across a public highway, known as the Truckee and Tahoe turnpike, which, it is claimed, runs over and across block 6. All the defendants set up the contention that the plaintiffs are estopped from maintaining this action.

As shown, the declaratory statement and the cash entry of the town site herein involved were filed and made under the act of Congress of March 2, 1867. Rev. Stats. U. S., p. 437. Section 2387 of said Act (U. S. Comp. St. § 4791), in substance and effect, provides that, where any portion of the public lands, not subject to entry under the agricultural pre-emption laws, have been or may be settled upon and occupied as a town site, the corporate authorities of such town,

or, if not incorporated the judge of the county court of the county in which such town is situated may enter in the proper land office, and at the minimum price, the land so settled and occupied, and hold the same in trust for the several use and benefit of the occupants thereof, according to their several interests. Said section further provides that, as to the disposal of the lots in such town, and the proceeds of the sales thereof, such trust shall be executed under such regulations as may be established by the Legislature of the state or territory in which such town is situated.

Section 2388 of said act (U. S. Comp. St. § 4792) provides, in part:

"The entry of the land provided for in the preceding section shall be made, or a declaratory statement of the purpose of the inhabitants to enter it as a town-site shall be filed with the register of the proper land office, prior to the commencement of the public sale of the body of land in which it is included, and the entry or declaratory statement shall include only such land as is actually occupied by the town, and the title to which is in the United States. * * *"

The Legislature of the state of California, in pursuance of the direction contained in the said act of Congress, at its session of 1867, 1868 (Stats. 1867, 1868, p. 692), passed an act regulating the duties of the county judge under said act of Congress. The state statute provides that it shall be the duty of such judge upon being requested by petition by a stated number of resident householders of such town, to proceed to the taking of the necessary legal steps for the entry of the lands as a town site, to cause a survey of the lands to be made and a plat and map thereof made and filed, and mark by suitable monuments the lands which the inhabitants of such town claim, particularly designating in such survey all streets, roads, lanes and alleys, public squares, churches, school lots, cemeteries, and commons "as the same exist and have heretofore been dedicated in any manner to public use." etc.

The finding that block 6, at the time of the making of the Bethel survey, constituted public commons, is well fortified by the evidence. The dispute here is, as stated, as to the fractional portion of said block claimed by the mercantile company and a like portion thereof claimed by the railway company. As to these claims, we are of the opinion that there is not sufficient evidence to support either, and that the trial court was therefore right in rejecting the railway company's claim and wrong in allowing the mercantile company's claim. Before passing to a consideration of the evidence, however, a view of the provisions of the federal and state statutes may well first be taken.

The question first discussed in the briefs is as to the legal effect of the filing by the county judge of the declaratory statement on July 11, 1868, the contention of the defendant being that it is merely to withdraw temporarily the town-site lands from sale by the government—that is, "pending the submission and hearing of the proofs relative to the requirements of the town-site act"—and that it does not, as in the case of a cash entry, create an "inceptive right" to title to the lands involved.

Section 2388 of the Act of Congress of 1867, supra, explicitly provides two different initiatory steps looking to the patenting for town-site purposes government lands subject to such entry—the one by cash entry and the other by the filing of a declaratory statement. While it may be true that the filing of a declaratory statement will not bind the government, it certainly must be true that the effect of such filing is to protect, for a reasonable or limited time, the settlers for whose benefit the filing of such statement is made, against subsequent settlers. If it does not have this effect, then the declaratory statement can accomplish nothing and the insertion in the acts of Congress, relative to the acquisition of title to lands of the public domain of the provision authorizing the filing of such a statement, was an idle act. But the provision was intended to serve a purpose, as is shown by the decisions of the Department of the Interior and by the decisions of the courts.

In Re Application of Mather, 5 Decisions, Land Department, p. 633, it is said:

"The declaratory statement is a notice given by the settler of his intention to purchase the land and such notice protects his claim against subsequent sellers for a specified time. The notice is for the protection of the settler, not of the government."

In Re Pre-emption Declaratory Statement of Ellen Barker, 4 Decisions of Land Department of Interior, 514, 515, it is held:

"The filing of a declaratory statement is not made a condition precedent to the exercise of the pre-emption right (section 2259, R. S.); it is merely a protection against the claims of subsequent settlers," citing Johnson v. Towsley, 13 Wall. 72, 20 L. Ed. 485.

In Re Pre-emption Entry of Paris Meadows et al., 9 Decisions, Land Department of Interior, pp. 41, 44, it is said:

"What then is the office of the declaratory statement? It is a notice given by the settler of his intention to purchase the land described therein, and such notice protects for a limited time his claim against subsequent settlers, by being duly filed in the proper local land office, where it is to be noted on the proper record. Any one thereafter seeking to claim the land is not prohibited from putting a claim of record, but he is notified that he does so subject to the claim of the pre-emption declarant whose intention has thus been announced."

See, also, 10 Decs., Dept. of Interior, pp. 617, 618.

The case of Lockwitz v. Larson (Utah Sup. Ct.), 52 Pac. 279, is illuminating upon the matter in hand. That case involved a contest over lots in a town site located under the act of Congress of 1867, and it is therein held, in effect, that, as to the location of town sites on government domain, under the act of Congress of 1867, the filing of a declaratory statement by the proper officers is an "entry" within the meaning and intent of said act, and further held that—

"the interests of the occupants attach simultaneously with the making of a town-site entry, and that no person who may have occupied land on the town site previous thereto, or may occupy such lands thereafter, but who was not a settler and occupant at the time of the entry, is a beneficiary under the act, nor can such person derive any benefit directly by reason of the entry."

[1] It is to be conceded, of course, that the filing of a declaratory statement is not necessary to the location of a town site, yet, as has been shown, it is proper, under the act of Congress of 1867, to take that course as the initial step for making a town-site entry in preference over the making of a cash entry as the first step looking to the pre-emption of lands for such a purpose; and, while the scope of a declaratory statement does not extend as far as a cash entry in the preservation of the rights of the settlers; while, in other words, the declaratory statement may not be an actual entry in the same sense that a cash entry is and, to effectually serve the purposes for which it is intended, must be kept alive by following it up within proper time after it has been filed by other steps essential under the law to the establishment of a town site, yet the effect of such filing is, even if not as against the government, certainly as against the claims of others, to vest in those who are actual or bona fide settlers upon and occupants of portions of such lands at the time of the filing of such statement an inceptive right to the portions so settled upon and occupied.

It follows from the conclusion thus announced that, unless the evidence is such as to support the implied finding of the court that Chesrown was an actual settler upon and occupant of the land claimed by the defendant mercantile company, prior to and at the date of the filing of the declaratory statement on July 11, 1868, the judgment in favor of said defendant cannot be upheld; and so this brings us to an examination of the evidence.

[2, 3] In the first place, it is to be observed that a map made in 1863 was introduced in evidence and thereon block 6 was marked and designated as public commons and the Bethel map, as seen, corresponds in that particular with said map of 1863. We refer to the last-mentioned map because it is stated by counsel for the defendants that there is no evidence to show that prior to the survey of the town site made by Bethel in 1871 block 6 constituted a public commons and because, also, they contend that the mere fact that Bethel marked and designated block 6 on his map as public commons is not evidence that the block was previously regarded as public commons. Now, as to the Bethel map on which the whole of block 6 is marked and designated as public commons, said map having been made by and under the authority of the act of the Legislature of 1867 and 1868, supra, constitute, by virtue of the provisions of section 3 of said act, "Prima facie evidence of the contents and correctness thereof in all the courts of this state." Hence, the burden was upon the defendant mercantile company to overthrow or overcome, by competent evidence, the fixed probative effect imparted by the law to said map and the field notes made at the same time. This burden the mercantile company failed to sustain. Indeed, a careful examination of the record has firmly convinced us that Chesrown at no time, either prior or subsequently to the filing of the declaratory statement, was an actual settler upon any part of block 6, unless the wharf built by him over the water from said block may be deemed to be a portion thereof. In other words, there is no evidence showing that he ever settled upon or occupied the portion of block 6 now claimed by the defendant mercantile company, and that all that he ever did claim was the right to pass over the road crossing block 6 and leading to his wharf—that is, a right of way over the commons. He testified that he first went to Tahoe City in the year 1869 and departed therefrom permanently in the year 1877. He did not, however, reside continuously at said town during the period from 1869 to 1877, but during a part of the years 1869, 1871, and 1876 worked at Truckee and other places. In the fall of 1871, though, he started the construction of a wharf or pier on the lake, the same extending from the shore line of block 6 into and over the lake for a distance of about 150 feet. Upon this wharf or pier, at the extreme eastern end thereof, he erected, in the year 1872, a building, which he used for a warehouse and a saloon and which he termed, as it has ever since been known, the Tahoe Custom House. He stated that he started the saloon in said building in the month of May, 1873, and conducted it until the fall of 1873, when he sold the wharf and custom house to two parties named A. F. Campbell and J. O. Forbes. Here we may state that there is a variance between the testimony of Chesrown and the deed to Campbell and Forbes as to the time when the transfer was made. It is probable that Chesrown meant to testify that he opened the saloon in 1872, for the deed to his grantees was dated January 27, 1873. But this variance is immaterial. The deed conveyed

to Campbell and Forbes whatever title Chesrown had—

"in a certain peace of property situated at Tahoe City, * * * known as the Lake Tahoe Custom House, together with all lumber on hand, wharves, warehouses, break wattrs, furnutur, fictures with lands rodes & leading to the above described property." (This conveyance is the foundation and source of the mercantile company's claim to title to the portion of block 6 now occupied and claimed by it.)

Chesrown testified that when he built his wharf the land known as public commons (block 6) was not occupied by any one; that he never made use of the land adjacent to the wharf; that there was an old barn standing on the block, but that he did not know who put it there; that no one claimed to own the barn, and different persons at different times, including himself, had used it for temporary purposes and convenience. He said that he never claimed any part of block 6 and had never continuously occupied or used any part of it except a road leading to the wharf and passing over and through the commons, and that such use was only that which was common to the general public. He testified that he never at any time claimed to own the barn referred to and that while he was the owner of the custom house he did not know of any one claiming to own the commons or any part of them, that he never used any land around the wharf, and that he did not build a store there. He stated that he assisted Bethel a part of one day in the survey of the town site. While assisting the surveyor, he said he did not go out on the commons and point out any particular piece of land thereof which he claimed that he had ever settled upon or occupied, but that he merely told Bethel that he would like to have him mark out a passage way or roadway over the commons to his wharf for his convenience and that of others going to the wharf. It was however shown that, in a deposition taken prior to the trial, Chesrown stated that while the survey of the town site was being made by Bethel, he (Chesrown) pointed out and indicated to the surveyor the portion of the block now claimed by the mercantile company as the portion thereof that he "calculated to get a deed to," and that he requested Bethel so to mark the said block on the map. In fact, as to this matter, his deposition showed that he deposed as follows:

"I know I told him (Bethel) I wanted the piece of land there for a landing and told him to make that out when he was making the map, and to make so much front, and I thought he done it—he made the map right there in the hotel after he got done surveying."

He stated in his deposition that he pointed out the boundary lines of the portion that he claimed, and those lines correspond with those within which the portion of block 6 claimed by the mercantile company is embraced.

It is very clear from the foregoing testimony that, as stated before, Chesrown never claimed any portion of block 6 and much less was he a settler upon any portion of said block at the time of the filing of the declaratory statement. As a matter of fact, the deed from Chesrown to Campbell and Forbes, it will be observed, does not convey or purport to convey the lot claimed by the mercantile company as described in the pleadings. All that the said deed purports to convey is the wharf and the road or right of way leading thereto. It is true the word "lands" is used in the deed, but since it was unquestionably shown by Chesrown's own testimony that he never settled upon or claimed the land adjacent to his wharf, it would seem that what he meant by the use of the word "lands" was the right to pass over the road leading to his wharf, which road, as we have seen, passed over and across block 6. It is also a circumstance of some significance that Chesrown did not mention in his deed to Campbell and Forbes the barn referred to. It is obvious from this that, as he testified, he never made any claim of ownership of said barn or the ground upon which it stood. The fact that he told the surveyor that he desired to claim or get a deed to the portion of said block now claimed and occupied by the mercantile company is of no legal consequence. The act of Congress under which town sites may be located or established on the public domain intends that the same may be done entirely for the benefit of those who are actual settlers upon said town site at the time that any authorized initial step for such location is taken, and it is as clear as any proposition can be that the mere intention of a party to claim any portion of such town site, unaccompanied by the act of settling upon the same, cannot have the effect of vesting in such person any right whatsoever to the piece of land which thus he has in mind.

[4] Thus (to repeat) it is plain that Chesrown was not, nor did he pretend to be, a settler upon any part of the commons involved in this litigation at the time of the filing of the declaratory statement. Indeed, it is not shown by any evidence in the case—not even by his deposition of which certain portions got into the record for impeachment purposes only—that he was a settler upon any part of the commons at the time of the making of the cash entry in the month of December, 1871. It, of course, follows that the claim of the mercantile company, based as it is entirely upon the asserted rights of Chesrown, is wholly without a valid foundation and cannot be sustained, unless we are required to uphold its contention that the plaintiffs are estopped from maintaining this action as against it because it was shown that the said defendant, with the knowledge

and tacit assent or acquiescence of the plaintiffs, had for many years continuously been in possession of and had erected, and at great expense maintained, buildings for business and other purposes upon the lot claimed by it. In other words, the point is that the said defendant had put expensive improvements upon said lot and had maintained the same for many years under a claim of right and that the plaintiffs during all those years had knowledge of those facts and by silence had consented thereto. This involves the plea of the doctrine of equitable estoppel or estoppel in pais, but, assuming that such a defense is appropriate to a case of this character, the answer to the contention is that estoppel was not pleaded, and it is so well settled that authorities need hardly be cited in support of the proposition that where a party relies upon estoppel in pais it is his duty to plead it, and where he has failed to do this the question cannot be considered. See Burk v. City of Santa Cruz, 163 Cal. 807, 810, 811, 127 Pac. 154; Clarke v. Huber, 25 Cal. 593; Chapman v. Hughes, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982; Delger v. Jacobs, 19 Cal. App. 197, 206, 125 Pac. 258.

We are now brought to the consideration of the appeal by the Lake Tahoe Railway & Transportation Company. As seen, it is first contended by said company that it derived the right to the portion of block 6 over and across which its tracks are maintained and upon which it maintains certain buildings from the board of supervisors of Placer county. This defendant also undertakes to invoke the doctrine of equitable estoppel as a defense against the action by plaintiffs. But as to this last proposition we may as well here say that, since it is true that this defendant did not plead estoppel or rely upon it as defense in the court below, what we have said upon that subject in disposing of the appeal of the mercantile company is equally applicable to the attempt of the railway company now to avail itself of the defense of estoppel as against the right of the plaintiffs to maintain the action against it.

[5] The contention of the railway company that its right to occupy the portion of block 6 over which its tracks cross was granted to it by the board of supervisors is, in our judgment, not sustained by the record. The resolution by the board of supervisors in terms merely granted to said defendant the right to cross the road, known as the Truckee and Tahoe turnpike—

"at any and all points, and also a right of way along such parts of said road as the said company may desire to use for the line of said railway as shown by the map of preliminary survey and map of location to be hereafter filed."

It will be noted that there is nothing in this resolution or purported franchise which expressly vests in the railway company the right to run its tracks over or across block 6 or to erect and maintain buildings thereon. This right, however, in so far as the maintenance of its tracks and switches is concerned, might be implied from the fact, if it were a fact, that the turnpike crosses the commons and the line of tracks of the railway company runs along so much of said turnpike as passes through and over the commons. But, in the first place, it is to be stated that it is not clear that the wagon road running through the commons is a part of the Truckee and Tahoe turnpike. There is in other words, no evidence which satisfactorily shows that the road passing through the commons is any part of the turnpike, and in support of the claim that it acquired the right to run and maintain its tracks over and across the commons, the burden was upon the railway company unmistakably to show that the road passing through the commons was a part of the turnpike. This necessarily must be true, since the right purporting to be granted by the board of supervisors to the railway company to run its tracks along and across the said turnpike is expressly limited to the route of said turnpike, and the maintenance of its line of tracks along any other way or route would be beyond the terms of the purported franchise. In the second place, it is to be said that, even if the roadway running through the commons is a part of the turnpike, it appears from the evidence without conflict that the railway company did not run the portion of its tracks through the commons along such portion of said turnpike, but that it located its tracks on the commons a considerable distance from and west of said road. This, of course, was not in accordance with any right which the resolution of the board of supervisors purports to grant to the company.

But there is, it seems to us, another answer to the claim that the railway company legally derived any right from the board of supervisors as a result of the resolution referred to. Section 5 of the Act of 1868, as seen, provides that all streets, roads, etc., cemeteries, squares, and commons marked and platted on the map of the town site as prescribed and directed by the provisions of said act shall be deemed and considered and—

"they are hereby declared to be, dedicated to public use, by the filing of such town plat in the office of the county recorder, and *shall be inalienable, unless by special order of the board of supervisors of the county*, so long as such town shall remain unincorporated."

It is the contention of the railway company that it was in pursuance of the authority impliedly given the board of supervisors by the italicized portion of the foregoing provision of the act of 1868 that the resolution granting said company a right of way over block 6 was adopted. Indeed, if any authority existed in the board of supervisors to grant a railway company a right of

way over the public commons of the town site in question it is to be found alone in section 5 of the Act of 1868 as above quoted herein. But a serious question arises as to whether the provision referred to is to be given the construction to which counsel for defendants here attempt to subject it. We do not think the construction so given is sound. The public commons and all other pieces of property located within the town site and dedicated to a public use were and are held in trust by the authorized public authorities for the benefit of the inhabitants of the town of Tahoe City, and it certainly was not intended by the Legislature that the board of supervisors of the county should be vested with the arbitrary power of diverting the trust from its expressed purposes or of disposing of such pieces of property without the consent of those for whose benefit such property was set aside and held. It is not made to appear that such consent was given. It is true that the statute makes no express provision requiring such consent to be expressed, but the very fact that the lots which were dedicated to public use were intended to be and are held in trust for the benefit of the inhabitants of the town of Tahoe City is itself sufficient to preclude the idea that such property might be disposed of by the board of supervisors without first obtaining the consent of the beneficiaries of the trust. Moreover, it is very clear that, even if the board of supervisors had the power to transfer such property and so allow it to be converted to other uses than that to which it is dedicated, it would not have the authority to make a gift of the property, nor cut it up by granting rights of way either for railroads or other kinds of roads over and across the same. Manifestly, the provision under consideration is not limited in its application alone to public commons. It has application to all the pieces or parcels of property embraced within the town site which are dedicated to public use, and obviously it is not a reasonable assumption that it was intended that the board of supervisors should thus be vested with power to grant rights of way for a railroad over and across a cemetery or a school lot. There can be no doubt that the provision referred to was intended for the benefit of the inhabitants of the town, and its purpose probably was to enable them, whenever it might appear best for the public interests or the public convenience, to change the locations of their cemeteries, public schools, squares, and commons from where they are designated on the map to other places within the town site, in which case, we assume, if found necessary to do so, the board of supervisors may, upon request of such inhabitants, expressed in appropriate form, authorize by special order the sale of such lots, for the benefit, however, of the inhabitants.

There is no legal force to the contention of the plaintiffs that that part of the decree which permits and orders the removal by the railway company of the tracks, buildings, structures, etc., maintained on block 6 by said defendant, is erroneous. The record shows that the structures erected and maintained on the property, aside from the railroad tracks, consist of a couple of cabins, a paint shop, a shed, a cottage, an engine house and a car barn. These were erected and used as essential equipments of the railway company "plant," so to speak, or used in aid of the operation of the business of said defendant as a transportation company. The argument is that these structures became and are a part of the realty by virtue of the provisions of sections 660 and 1013 of the Civil Code.

[6] It is not necessary in this case to enter into a general or an exhaustive discussion of the principles underlying the law of fixtures or to undertake to distinguish the occasions on which personal property annexed to real property becomes a part of the latter from those on which such property when so annexed retains its original identity. It is enough to say that, generally speaking, the question whether personal property affixed to land becomes a part thereof is largely one of intention, and this intention is to be determined by certain general tests, of which the one most pertinent to the present consideration is the adaptation or application of the personal property to the use or purpose to which that part of the realty to which it is connected is appropriated. See 10 R. C. L. 1059; 11 R. C. L. 1062; Breyfogle v. Tighe et al. (Cal. App.) 208 Pac. 1008. In this case, it must be borne in mind, the personal property annexed to the land by the defendant railway company was for the purposes of its business as a transportation company. A railroad company is a public agency and an instrument of commerce, and its tracks and the buildings necessary to carry on its purposes are mere accessories to the operation of its business.

[7] The public necessity or requirements or the very exigencies of its purposes may at any time make it convenient and to the interest of the public as well as to itself to abandon a certain right of way and remove its tracks and equipments to another, and therefore we think it only responsive to sound reason to say that where a railway company lays its tracks and erects buildings for the proper conduct of its transportation business over and across land under a claim of right, such property cannot be held to become a part of the realty, but will at all times retain the character of personalty. The view thus expressed is sustained by a large number of cases, to which we will make simple reference without reproducing the expressions found therein. St. Louis, etc., R. Co. v. Nyce, 61 Kan. 394, 59 Pac. 1040, 48 L. R. A. 241; Wagner v. Cleveland, etc.,

R. Co., 22 Ohio St. 563, 10 Am. Rep. 770; Atchison, etc., R. Co. v. Morgan, 42 Kan. 23, 21 Pac. 809, 4 L. R. A. 284, 16 Am. St. Rep. 471; Sangamon, etc., R. Co. v. Morgan County, 14 Ill. 163, 56 Am. Dec. 497; Randall v. Elwell, 52 N. Y. 521, 11 Am. Rep. 747; 11 R. C. L. pp. 1079, 1080, and cases cited in the footnotes. The maintenance of railroad tracks and the essential equipments of the transportation business upon a piece of land involves as a rule the appropriation of so much of the land thus occupied to a use or purpose to which it is not naturally or customarily adapted. In other words, when realty is so appropriated and used, it is not devoted to the ordinary or usual purposes or uses of land. Nor, obviously, can it be said that the structures erected upon the land in dispute has had or can have the effect of enhancing the value of the land or improving or benefiting it for the purpose to which otherwise it might be devoted or, in ordinary circumstances, is adapted.

[8] We have now considered all the points discussed in the briefs with the exception of that involving the plea by all the defendants of the statute of limitations, as to which it is sufficient to say that it is well settled that, where a piece of ground is reserved for or dedicated to public purposes and therefore becomes public property, title thereto cannot be acquired as against the public by adverse possession, and the right of action to recover possession of the same for the public purposes to which it has been dedicated is not subject to the statute of limitations. Board of Education of the City and County of San Francisco v. Martin et al., 92 Cal. 209, 28 Pac. 799, and cases therein cited; Howard v. Oroville School District, 22 Cal. App. 544, 551, 135 Pac. 689.

For the foregoing reasons, that part of the judgment affecting and in favor of the Tahoe Mercantile Company is reversed, and that part of the judgment in favor of the plaintiffs and against the Lake Tahoe Railway & Transportation Company, including the part thereof awarding to said Lake Tahoe Railway & Transportation Company the right to remove its tracks, buildings and equipments from said block 6 of said Tahoe City, is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the Third Appellate District is denied.

In denying the petition for transfer to this court, we withhold approval of that portion of the opinion dealing with the power of the board of supervisors to grant rights of way across the common. Inasmuch as the opinion holds that the supervisors did not make such grant, it is unnecessary to determine that question.

WILBUR, Acting C. J., LENNON and LAWLOR, JJ., and RICHARDS, Justice pro tem., concur.

---

(59 Cal. App. 13)

## HEBERLING et al. v. DAY et al.
(Civ. 2433.)

(District Court of Appeal, Third District, California. Aug. 31, 1922.)

**1. Action ⟸38(1)—Alleging two sets of circumstances under which right to lien was invoked not statement of two different causes of action.**

In an action to foreclose a lien where it was alleged that plaintiff filed a lien on the building April 27th, alleging a statutory completion on April 1st, and in another paragraph that the building was accepted May 22d, and plaintiff, to cure defects in the lien filed, filed a lien June 4th, the statement of two different sets of circumstances under which the remedy may be invoked to secure a single relief did not involve the statement of two different causes of action.

**2. Mechanics' liens ⟸158—Amended lien may be filed within the 30 days within which original may be filed.**

An amended lien may be filed within the 30 days within which an original claim may be filed.

**3. Mechanics' liens ⟸5—Procedure adopted for invoking liens liberally construed.**

The right to liens is constitutional and the procedure adopted by the Legislature for invoking it must be liberally construed.

**4. Appeal and error ⟸1039(2)—Several causes of action, if united but not separately stated, without prejudice where defendants informed of all facts relied on.**

Where facts constituting several causes of action were separately stated, except that pleader omitted to allege "except that the allegations of paragraphs 1 to 5, both inclusive, are hereby expressly referred to herein and made a part," it was without prejudice to defendants; it appearing that they were informed of every fact which plaintiffs relied on for recovery.

**5. Mechanics' liens ⟸290(5)—Findings of two different completion periods from which lien claimants could file liens not inconsistent.**

Code Civ. Proc. § 1187, is not inconsistent merely because it provides that certain acts of the owner or those constructing a building shall, for the purpose of filing liens, be deemed equivalent of completion, and findings that there has been a deemed completion and also an actual completion of the same building are not inconsistent, as they merely mean that there are two different starting points from which the time within which claims of lien may be filed

begin to run and claimants could file claims with respect to either point.

**6. Mechanics' liens ⊂⊃281(2)—Evidence sustained finding of completion of building by use and occupation of owner.**

Evidence *held* to sustain a finding of completion of a building by use and occupation of the owner some time between April 1st, and April 27th.

**7. Mechanics' liens ⊂⊃281(4)—Evidence sustained finding of amount of claim for lumber.**

Evidence *held* to support finding of amount due lumber company on claim for lien and that materials were furnished on estimates.

**8. Mechanics' liens ⊂⊃154(2)—Affidavit attached to notice of claim for lien held sufficient.**

Where the affidavit attached to a notice of claim declared that the claim "contains a correct statement of * * * demand after deducting all just credits and offsets," the requirements of Code Civ. Proc. § 1187, were met.

**9. Mechanics' liens ⊂⊃204—Assignor of lien claim held to have sufficient interest to entitle him to file lien.**

Where a lien claimant assigned his claim to a bank as collateral to a loan, even though prior to the date of filing, he still had sufficient interest in the claim to entitle him to file a lien.

**10. Mechanics' liens ⊂⊃157(1) — Absence of corporate seal on notice of claim did not render claim invalid.**

Corporate seals import only prima facie verity to corporate contracts, and where a notice of claim of lien, properly verified, was refused of record on June 20th, because the corporate seal of claimant was not affixed, and returned to claimant with reason for refusal, under Civ. Code, § 1170, on reapplication the claim will be deemed to have been filed as of date of first transmission to recorder.

**11. Mechanics' liens ⊂⊃158—Claimant, having filed original and amended claims, not put on election as between them.**

Where both the original and amended claims related to the same indebtedness, claimant need not be put to an election as between them, and there was no error in admitting the claims without requiring such election.

**12. Mechanics' liens ⊂⊃157(1) — Lien notice failing to state that amount was due "after deducting all just credits and offsets" not defective.**

In view of Code Civ. Proc. § 1203, declaring that errors in the statement of demand shall not invalidate a claim, the omission of statement in a notice of claim of lien that the amount of the demand was due "after deducting all just credits and offsets," as provided by section 1187, did not make the notice defective.

**13. Pleading ⊂⊃403(2)—Omission in complaint to enforce lien cured by answer.**

In a proceeding to foreclose liens where there was a prayer that the owner pay into court money due the contractor, any omission in the complaint to allege that the owner had money in its possession due the contractor was cured by the owner's answer alleging it had a balance in its hands and asking that its liability be limited to that amount.

**14. Principal and surety ⊂⊃163—Judgment of $10,000 not excessive as to surety bound for $13,000.**

Where the net amount of a judgment against a principal and his sureties was approximately $10,000, it was not excessive as to sureties whose liability on their respective undertakings was in no case less than $13,000.

Appeal from Superior Court, Tulare County; George L. Jones, Judge.

Consolidated actions by B. U. Heberling, doing business as the Visalia Planing Mill, and others, against D. B. Day and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Robert T. Linney, of Los Angeles, Karl A. Machetanz, of Exeter, and Lamberson & Lamberson, of Visalia, for appellants.

Farnsworth, McClure & Burke, Power & McFadzean, and Bradley & Bradley, all of Visalia, for respondents.

HART, J. The plaintiffs instituted actions in the superior court of Tulare county for the foreclosure of certain liens for materials furnished for and labor performed on the construction of a certain building in the city of Visalia, and also for recovery of judgments against the sureties upon the bond furnished by the contractor to the owner of the building for the faithful performance of the terms of the building contract to satisfy the several demands sued for. By order of the court the actions were consolidated. Section 1195, Code Civ. Proc.

On the 3d day of May, 1917, one D. B. Day, a building contractor, and the Visalia Elks Building Association, a corporation, entered into a written contract, by the terms of which the said contractor agreed to construct for said corporation, in the city of Visalia, and furnish therefor all necessary labor and material, a three-story building and basement, for the total sum of $53,287. Attached to the contract were the plans and specifications, and for the faithful performance of the terms of said contract the said Day, as principal, and the defendants, Ragle, Cole, J. P. Day, and Blair, as sureties, executed and delivered to said association a bond in the penal sum of $26,644, as follows: Ragle, in the sum of $14,000; Blair, in the sum of $15,000; Cole, in the sum of $14,000; Day, in the sum of $13,000. The condition of said bond was that said Day would faithfully perform said contract in accordance with the plans and specifications annexed thereto, pay all claims of all persons performing labor upon or furnishing materials used, "and to be

used in said work," and to turn over said building to said association completed in conformity with the contract and plans and specifications, within the time limited in said contract, free and clear of all claims, demands, liens, etc. This bond, with the contract, was filed for record on the 3d day of May, 1917, in the office of the county recorder of Tulare county.

The complaint alleges that said building was completed and said contract between the Elks Building Association and said Day was fully performed on the 21st day of May, 1918, and that on the 22d day of May, 1918, said owner, building association, formally accepted said building, and caused to be prepared and to be filed in the office of the county recorder of Tulare county a notice of the completion of said building, which notice contained all the facts required to be set forth in such a notice and stated that the building had been completed on the 21st day of May, 1918. Then follows a statement in detail of the materials furnished and used in said building by plaintiff Heberling, doing business as Visalia Planing Mill, and the statement that on the 27th day of April, 1918, said Heberling, etc., filed for record in the office of the county recorder of Tulare county a claim of lien duly verified by his oath for the purpose of securing and perfecting a lien for the amounts due him for the materials furnished as alleged; that thereafter, and within 30 days from the date of the actual completion of said building, and for the purpose of curing certain defects in said lien, and for the further purpose of securing and perfecting his lien for the amount due him as explained, said Heberling, etc., filed for record in the office of the county recorder of the county of Tulare, on the 4th day of June, 1918, an amended claim of lien duly verified by his oath.

The claim of the plaintiff Clark doing business as Visalia Plumbing & Sheet Metal Company, is next set out in the complaint with particularity, it being based upon a subcontract between said Clark, etc., and the contractor, Day, for the furnishing of the necessary labor and materials, etc., for the installation of the plumbing, heating, ventilating, and vacum cleaning system of the building and also for the sheet metal work. In this paragraph of the complaint it is alleged that the owner of the building and its representatives and lessee entered into the use and occupation of said building on or shortly after the 1st day of April, 1918, and further alleged that said building was completed within the meaning of section 1187 of the Code of Civil Procedure by reason of such entering into the use and occupation of said building. It is alleged that on the 29th day of April, 1918, said Clark, etc., filed in the office of the county recorder of Tulare county his claim of lien duly verified for the materials so furnished and the labor so performed. It is then alleged that within 30 days from the date of the actual completion of said building, to wit, on the 21st day of May, 1918, said Clark, for the purpose of curing certain defects in the lien theretofore filed, filed for record in the office of the county recorder an amended claim of lien duly certified, etc.

The claim of each of the other plaintiffs is set out in the complaint in the usual form, and as to each it is alleged that a claim of lien was properly prepared and filed within due time. As to the claim of the First National Bank of Visalia it is alleged that one J. B. Murphy, having under a subcontract performed all the cement work and the lathing and plastering in said building required by the plans and specifications for the same and filed his claim of lien for the balance due for said work in the sum of $2,524.32, subsequent to the filing of said claim of lien, sold and delivered said lien and the debt to secure which it was filed to the said bank.

The prayer is for a judgment against the contractor as principal and Ragle, Cole, Blair, and John P. Day, as sureties on the faithful performance bond in favor of each of the plaintiffs in the several amounts due them and for which claims of lien were filed: that the said building association be required to pay into court any money due and owing from it to the said contractor; and that said amount, whatever it may be, be apportioned pro rata among the various lien claimants and plaintiffs herein, etc.

The defendants demurred to each of the several counts of the complaint on general and special grounds, but the only point urged on the demurrer is that the complaint, in so far as are concerned the two several counts in which the Heberling and Clark claims are set out, is faulty in that therein there are two causes of action improperly joined and not separately stated. This point will later be considered.

The demurrer to each of the counts having been overruled, the defendant D. B. Day answered the complaint and each of the several counts setting up the claims of the plaintiffs as lien claimants, and the sureties on the faithful performance bond likewise answered the complaint.

The answers of the Elks Building Association to the complaint and each of the several counts thereof are not in the transcript, having been inadvertently omitted therefrom. They have, however, been certified to this court on a suggestion of a diminution of the record, and it is ordered that they be made and that they now do constitute and are a part of the record on this appeal. These answers are in all particulars substantially alike, and therein it is, among other things, alleged (after averments as to the making of the contract between D. B. Day

and the association, as already explained, the execution and delivery to it of a faithful performance bond by said Day, in an amount not less than 50 per cent. of the contract price of said building, and the due recordation of said contract and bond) that said association made progress payments on said contract as required thereby, and retained for 35 days and still retains, of the contract price, the sum of $13,321.25, which sum is 25 per cent. of said price. Then, after allegations concerning the work of installing and putting in place upon one end and side of the building an "Anton Lateral Arm awning" by one E. C. Glunz under a contract with said contractor Day, said awning being called for by the contract between said Day and said association, and the payment by the latter to said Glunz of the sum of $717.75 for the materials and work required for that purpose, the said answers proceed:

"Alleges that it is and would be just and equitable to restrict the recovery under the liens filed against said building and property to the amount of $13,321.25, less the said sum of $717.75 to be paid said Glunz as aforesaid, and that judgment be rendered against said contractor and the sureties on his said bond for any deficiency or difference that there may remain between said amount due to said contractor, less said $717.75, and the whole amount found to be due to lien claimants for labor and materials furnished by them for use in and used in said building, in the construction thereof."

The answers referred to further allege that the building association is ready, able, and willing to pay into court, subject to any order made by the court with reference thereto, said sum of $13,321.25, minus the said sum of $717.75 so paid to said Glunz. It is then stated in said answers that certain persons (naming them) had filed claims of lien against the building and had brought suits to foreclose the same; that the contractor, Day, disputed the demands for which said liens were filed, claiming that there were certain offsets existing in his favor and against said demands for which he had not been credited, for which reason, so said answers aver, an accounting was necessary and should be had to the end that it may be ascertained and determined what the true amounts due to the several lien claimants are. The said answers pray that the building association be allowed to pay the said "hold-back" fund into court for the use and benefit of the lien claimants, in accordance with their several rights, as determined and adjudged by the court.

It is not essential to this decision to refer in detail or even recapitulate in substance the findings. It will be sufficient to consider, as will hereinafter be done, the findings which are attacked on one ground or another. We may, at this point, state that, as to the claim of E. C. Glunz, referred to in the answers of the building association, as above indicated, the court found that after the same was filed the said Glunz sold, assigned, and delivered the claim, together with the lien filed to secure the same, to the building association in consideration of the payment to said claimant by said association the full amount of said claim and that said association has ever since and now is entitled to participate in the hold-back fund "now in its hands to the extent of its proportionate part of such fund," etc.

The judgment decrees that the contractor and his bondsmen are liable for the several sums adjudged to be due the lien claimants; that the Visalia Elks Buildings Association has in its possession the sum of $13,066.45 for distribution among the plaintiffs; that the plaintiffs have liens upon the property and the building of the association amounting in the aggregate to the said last-mentioned sum; that each of the plaintiffs has a lien upon said building for that proportion of the amount adjudged to be due him which bears the same ratio to the total amount due him that the sum of $13,066.45 bears to the total of all the amounts adjudged to be due to the plaintiffs. It directs the building association to deposit in court said sum of $13,066.45 within 10 days from the entry of the judgment and orders the clerk forthwith to distribute that amount pro rata among the plaintiffs, and further provides that on the payment of said sum to the clerk the building and property of the building association shall be released and discharged from the plaintiffs' liens. It is further decreed that in the event of the failure of the building association to comply with the requirement of the judgment as to paying into court the "hold-back fund" or the said sum of $13,066.45, within 10 days from the date of the entry of the judgment, the real property of the association described in the pleadings shall be sold in accordance with the usual practice with reference to mortgage foreclosure sales, and that in the event that said property be sold for more than enough to satisfy said claims of lien to the extent and in the amount of said last-mentioned sum of money, together with the costs of sale, the surplus shall be paid over to said association. It is further decreed that the relief awarded to said plaintiffs and specified in paragraph 1 of the judgment to the effect that the builder and his bondsmen are liable for the several sums adjudged to be due the lien claimants, etc., "is entirely separate and distinct from, and independent of, the relief which said plaintiffs are entitled to have by participating in said sum now in the hands of said association and to be paid into court as hereinbefore provided, or, in the event that it is not so paid into court, as hereinbefore provided, of foreclosing and selling said prop-

erty, but nothing in this judgment contained shall be construed as awarding said plaintiffs, or any of them, or entitling them, or any of them, to more than one recovery hereunder."

It was stipulated by counsel for the appellants that the Elks Building Association "did pay into the superior court of the county of Tulare, state of California, within the time limited in said action, said sum of $13,066.45, which was the 25 per cent. of the contract price, held back by said association." This stipulation does not appear in the printed record on appeal, but is here on suggestion of a diminution of the record, and it is ordered that the same be made a part of the record on this appeal. The points urged by the appellants are quite numerous and involve objections to the complaint in certain particulars and also the claim that certain findings are not supported and that others are inconsistent with each other. An examination of these points has readily convinced us that there is no substantial merit to any of them, and they therefore deserve and will receive but limited consideration herein.

[1] The objection to the complaint is directed against the counts setting forth, respectively, the claims of Heberling and Clark and is based upon the ground that two different causes of action are improperly united and not separately stated in each of said counts. In the Heberling count it is alleged, as will be noted, that on the 27th day of April, 1918, said Heberling filed a lien upon the property of the building association upon the hypothesis that there had been a statutory completion of the building (by occupation and use) on the 1st day of April, 1918, as alleged in the complaint, and it is also alleged in another paragraph of said count that the contract was fully performed on the 21st day of May, 1918, that the building association formally accepted said building on the 22d day of May, 1918, and that Heberling, for the purpose of curing certain defects in the lien so filed, filed a claim of lien on the 4th day of June, 1918. Similar allegations are contained in the Clark count. The argument is that these allegations involve the statement of and improperly join, without separately stating them, two different causes of action, and that the demurrer of the appellants to both counts should have been sustained on that ground. It is perfectly clear that both claims of lien relate to a single indebtedness and that one cause of action only is stated in each of said counts. The contention of the appellants involves a confusion of the relief asked and the remedy whereby it is sought to secure such relief. The lien is merely the remedy provided by the Constitution for the enforcement of the payment of a debt which is incurred against the contractor or the owner of the property by reason of the performance of labor on or the furnishing of materials used in the construction of work upon certain property by third parties, and, obviously, the mere statement in the complaint of two different sets of circumstances upon which that remedy may be invoked to secure a single relief does not involve the statement of two different causes of action.

[2,3] But, in this connection, it is further contended by appellants that there is no authority in law for the amendment of a claim of lien. While express authority is not to be found therefor in the Code, no sound reason against the right to file an amended lien within the 30 days within which an original claim may be filed is apparent. It must be borne in mind at all times that the right of laborers, mechanics, and materialmen to liens for the enforcement of their demands for labor bestowed upon and materials furnished for and used in buildings or other structures, comes directly from the Constitution, and that the rule now is, if justly it were ever otherwise, that the procedure adopted by the Legislature for invoking that right must be liberally viewed and construed. The contention of appellants as to the right to file an amended claim of lien within the time for filing the original claim is, in principle, determined adversely to said contention in Schwarz & Gottlieb, Inc., v. Marcuse, 175 Cal. 401, 165 Pac. 1015.

[4] As to the Murphy claim (assigned to the plaintiff First National Bank, etc.), it is contended that several causes of action are improperly united and not separately stated, to wit: (1) An action on a contract to furnish certain material; (2) an action for the reasonable value of extra work and material. Conceding, for the argument, that these causes of action should have been separately stated, and that the court erred in overruling the demurrer, such error was in no wise prejudicial to appellants. The facts constituting these several causes of action are separately stated, except that the pleader omitted to allege, as in the various other counts, "that the allegations contained in paragraph 1 to 5, both inclusive, are hereby expressly referred to herein, and made a part of this cause of action." Said allegations 1 to 5 are to the effect that the plaintiffs were partnerships or corporations as the case may be and that the Visalia Elks Building Association was a corporation; that the association was the owner of the lot on which the building was erected and caused the building to be constructed; the execution of the contract for the erection of the building; the execution of the faithful performance bond; and the completion of the building. It thus appears that the defendants were fully informed of every fact upon which plaintiffs relied for a recovery. The particular extra work and material, and the reasonable value of each thereof, constituting the several caus-

es of action contained in the single count, are fully stated. The case is not like that of Bowman v. Wohlke, 166 Cal. 121, 135 Pac. 37, where the amended complaint alleged a series of acts, constituting separate causes of action, in one count and then alleged damages in the lump sum of $10,000. The court said (page 127 of 166 Cal., p. 37 of 135 Pac.):

"The complaint in all but two or three instances, where certain items of special injury were alleged, failed to set forth the amount of damages claimed on account of each cause of action. So much, at least, the defendants were entitled to know."

[5, 6] The findings which it is claimed are inconsistent with each other are Nos. 11 and 12. The asserted inconsistency is in the fact that finding 11 declares that the building was actually completed "on or before" the 21st day of May, 1918, while finding 12 states that the building association, its representatives and lessee, entered into the use and occupation of said building on the 1st of April, 1918, and that such entry, use, and occupation "on its part was the equivalent of the completion of said building within the meaning of section 1187 of the Code of Civil Procedure." These findings follow the language of section 1187 of the Code of Civil Procedure, and, if they are inconsistent, so are the provisions of said section. It is manifest, though, that said section is not inconsistent merely because it provides that certain acts by the owner or of those engaged in constructing the building or structure shall, for the purpose of filing liens, be deemed the equivalent of completion; and findings that there have been a deemed completion and also an actual completion of the same building merely mean that there were two different starting points from which the time within which claims of lien may be filed began to run and that lien claimants were at liberty to file their claims with respect to either starting point. It is clear that there can be no inconsistency between findings so declaring. In this connection, it is to be said that there is no foundation for the claim that there is no evidence to support finding 12 to the effect that the building association entered into the use of the building between April 1 and April 27, 1918. The defendant (contractor) Day himself testified (Trans. p. 482) that, while he could not fix the exact date the Elks Lodge moved into the building, he did know that it was during the month of April; that he attended a lodge meeting in the month of April. He further stated (Trans. p. 483):

"The Elks Lodge accepted the building in the month of April. I attended a meeting of the lodge at that time."

[7, 8] It is insisted that the finding that plaintiff Spalding Lumber Company agreed to and did furnish material to the value of $8,885.41 is not supported. The witness Hughes, secretary of said plaintiff, gave a full and complete statement of the materials furnished for and used in the building and testified that the total reasonable value of the materials so furnished and used was the sum of $8,885.41, of which the sum of $5,864.88 had been paid, leaving an unpaid balance of $3,020.53 (Trans. pp. 378, 379). This testimony, of course, affords full support for the finding. Hughes testified that said plaintiff agreed to and did so furnish said materials, and this answers the objection that there is a fatal variance between the allegations and proof as to this claim, in that it is alleged that the materials were furnished under contract, whereas the proof shows that they were furnished on estimates. But the validity of the Spalding claim of lien is challenged on the further ground that "the notice of lien fails to state that all just credits and offsets have been made." The affidavit of Secretary Hughes atached to the notice of claim declares that said claim "contains a correct staement of said claimant's demand after deducting all just credits and offsets." This certainly sufficiently meets the requirement in that respect of section 1187 of the Code of Civil Procedure.

It is claimed that there is no evidence to support the finding that the plaintiff Visalia Water Company furnished water to the contractor for the purposes of the construction of the building to the value of $29.48. We have not been required to examine the record to ascertain whether there was evidence, by way of the testimony of witnesses, introduced in support of said claim for the reason that the answer of the contractor Day and that of the sureties admit that water to the value of $30 was so furnished.

[9] The finding (19) as to the Murphy claim for extras in the sum of $250.50 is attacked for want of evidence to support it, but the attack is groundless. Contractor Day approved and accepted the itemized bill for extras furnished by Murphy, the total amount thereof being the sum of $250.50. It is also contended that Murphy's lien is invalid because prior to filing the same he assigned his claim to the plaintiff bank. The president of plaintiff bank testified that Murphy assigned the claim as collateral security for a loan made to him by said bank. This testimony is corroborated by the fact that Murphy executed and delivered to the bank his note for said loan. Therefore, even if Murphy assigned the claim to the bank prior to the date of the filing of his claim of lien, he still had sufficient interest in the claim to entitle him to file a lien. 18 R. C. L. p. 561. The reference to the testimony as to this assignment is a sufficient reply to the contention that the finding that said assignment was made is without evidentiary support.

[10] The claim that there is no evidence to

sustain finding 22 that the plaintiff Pacific St. Elec. Co. filed its claim of lien on June 20, 1918, is, in our opinion, without substantial merit. The objection grows out of the fact that the corporate seal of the said plaintiff (a corporation) was not affixed to the notice of claim of lien; the county recorder refusing to file the claim on that ground and returning the same to said corporation and notifying it of such refusal and the reason therefor. Upon receipt of said claim, said plaintiff remailed the same to the recorder and requested him to file the said claim as of the date the same was first received by said recorder. The specific contention is that the claim was not filed in contemplation of law until the day the claim was received back by the recorder. The recorder testified that the claim of lien was delivered to his office on June 20, 1918. The claim was verified by a duly authorized officer of the corporation, and this fact appeared in the affidavit attached to the claim. We do not think the absence of the plaintiff's corporate seal from the affidavit rendered the notice of claim of lien invalid. The rule is not now, as formerly, that a corporation cannot "express its will, or enter into a contract, except through an instrument under seal." Thompson on Corporations (2d Ed.) § 1920. The modern rule seems to be that the seal of a corporation performs no other or further function than to impart prima facie verity to the due execution of its written contracts or obligations, and that the execution of contracts by corporations may be shown by parol. Commercial S. Co. v. Modesto Drug Co., 43 Cal. App. 162, 178, 184 Pac. 964. Under section 1170 of the Civil Code, the claim of lien, being duly acknowledged by an officer of the corporation authorized to verify and cause it to be filed, was deemed to be filed on the day (19th day of June, 1918) when said officer deposited it with the county recorder, and, we may add that, since the claim was upon its face in all respects in legal form, it did not rest with the recorder to question the sufficiency of the form thereof and so refuse to record it. But, at all events, under section 1197 of the Code of Civil Procedure, the said plaintiff has a right of personal action against the contractor, and, on the authority of General Electric Co. v. Baltimore Bonding Co., 180 Cal. 675, 182 Pac. 444, said plaintiff was entitled to proceed in a direct personal action on the faithful performance bond.

The objection that the finding as to the Glunz claim, heretofore referred to, is not authorized by the evidence, cannot be sustained. On pages 460 and 467 of the transcript will be found testimony by Glunz to the effect that he agreed with the contractor to and did put up an awning on the building for the price of $717.75, and that that sum represented the reasonable value of said awning and the labor performed upon it.

[11] There is no legal force to the proposition maintained by appellants that Heberling and Clark should have been put to an election as between the original and amended claims filed by them, respectively, and that it was error to admit the claims without requiring such election. Both the original and amended notices of claim of lien in each instance, as already pointed out, related to the same indebtedness, and it was therefore not material which of the two was relied on, it appearing that each was filed within due legal time after the completion, statutory or actual, of the building.

[12] It is urged that the notice of claim of lien of the plaintiff Pioneer Brick Company was defective because it failed to state that the amount of the demand therein set forth was due "*after deducting all just credits and offsets,*" the italicized words having been omitted from the notice. The notice states that "there now remains due, owing and unpaid from said D. B. Day to this claimant the sum of $636.35." Section 1187, supra, provides that a lien claimant "must file for record * * * a claim of lien containing a statement of his demand after deducting all just credits and offsets." Assuming that that language means that the claim must contain the statement that there are "no just credits or offsets" against the claim where there is none, the omission of a statement to that effect in the notice of claim of lien cannot have the effect of invalidating the claim or the act of recording it, since section 1203 of the Code of Civil Procedure expressly declares that errors or mistakes in the statement of the demand or of the amount of credits, etc., shall not have that effect. It is not claimed that there were any credits or offsets which should have been deducted from the demand set forth in said claim.

[13] It is contended that, while the prayer of the Heberling et al. complaint asks that the building association be required to pay into court any money due and owing from it to the contractor, D. B. Day, yet there is no allegation in said pleading that said association had in its possession or custody any moneys which were due the contractor under the contract. It is true that the complaint contains no allegations as to the so-called "hold-back" fund, but, as before shown, the answers of the building association allege that it has a balance (25 per cent. of the contract price) in its hands and prays that the liability of said association (the owner) be limited to the amount of such fund. This was, of course, sufficient to show that there was a fund in the hands of the owner subject to be applied to the payment of the debts arising by reason of the performance of the contract by the contractor.

[14] There have now been considered such of the points affecting the remedy by lien invoked herein as it has been conceived merit-

ed special attention, and, as must be obvious from the discussion, those points are wholly devoid of force. If, however, it were necessary to concede that any of the points so urged are well taken, the plaintiffs, as before suggested, have their right to a direct action against the contractor and his sureties on the faithful performance bond; and they have, as seen, exercised that right in this case. It follows that, even if any of the claims of liens or all of them were for any reason invalid, the plaintiffs and each of them are fully protected by the judgment against the sureties on said bond. And in this connection, we may consider the contention of the appellants that the judgment against the sureties is excessive. The aggregate amount of the judgment is $23,000. The defendant sureties obligated themselves in the sum of $14,000, $14,000, $15,000, and $13,000, respectively. The judgment is joint and several. The judgment directs the owner to pay the sum of $13,321.25 into court to be applied pro rata on the judgment. As seen, a stipulation is on file herein to the effect that the Visalia Elks Building Association did pay said sum into court and that on the stipulation of the parties it was paid to the various claimants. It thus appears that by such payments the judgment has been reduced to about $10,000, or $3,000 less than the amount of the obligation of any surety. Under such circumstances the appellants cannot complain.

The judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

189 Cal. 704

## FORWARD et al. v. SAN DIEGO COUNTY et al. (L. A. 7133.)

(Supreme Court of California. Oct. 10, 1922. Rehearing Denied Nov. 9, 1922.)

**1. Officers ⟸100(1)—Appointment of advisory board held to increase compensation of assessor in violation of Constitution.**

Where the Board of Supervisors of San Diego county, acting under Pol. Code, § 4041b, as amended by St. 1919, p. 1336, appointed an advisory board to co-operate with county assessor, whether members of the advisory board are officers or employees, their function is to aid the assessor in performing his duties, and hence the effect thereof was to increase the compensation of the assessor after his election and during his term of office, in violation of Const. art. 11, § 9.

**2. Statutes ⟸102(2) — Statute for appointment of advisory board to co-operate with assessor held to violate requirement as to general and uniform laws as to compensation.**

Pol. Code, § 4041b, as amended by St. 1919, p. 1336, providing for appointment of an advisory board to co-operate with the county assessor whenever, in the judgment of the board of supervisors of any county, it is deemed for the county's best interest, violates Const. art. 11, § 5, requiring general and uniform laws for appointment and compensation of officers, in that it delegates to the board of supervisors the right to determine when the advisory board shall be appointed, thus allowing the board to add to the assessor's compensation in its discretion, the allowance of additional deputies or assistants being an increase thereof.

In Bank.

Appeal from Superior Court, San Diego County; Edgar A. Luce, Judge.

Action by John F. Forward, Jr., and others, against the County of San Diego and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

H. S. Utley, of San Diego, and E. S. Lovett, for appellants.

Haines & Haines, of San Diego, for respondents.

LAWLOR, J. Plaintiffs, as citizens and taxpayers of the county of San Diego, brought this action against the said county, C. R. Hammond, as auditor of the said county, and George W. Heston, as treasurer of the said county, to have annulled and declared void an order of the board of supervisors of the said county appointing "an advisory board to co-operate with the county assessor of the said county of San Diego in making the annual appraisement of real property therein for taxation purposes," and appointing the three members thereof; to restrain, enjoin, and prohibit defendant C. R. Hammond, as auditor of the said county, from drawing warrants for claims presented to the board of supervisors in the month of September, 1921, and allowed by it, or any claims thereafter arising under the order, for compensation and expenses of members of the advisory board; to restrain, enjoin and prohibit defendant George W. Heston, as treasurer of the said county, from paying any such claim; for general relief and for costs. The order was passed by the board of supervisors on June 12, 1921, under the authority of section 4041b of the Political Code as amended by St. 1919, p. 1336, which provides:

"Whenever, in the judgment of the board of supervisors of any county, it is deemed to be for the best interest of the county, on account of changes in land values, that there be appointed an advisory board to co-operate with the county assessor in making the annual appraisement of real property therein for taxation purposes, the board of supervisors, by a four-fifths vote, may appoint such advisory board, which shall consist of three members. Before any person thus appointed shall enter upon the duties of his office, he shall take the oath of office and shall execute such bond as the supervisors may prescribe. The members of the advisory board shall be allowed their necessary expenses and each member shall receive a compensation of not to exceed ten dollars per day while actually engaged in the duties of his office. Competent persons may be employed to compile records necessary for determining the true value of land. All claims for compensation and expenses hereunder shall be paid out of the general fund of the county after approval by the board of supervisors."

In the order the three members were appointed to serve on the advisory board, and pursuant thereto they took the oath of office, furnished bond, and proceeded to exercise the powers and functions of such advisory board. The claims for compensation and expenses above referred to were presented and allowed.

In their complaint plaintiffs alleged there was no warrant of law for the appointment of the members of the advisory board or the creation of the board, that the order of the board of supervisors is in violation of certain sections of the Constitution of this state, and that the appointments of the members of the advisory board were ultra vires the board of supervisors. Defendants interposed a demurrer on the grounds that the complaint did not state facts sufficient to constitute a cause of action, or to entitle plaintiffs to relief by injunction or to any equitable relief whatsoever. The demurrer was overruled, and, defendants declining to answer, judgment was entered declaring the order of the board of supervisors void, and enjoining each of the defendants as prayed in the complaint. From that judgment this appeal is taken.

[1] Counsel for the respective parties have

dealt chiefly in their briefs with the question whether or not the members of the boards provided for in section 4041b are county officers or employees, for respondent contends that, if they are public officers, the act violates section 4, art. 11, of the Constitution, providing for a uniform system of county governments, and section 5 of article 11, to the effect that the Legislature shall provide by general and uniform laws for the election or appointment of county officers. Respondents also insist that the allowance of their claims would, in effect, amount to an increase of the salary of the county assessor, in violation of section 9 of article 11, of the Constitution. We are of the opinion that this latter contention must be sustained, and that it is immaterial in this connection whether the members of the boards are officers or employees. Whichever they are, their function is to aid the county assessor in performing the duties which devolve upon him by law.

At the time of the adoption of section 4041b of the Political Code San Diego county belonged to the seventh class (Pol. Code, §§ 4005c, 4006, since amended, Stats. 1921, p. 2), in which county the assessor was paid a fixed amount for his own salary and allowed deputies at specified salaries (Pol. Code, § 4236), to be paid out of the county treasury (Pol. Code, § 4288).

In Newman v. Lester, 11 Cal. App. 577, 105 Pac. 785, it was held that—

"Where the statute provides a fixed salary for the officer and a separate allowance for expenses of his office (Kirkwood v. Soto, 87 Cal. 394, 25 Pac. 488); or a fixed salary for the officer and a fixed salary for a certain number of deputies or clerks, all payable out of the county treasury, an increase of such separate allowance for expenses or for deputies, whether in the number of deputies or the amount paid to each, is not a violation of the constitutional provision that 'the compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office' (Const. § 9, art. 11)."

This decision has been followed in the recent case of Foucht v. Hirni (Cal. App.) 208 Pac. 362, but in neither case was there a petition for a hearing in this court. The doctrine announced in Newman v. Lester, supra, was referred to in Elder v. Garey, 19 Cal. App. 775, 127 Pac. 826, and County of Calaveras v. Poe, 167 Cal. 519, 140 Pac. 23. This is the first time the precise question has been presented to this court.

In the case of Newman v. Lester, supra, the court apparently overlooked the fact that the Political Code (section 4290) expressly required that the officer should pay all deputies and assistants other than those there mentioned, and that this provision applied to all the counties in the state, regardless of whether or not in the Political Code a lump sum was allowed the officer or whether he was allowed a certain number of deputies at a salary fixed in the statute. At the time the case of Newman v. Lester, supra, was decided, section 4290 of the Political Code provided:

"The salaries and fees provided in this title shall be in full compensation for all services of every kind and description rendered by the officers named in this title either as officers or ex officio officers their deputies and assistants, unless in this title otherwise provided, and all deputies employed shall be paid by their principals out of the salaries provided in this title, unless in this title otherwise provided. * * *"

Under this section, which, so far as hereinabove quoted, remains the same, it is obvious that to relieve the officer of the obligation to pay extra deputies and assistants, is to increase his salary to that extent, irrespective of the question as to whether in that particular county he is given a lump sum from which he is to secure his own remuneration and pay all deputies or assistants, or whether he is given a fixed salary and a certain number of deputies and assistants, also at fixed salaries, and is also required to pay additional deputies and assistants from his own salary. The case of Newman v. Lester, supra, having overlooked this provision of the statute, cannot be regarded as authority, and this is equally true of Foucht v. Hirni, supra.

Section 5, art. 11, of the Constitution, requires that the Legislature shall provide by general and uniform laws for the appointment of county officers, and shall regulate their compensation. It was held in Tulare County v. May, 118 Cal. 303, 50 Pac. 427, that the compensation of officers by means of the two systems referred to in Newman v. Lester, supra, did not destroy the uniformity of county government required by this section. No matter which system is followed, the compensation in each case is for the performance of the duties of the particular office, whether they be performed by the officer or by his deputies or assistants. To hold that, where the officer pays his own deputies or assistants, he could not be allowed additional aid, and where the deputies or assistants are paid from the county treasury he could, would be to destroy the very uniformity of system which in Tulare County v. May, supra, was held to obtain.

As the increase in compensation consists in paying out additional money from the county treasury, whether paid directly to the deputy or assistant, or indirectly through the county officer, to secure the performance of the duties of the office, it makes no difference whether the duties are performed by a new county officer or by additional persons employed in such an office. The result is the same in each instance, and the county is required to pay more for the operation of the office. The appointment of the members

of the board in the case at bar is a granting of additional aid to the county assessor, and therefore violates the constitutional inhibition in this respect. Newman v. Lester, supra, and the cases citing it to this point, are disapproved.

[2] The act is also violative of section 5 of article 11, in that it delegates to the supervisors the right to determine when the members of the board shall be appointed, thus allowing the board of supervisors to add to the compensation of a county officer at its discretion, for, as already pointed out, the allowance of additional deputies or assistants is an increase of compensation. It is true that the board of supervisors has a right to employ persons to assist in the performance of the duties that devolve upon the supervisors; for instance, to employ a superintendent of the county hospital and of the poor farm, and other persons, to enable them to discharge their many duties as supervisors, which it is not intended they should perform personally. In this sense only are they entitled to employ persons and fix their salaries as employees of the county. The persons contemplated by section 4041b being engaged to aid a county officer, the board of supervisors has no authority in the matter. Skidmore v. West, 186 Cal. 212, 199 Pac. 497.

Judgment affirmed.

We concur: WILBUR, Acting Chief Justice; WASTE, J.; LENNON, J.; RICHARDS, Justice pro tem.

---

189 Cal. 723

## PREWITT v. SUNNYMEAD ORCHARD CO. et al. (L. A. 6526.)

(Supreme Court of California. Oct. 16, 1922.)

**1. Limitation of actions ⟸100(12) — Facts held not to amount to notice of fraud starting statute running.**

As respects right to rescind for fraud a purchase of capital stock, the fact that no dividends had been paid, that four assessments had been levied upon the stockholders, and that stockholders had discussed dividing the corporation's land among them to save it from being taken upon a mortgage foreclosure, *held* not to so put plaintiff on inquiry as to amount to discovery of the fraud sufficient to start the running of Code Civ. Proc. § 338.

**2. Corporations ⟸80(9)—Purchaser of stock not charged with knowledge of facts contained in corporation's books.**

Though, under Civ. Code, § 19, relating to constructive notice, where a purchaser of stock had no actual knowledge of circumstances which would lead her to examine the corporation's books, or of matters which appeared therein, and as there was no duty imposed upon her by law to examine them, she cannot be charged with constructive knowledge of the facts which an examination might have led her to discover.

**3. Cancellation of instruments ⟸60—Not necessary for court to order contract rescinded where notice of rescission had been served by plaintiff.**

Where, in an action to rescind a contract on the ground of fraud, it was found that plaintiff served notice of rescission on defendant, and the other findings showed that her repudiation was fully justified, it was not necessary for the court to order the contract rescinded.

In Bank.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Addie Lillian Prewitt against the Sunnymead Orchard Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Evans, Abbott & Pearce, of Los Angeles, for appellants.

Fred N. Arnoldy, of Los Angeles, and John W. Lester, for respondent.

LAWLOR, J. This action was brought by plaintiff, Addie Lillian Prewitt, to have rescinded a contract which she had entered into with defendant Sunnymead Orchard Company for the purchase of 1,000 shares of its stock, and to recover damages, upon the ground that the purchase was induced by fraudulent representations made by the defendant company through defendants N. A. Ross and A. G. Stearns, who were respectively its president and secretary, plaintiff having previously served notice of rescission. The purchase was made on May 7, 1913, plaintiff taking the stock at the par value of $1 per share. Part of the purchase price was paid in cash, and for the balance notes were given, which plaintiff afterward paid. The business of the company was the improvement and subdivision of farm lands, and the alleged fraud consisted in falsely representing that it had actually paid more than $85,000 on account of the purchase of its lands, whereas in fact it had paid only about $18,000, and in further representing that the individual defendants thought so well of the stock that they had personally invested $50,000 therein in money, whereas they had in fact invested nothing.

The notice of rescission was not served until October 1, 1918, more than five years after the purchase of the stock, and the complaint was not filed until January 31, 1919. Plaintiff in her complaint alleged that she had no knowledge, notice or suspicion of the facts constituting the fraud complained of prior to September 15, 1918; that the circumstances under which she discovered the falsity of the representations were that on September 15, 1918, defendant N. A. Ross

caused a special meeting of the stockholders to be held, at which he endeavored to force the consent of the stockholders to the granting of an option on the property of the company for $2,500; that in the discussion which thereupon ensued she was informed and learned for the first time that about 500 acres of land, which constituted a large part of the company's tract, had, on December 1, 1915, been deeded back by the company to the person from whom it had been purchased, for no other consideration than a release from its obligation to pay the unpaid balance due on it; that plaintiff expressed surprise that the land should be deeded back without consideration after more than one-half of the purchase price had been paid; that thereupon plaintiff learned and discovered for the first time that the company had not invested the sum of $85,207.50 in money in the land, and that, after diligent investigation, she learned that not over $18,207.50 had been so invested, whereupon she gave notice of her rescission. It was also alleged that the defendants, until September 15, 1918, concealed these facts from plaintiff, and contrived to and did keep her in ignorance of them.

The defendants denied all the allegations of fraud, and, in addition, pleaded the statute of limitations (Code Civ. Proc. § 338), and further alleged that the action was barred by the plaintiff's laches under section 1691 of the Civil Code.

The trial court made detailed findings in favor of the plaintiff upon all the issues raised by the pleadings, and pursuant thereto judgment was rendered in her favor against defendants Sunnymead Orchard Company and N. A. Ross, defendant A. G. Stearns not having been served with summons, and not having appeared. From that judgment defendants Sunnymead Orchard Company and N. A. Ross take this appeal.

Appellants concede that there was at least some evidence to support the findings in favor of respondent upon all of the allegations necessary to constitute a cause of action for fraud, their single contention being "that this action was barred by the statute and by laches on the part of respondent," predicating their contention upon the provisions of the two Code sections already cited. It is not made clear whether their claim is that the findings do not support the judgment or that the evidence does not support the findings. They express their contention in five propositions: First, that respondent at the time she purchased the stock expected an income therefrom in the way of dividends to begin soon after investing, and that therefore, when such dividends were not forthcoming, she was put upon notice which should have caused her to investigate the reasons thereof; second, that, instead of dividends being forthcoming, four assessments were thereafter levied, one in January, one in June, and one in December, 1916, and one in May, 1918, and that these assessments should have given her further notice that the condition of the company was precarious; third, that she should have had notice of the condition of the company by reason of discussions which were had with stockholders, of which she was cognizant, with reference to a proposed plan of dividing the land of the company among the stockholders for the purpose of saving it from being taken upon a mortgage foreclosure; fourth, that she should have been put upon inquiry, as a stockholder interested in the affairs of the company, by the fact that the books of the company disclosed that the land was deeded back to the original owners for the purpose of satisfying the mortgage more than three years before she filed her action for rescission; fifth, that she should be held, as a stockholder, to know from the books of the company that 10,000 shares of stock, owned by various stockholders, had been sold at 5 cents per share to satisfy delinquent assessments, and that she should have been put upon inquiry by this fact.

Without disputing the soundness of the findings concerning the discovery of the fraud, appellants claim these matters should have caused respondent to investigate the affairs of the company long before she commenced her action, and that had she pursued such an inquiry she would have learned long before September 15, 1918, all she was found to have learned on that date.

The court found that—

"The defendants at all the times mentioned, and until the said 23d day of September, 1918, concealed from the plaintiff the fact that the defendant corporation, on or about December 1, 1915, deeded back approximately 500 acres of said tract as in paragraph VII of the complaint is alleged, and contrived to and did keep the plaintiff in ignorance of the said fact until the said 23d day of September, 1918, for the purpose and with the intent of concealing from the plaintiff, and preventing plaintiff from discovering, her said cause of action and the falsity of the representations and statements so made to her by the defendants as aforesaid; that defendants caused a number of the stockholders of defendant corporation to meet on or about November 1, 1915, for the purpose of assenting to the said conveyance; and that defendants contrived to and did keep the plaintiff in ignorance thereof, and failed to give the plaintiff any notice thereof, and contrived to and did conceal the said fact from the plaintiff, and that plaintiff did not have or receive, and had not had or received, any notice, knowledge or suspicion thereof until the said 23d day of September, 1918; that the said sum of $180 on account of assessments levied and declared by defendant corporation as aforesaid was paid by plaintiff to the defendants, * * * and that no part of said sums have been repaid to plaintiff; and that during the said period, and at the times of the payment of said assessments, plaintiff had a number of conversations

with the defendants, and that the defendants in such conversations represented and stated that the purpose of said assessments was to raise funds to take care of interest installments accruing on the unpaid purchase price of said tract, and to defray expenses of the nursery operated by defendant corporation in connection therewith, and further that, by reason of the depressing effect of the World War upon the real estate market, defendants had been unable to make sales and to carry out their plans for subdividing, improving, and selling the said tract, and that therefore no proceeds or profits had theretofore accrued therefrom and said assessments had become necessary; that the plaintiff, believing that the World War and the conditions resulting therefrom had delayed and interfered with the said plans of defendants, and that by reason thereof no proceeds or profits had as yet accrued, and that therefore said assessments had become necessary, did not make any investigation as to the financial condition or affairs of defendant corporation prior to the 23d day of September, 1918; that plaintiff is a woman without any experience in or knowledge of the affairs of corporations or of the rights of stockholders, and without any experience in business enterprises or investments, and that plaintiff at all times until the 23d day of September, 1918, relied upon the said representations and statements so made to her by defendants as aforesaid, and believed them to be true, and had no reason to believe or to suppose or to suspect, the same to be false or untrue until the said 23d day of September, 1918, and that at no time prior thereto did the plaintiff have any notice, knowledge, information, or suspicion, as to the falsity of the said representations and statements, *nor did any facts or circumstances come to the notice, knowledge or attention of the plaintiff which caused her, or which would have caused any person of ordinary prudence, to believe or to suspect that the said representations or statements were false or untrue in any respect, until the said 23d day of September, 1918.*"

Appellants' contention apparently is that in the particulars mentioned the evidence does not support the portion of this finding we have italicized, and that facts and circumstances did come to respondent's attention which should have put her upon inquiry as to the truth of the representations and statements before September, 1918. This position is untenable.

[1] With reference to the first point, that there was no income from respondent's investment, appellant Ross himself testified he "explained to her that our plan was to develop the land and sell it planted, and it would be some time before we could hope to get any quick returns out of it." V. M. Tresslar, a witness for appellants, stated that the condition of the real estate market between 1913 and 1918 was very poor; that, as a result of a freeze in 1912 and 1913, followed by the breaking out of war, there was practically no sale for land of the character of that which the company owned. Respondent testified she went to appellant Ross' office several times, and "I asked Mr. Ross how things were progressing, and he was always very optimistic; and always gave me a good report; that everything was all right." Respondent also testified that—

"I frequently asked him when I was in there, if everything was prosperous, and he always replied that it was.

"Q. Didn't you go further than that and ask him whether the company was not getting into a very bad condition? A. Oh, no sir; I never did.

"Q. Did you ever feel the company was getting into a bad condition until you had this conversation with Mr. Ross in September, 1918? A. No, sir. * * *

"Q. You had no suspicion that the company was failing? A. No, sir; none whatever. Mr. Stearns had told me that Mr. Ross was very deliberate in his transactions, and he had always made a success, and I had no reason to doubt the statement."

Silas Prewitt, respondent's husband, testified that—

"He [Ross] always told me that things looked all right; and of course he mentioned the fact that there was no land being sold, and that there had been a depression in real estate, and spoke of the different conditions; but he says 'We will come out all right, because we have got plenty of time on this proposition; and I am having prospective customers.' And several times he spoke that he thought he had deals in view whereby he would dispose of some or all of the land."

Touching the second point, concerning the assessments, respondent testified she knew nothing about the corporation business, and had not considered the matter of paying assessments; that she paid the assessments; that she paid them to appellant Ross, who always told her everything was prosperous. Appellant Ross stated that respondent said "she was disappointed that we had to have an assessment; that she didn't understand that we was going to have assessments. I told her we were all disappointed—I was, I was sure, because it hit me pretty heavy, and we hoped to get through without it, but, under the conditions, it was impossible to do it and we had to take care of our interest and other obligations, or lose out, that was all"; that "I explained to her each time that the necessity of the assessments was that we were in bad luck and couldn't make sales, and we had to dig up money to keep our interest paid up, to keep from selling our land; but we were hoping to pull through."

On the third point, regarding the matter of dividing up the land, respondent testified that appellant Ross had said the stockholders could always have the land; that it could be divided if any one wanted it; that they did not discuss about dividing it, but that he said it could be divided—that if any one wanted their land they could have it; and

that at the time of these conversations she still believed the land was over half paid for.

It cannot be said, in view of this evidence, that the facts mentioned in appellant's first three points were sufficient to put respondent upon inquiry as to the company's interest in the land, which was the subject of the fraudulent representations. According to her testimony, she knew nothing about the company's business, and relied on Ross' statements as to its financial condition. He, as president of the company, told her there would be no immediate profits, that the assessments were to meet interest payments and make improvements, and that, as a protection the stockholders could take portions of the company's land in exchange for their stock if they wished to do so, notwithstanding he knew that only $18,000 instead of $85,000 had been paid on a total purchase price of $123,000 for the land. In the face of the findings we cannot say there is anything in this evidence which would lead respondent to suspect that the company owned but a small equity in its lands.

[2] With reference to appellant's last two points it remains to consider whether, assuming the matter shown by the company's books would have been sufficient to put respondent on inquiry, she must be deemed to have had knowledge of all such records solely because she was a stockholder. It was found, and is not disputed, that she did not know the land had been deeded back to the former owners, and she testified that she did not know any stock had been sold at 5 cents per share to satisfy delinquent assessments.

Section 19 of the Civil Code provides:

"Every person who has had actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

In Tarke v. Bingham, 123 Cal. 163, 166, 55 Pac. 759, 760, referring to this section, it was said:

"But the converse of the proposition is equally true. Where no duty is imposed by law upon a person to make inquiry, and where under the circumstances 'a prudent man' would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission."

It is said in Cook on Corporations (7th Ed.) § 731, p. 2620, referring specifically to actions by a stockholder against a corporation, that—

"It is not incumbent upon the stockholder to keep himself informed as to the various acts of the corporation. He is not chargeable with knowledge merely because he might have ascertained the facts by an examination of the corporate books."

Appellants rely on the case of Lady Washington Consolidated Co. v. Wood, 113 Cal. 482, 45 Pac. 809, wherein the plaintiff corporation sought to have set aside a release of a claim against an estate of which the defendant was executor, which release it was asserted was fraudulently executed by plaintiff's directors. In that case the court held:

"They [the stockholders] were chargeable with knowledge of all the acts of the directors which were spread upon the records of the corporation, and of all the facts connected therewith that the inquiry suggested thereby would have disclosed. * * * 'The shareholders of a corporation cannot avoid responsibility for the unauthorized acts of their agent, by abstaining from inquiry into the affairs of the company, or by absenting themselves from the company's meetings, and at the same time reap the benefit of their acts in case of success.' Underhill v. Santa Barbara, etc., Co., 93 Cal. 312."

That case is distinguishable from the one at bar upon two grounds. First, in that case it was "not averred that any of these facts, or of the transactions set forth as constituting the fraud, were done secretly, or were concealed from the plaintiff, or that any information which it sought was refused or that, indeed, it sought to obtain any information upon the subject." In the case at bar all such matters were alleged in the complaint and specifically found by the court in favor of respondent. In The Lady Washington Consolidated Co. v. Wood, supra, the action was brought by the company to recover property which it was alleged had been fraudulently disposed of by its agents, the directors of the company. The company and its stockholders in such a case clearly would be charged with knowledge of the acts of their agents, the directors, as they were recorded in the books. In this case respondent sued as an individual upon the rescission of the contract with the company; no rights of third persons or their dealings with the company are involved and no such question of estoppel is raised.

Inasmuch as respondent had no actual knowledge of circumstances which would lead her to examine the books or of the matters which appeared therein, and as there was no duty imposed upon her by law to examine them, she cannot be charged with constructive knowledge of the facts which an examination of the books might have led her to discover.

[3] Appellants ask that the judgment be reversed or set aside because it grants respondent her relief without adjudging that the contract be rescinded. It is said in Benjamin on Sales (5th Ed.) p. 461, that—

"It is not necessary that there should be a judgment of court in order to effect the avoid-

ance of a contract, when the deceived party repudiates it. The rescission is the legal consequence of his election to reject it, and takes date from the time at which he announces this election to the opposite party."

In American Type Founders' Co. v. Packer, 130 Cal. 459, 62 Pac. 744, it was held that, where one contracting party, after the other's failure to perform his obligations under the contract, served notice of rescission on the latter, "the rescission was complete and perfect, and the court should have so found."

In the case at bar, it was found that respondent served notice of rescission, and the other findings show that her repudiation of the contract was fully justified. Under such circumstances it was not necessary that the court order it rescinded.

Judgment affirmed.

We concur: WILBUR, Acting C. J.; LENNON, J.; WASTE, J.; RICHARDS, Justice pro tem.

---

189 Cal. 689

## BLACKWELL v. AMERICAN FILM CO., Inc., et al. (L. A. 7008.)

(Supreme Court of California. Oct. 10, 1922. Rehearing Denied Nov. 9, 1922.)

**1. Death ⊜27—Recovery for death not barred by deceased's recovery for injury.**

That a person injured by negligence recovered damages before his death from an operation to correct his crippled condition does not in itself prevent his widow from recovering the damages she has sustained by reason of his death.

**2. Death ⊜76—Evidence held to show negligent injury caused death from shock of surgical operation.**

In an action for death by shock from an operation performed to cure a crippled condition resulting from negligent injuries not of a fatal nature, evidence *held* to warrant the jury's finding that the accident was the proximate cause of death.

**3. Death ⊜17—Surgical operation held not intervening cause of death of injured person.**

Where one injured by defendant's negligence died from the shock of a proper surgical operation performed in an endeavor to cure a crippled condition due to injuries not of a fatal nature, and there was no evidence that the physicians were not competent, or that deceased was negligent in employing them, the operation was not an intervening cause relieving defendant from liability.

**4. Death ⊜86(1)—Damages to surviving wife and children pecuniary loss.**

That one negligently injured had recovered damages for permanent injuries before his death is immaterial in the widow's suit to recover for his death, the measure of damages being the pecuniary loss suffered by her and her children by reason of the loss of her husband in his crippled condition.

**5. Highways ⊜184(2)—Evidence held to justify finding of negligence in driving on left side.**

Evidence *held* to justify implied finding of negligence in driving colliding car on the left side of the highway.

**6. Highways ⊜175(1)—Driving on left side negligence per se.**

Driving an automobile on left side of highway when approaching another vehicle coming in the opposite direction is negligence per se (Stats. 1917, pp. 382, 401).

**7. Appeal and error ⊜880(1)—Joint tort-feasor may not complain that jury exonerated other tort-feasor.**

Where the negligence of both defendants, one the owner of an auto stage in which deceased was riding, and the other an owner of a colliding automobile, contributed to deceased's death, the colliding auto owner cannot complain that jury exonerated stage company.

**8. Death ⊜58(1)—Finding of due care on part of injured person warranted by presumption.**

In action for the death of an automobile stage passenger injured in a collision with an automobile operated by defendant, the presumption of due care on part of decedent, arising from the absence of evidence as to his conduct, warranted the implied finding, according to Code Civ. Proc. § 1961, that he exercised ordinary care, though there was no evidence that he protested to the driver of the stage or that he offered to leave it.

**9. Appeal and error ⊜1051(1)—Conclusion of lay witness concerning fractured bone held not prejudicial where bone condition was otherwise made clear.**

In an action by a wife for her husband's death, where it was otherwise clear that there was no union of decedent's fractured bone, defendant *held* not prejudiced by admission of wife's conclusion that there was no union.

**10. Evidence ⊜314(1)—Wife's statement that deceased husband was told by physician to undergo operation held not hearsay.**

In an action by a wife for her husband's death caused by shock from a surgical operation, the wife could testify that decedent's physician told him to undergo the operation, since this testimony went to the fact that decedent followed his physician's instructions, and was not proof of a fact related by the physician, and hence not obnoxious to the hearsay rule.

**11. Appeal and error ⊜930(4)—Verdict for death presumed based on elements other than deceased's earning capacity not shown.**

In a widow's action for the death of her crippled husband, where there was no evidence warranting an implied finding of the earning capacity alleged in the complaint, the jury in awarding damages cannot be held to have made such finding, since in assessing damages they were not limited to evidence of deceased's earn-

ing capacity and it will be presumed that other elements of damage were considered.

**12. Death ⟹103(3)—Evidence of contributory negligence held insufficient for jury.**

Where there was no evidence as to the conduct of deceased, it was proper to withdraw the issue of contributory negligence from the jury.

**13. Trial ⟹243—Instructions concerning physician's unnecessary operation as independent intervening act held not to conflict with instruction upon injured person's due care in selecting physician.**

An instruction that, if deceased used ordinary care in selecting his physician, defendant, who caused the injury resulting in death, could not defend that the physician failed to give proper treatment, *held* not to conflict with instruction that improper treatment would not relieve defendant, but, if the physician performed an unnecessary experiment, which alone resulted fatally, defendant would not be liable, since the latter instruction was, in effect, that an unnecessary operation would constitute an independent intervening act.

**14. Appeal and error ⟹1066—In action for death, inapplicable instruction upon deceased's expectancy of life held not prejudicial.**

In an action for death, an instruction that for a person 46 years old the probable expectancy of life is 23.81 years, where deceased was only 36 years old, was not prejudicial, even though inapplicable, as the instruction was upon this theory favorable to defendant.

**15. Death ⟹104(4)—Instruction on damages to widow of deceased compensated by former judgment held proper.**

In a widow's action for negligent death of her husband, compensated by a former judgment recovered before his death, it was proper to give an instruction informing the jury that, even if the deceased had been fully compensated for loss of earning power, the value of his society, comfort, protection, nurture, and education could be recovered; such losses being personal to the widow and her children.

**16. Trial ⟹296(11)—Instruction as to comfort and nurture deceased father would have rendered his family in action by them proper in view of other instruction.**

In an action for death to compensate wife and children instruction *held* proper as not taking from the jury the question whether deceased would probably have given comfort, nurture, etc., to his family, where another instruction in effect informed the jury they should consider what comfort, nurture, etc., deceased would have rendered.

**17. Death ⟹104(6)—Executors and administrators ⟹51—Instruction that decedent's recovery for injury causing death constituted assets of his estate held correct.**

In an action by a widow as administratrix for the negligent death of her husband, where defendant maintained that decedent's former recovery could be shown in mitigation of damages, an instruction that the money recovered by decedent was an asset of his estate to pay debts, the balance going to his widow and children, was correct.

**18. Trial ⟹260(1)—No error can be based on refusal of instructions embodied in another instruction of similar import.**

A third instruction of substantially similar import, given at appellant's request, precludes error as to two instructions of that import refused.

**19. Death ⟹86(1)—Deceased's physical condition considered in estimating damages.**

In an action by a widow for negligent death of her husband, crippled by injuries, compensated by a judgment recovered before his death, it was necessary for the jury, in estimating the pecuniary loss to the widow and her children, to consider the husband's crippled condition.

**20. Death ⟹99(4)—$10,000 damages to wife and children held not excessive.**

$10,000 damages *held* not grossly disproportionate to the loss sustained by the wife and children of deceased, who was 36 years old, and had been compensated for the same negligent injuries crippling him.

In Bank.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Rachel E. Blackwell, administratrix of the estate of Edward W. Blackwell, deceased, against the American Film Company, Incorporated, and the United Stages, a corporation. Judgment for plaintiff and the United Stages, and defendant American Film Company appeals. Affirmed.

Ford & Bodkin, of Los Angeles, for appellant.

E. B. Drake and Duke Stone, both of Los Angeles, for respondents.

LAWLOR, J. Plaintiff, Rachel E. Blackwell, administratrix of the estate of Edward W. Blackwell, deceased, brought this action against defendants American Film Company, Incorporated, a corporation, and United Stages, a corporation, to recover damages for the death of said Edward W. Blackwell, her husband. The action was tried by a jury, which returned a verdict in favor of plaintiff and defendant United Stages, and against defendant American Film Company, awarding damages against the latter defendant in the sum of $10,000. Judgment was entered on the verdict, from which defendant American Film Company takes this appeal.

The admitted facts of the case are that on November 27, 1918, the decedent was a passenger in an automobile stage owned by respondent United Stages, and was traveling from Santa Barbara to Los Angeles. At a point between Santa Barbara and Ventura a collision occurred between the stage in which the decedent was riding and an automobile driven by one of appellant's employees, who was traveling from Los Angeles to Santa Barbara. In this collision the decedent was

seriously injured. He was first taken to a hospital in Ventura, later removed to one in Los Angeles, and finally taken to his home. His leg was broken above the knee, and no union of the bone could be effected. An operation was performed in June, 1919, which was unsuccessful. Following this operation decedent was taken home, where he remained for five months, at the end of which time, by the use of a walking splint, he was able to get about on crutches. On January 22, 1920, a second operation was performed to effect a bone transplantation, and a short time after the operation he died. It was alleged in the complaint that the collision was due to the negligence of appellant and respondent United Stages in the operation of their respective automobiles, and that the decedent's death resulted from the injuries he received in the accident.

The decedent during his lifetime commenced an action against appellant and respondent United Stages for damages for his injuries, in which a verdict against appellant was returned in his favor for $13,762. Judgment on the verdict was affirmed on appeal ([Cal. App.] 192 Pac. 189), and the said amount, together with interest and costs, was paid to Rachel Blackwell, as administratrix of his estate, the decedent having died between the time judgment was rendered and when it became final.

[1] 1. The first contention of appellant is that the evidence is insufficient to justify the verdict. It is insisted in this connection that there is no evidence showing that the death of decedent was proximately caused by injuries received in the collision. Appellant's theory is that the evidence shows that decedent was permanently injured in the collision, for which condition he was fully compensated by appellant; that, aside from the injury to his leg, he was apparently restored to health, and would have lived on indefinitely; that the second operation was not necessary, and was not performed to save his life, but in the hope of correcting his "stationary crippled condition," for which he had been compensated; that he died from the effects of shock attendant upon the operation, and that it would be unjust to say that the decedent would have a legal right to attempt to remedy such a permanent condition at appellant's risk. Respondent Rachel Blackwell's position is that the original fracture of the leg was responsible for decedent's death; that the operation was a necessary and scientific one; that it only contributed to the original injury to produce the decedent's death, and that the authorities justify a recovery where the original injury is either the mediate or immediate proximate cause of the death.

The fact that the decedent recovered damages for his injuries would not, in itself, prevent a recovery by respondent Rachel Blackwell, for this view overlooks the fact that she is suing, not to recover damages for the injuries and consequent suffering and loss to the decedent, but to recover as an heir or personal representative the damages she has sustained by reason of the decedent's death. Section 377, Code Civ. Proc.; Earley v. Pacific Electric Ry. Co., 176 Cal. 79, 167 Pac. 513, L. R. A. 1918A. 997; Redfield v. Oakland Consolidated, etc., Ry. Co., 110 Cal. 277, 42 Pac. 822, 1063; Bond v. United Railroads, 159 Cal. 270, 113 Pac. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50; Pierce v. United Gas, etc., Co., 161 Cal. 176, 118 Pac. 700. The only question presented in this connection is whether it can be said there was no evidence in this case from which the jury might have concluded the accident was the proximate cause of decedent's death.

The evidence clearly shows, and it is not disputed, that the injuries received by the decedent in the collision were not of a fatal nature. Dr. Ellis Jones, who performed the operation, the shock of which resulted in decedent's death, stated: That at the time of that operation decedent had gained 30 or 40 pounds, and was apparently in good health. That as far as he knew there was no infection of the injured member; that the operation was performed to correct decedent's crippled condition. That decedent was not in any danger of losing his life from the injury to the leg, and that the cause of his death was the shock resulting from the second operation. That decedent "had had a severe injury whereby that caused shock; he had several attempts to reduce that subcutaneously—they all lowered his resistance; he had infection, and then he had another operation, in the operating room, on the day of his death. Then he had shock, operative shock. But all these factors, it seems to me, had to be considered as to his ability to resist that operation." That the first operation was entirely proper. That the second operation was performed to secure a union of the bone, and was decided on because otherwise decedent would have been condemned to wear a walking splint, and not secure a union of the bone, and that the leg could have been amputated. Respondent Rachel Blackwell testified that decedent had been at home for five months before the second operation; that he had gained 30 or 40 pounds in weight, and was able to be about on crutches; that Dr. Jensen attended decedent until he was taken to Los Angeles, where Dr. Jones took charge of the case and attended him until his death, save for a time that Dr. W. W. Richardson attended him while Dr. Jones was on his vacation. The judgment roll in the action brought by decedent against appellant and respondent United Stages was admitted in evidence. In the complaint in that action it was alleged the injuries received by decedent were permanent.

[2, 3] It cannot be said, from this evidence as a whole, that the jury could not have found the accident was the proximate cause of decedent's death. According to the evidence we have set out, decedent was under the care of physicians and was receiving medical attention from the time of the accident until his death. The evidence also indicates that the second operation was a step in the continuous treatment administered in an endeavor to cure him of the effect of his injuries. The jury might have found from the evidence that the operation was a proper one under the circumstances; in fact, there are no indications to the contrary. Dr. Jones and Dr. George Piness both testified concerning their training and experience, and there was no evidence tending to show that they were not in every way competent, or that decedent was negligent in employing them. In such a case the treatment by a physician cannot be held to be a new or intervening cause which would relieve appellant from liability for the original injury. In Boa v. San Francisco-Oakland T. Rys., 182 Cal. 93, 187 Pac. 2, the following instruction was held to contain a correct statement of the law on this subject:

"If you find from the evidence that the plaintiff was injured through the negligence of the defendant, that she used ordinary care in the selection of a physician and surgeon for the purpose of treating her said injuries, it will be no defense to show that the physician or surgeon thus selected by her was unskillful or failed to give her the best or proper treatment, providing she complied with the directions and submitted to the treatment prescribed by such physician and surgeon."

In Variety Manufacturing Co. v. Minnie Landaker, 227 Ill. 22, 81 N. E. 47, a decedent had suffered a broken leg. Several months later his physicians cut the leg open and fastened the ends of the bones together with wire. The operation was unsuccessful and the patient died. In sustaining a verdict allowing damages to decedent's widow, the court said:

"It is next contended that the court erred in giving to the jury the appellee's second instruction. That instruction announced to the jury that a person who is suffering from an injury is only required to use reasonable diligence to employ a physician of ordinary skill and experience to treat him, and that the law regards the injury resulting from the mistakes of the physician, or from the failure of the means employed to effect a cure, as a part of the immediate and direct damages flowing from the original injury. The doctrine announced in said instruction is fully sustained by Pullman Palace Car Co. v. Bluhm, 109 Ill. 20, and Chicago City Railway Co. v. Saxby, 213 Ill. 274."

In Odeneal v. State, 128 Tenn. 60, 157 S. W. 419, it was said:

"One who unlawfully inflicts a dangerous wound upon another is held for the consequences flowing from such injury, whether the sequence be direct or through the operation of intermediate agencies dependent upon and arising out of the original cause. One of these dependent occurrences is the necessity of surgical aid, which may eventuate as the immediate cause of death. * * * Surgeons are not infallible. They are required to have and exercise only reasonable skill, measured by the rules of their art or profession. When the accused inflicts the injury that necessitates the operation, he is held to assume the risk attendant on it. Much is required before the surgeons can be substituted for the defendant."

In view of these authorities it must be held that the implied finding of the jury that the accident was the proximate cause of decedent's death finds ample support in the evidence.

[4] Appellant emphasizes the fact that decedent in his action alleged his injuries were permanent and recovered damages on that basis. Such an allegation is immaterial in the case at bar. The measure of damages in the suit brought by him was based upon his duty to use reasonable efforts to restore his health and earning capacity, and in so far as such reasonable efforts might restore his health and earning capacity they diminished the amount of his recovery in his action against appellant. The verdict and judgment in that action established the fact that he was damaged to the extent fixed by the verdict, and this represents his decreased earning capacity, injuries, pain, and suffering. The jury in this case had the advantage of the verdict of the jury in decedent's action, fixing the amount of his damages, and in determining the loss sustained by respondent by reason of the death of decedent had the opportunity to consider the extent of his incapacity in so far as it was determined by the preceding jury. The question in this case was what pecuniary loss was suffered by respondent and her children by reason of the loss of decedent in his crippled condition.

[5] 2. Appellant's second point is that the evidence is insufficient to justify the implied finding that appellant's automobile was so negligently operated that it collided with the stage in which decedent was riding. However, there was testimony, the weight of which it is not our province to consider, from which the jury could have inferred appellant was guilty of negligence.

[6] L. R. Montana, a passenger in the stage, testified:

Appellant's car "seemed to be coming toward our side of the road, toward the right-hand side of the road—that is, their lights. * * * From the lights it looked like it was coming towards our car, which was being driven on the right-hand side of the road at the time. * * * I felt the automobile that I was riding in get off the pavement; that is, I felt a bump or two as the machine got off the pavement. * * * It [the stage] was going about

35 or 40 miles an hour at the time of the accident; that is as near as I can estimate it."

On cross-examination he stated:

"The film car seemed to be coming to our side of the road. * * * My memory is that on this occasion our car did pull off the road; that is, the right wheels on the hard dirt."

Herman Eilers, also a passenger in the stage, testified that the stage was being driven to the right of the center of the road; that the right wheels were off the right-hand side of the highway at the time of the accident; that the stage had been driving about 30 or 35 miles an hour; that he did not know whether or not it had been going 40 miles an hour. In view of this evidence it cannot be said the jury could not have found appellant's machine was operated on the left side of the highway, which fact constituted negligence per se. Stats. 1917, pp. 382, 401.

[7] 3. The next contention of appellant is that the evidence does not justify the implied finding that the stage was not being operated at an excessive rate of speed, and that such rate of speed was not the proximate cause of decedent's injuries. This point cannot be raised by appellant. If both defendants were negligent, and their negligence contributed to decedent's death, appellant cannot complain that respondent United Stages was exonerated by the jury, for they are both jointly and severally liable. Horgan v. Jones, 131 Cal. 521, 63 Pac. 835; Benson v. Southern Pacific Co., 177 Cal. 777, 171 Pac. 948.

[8] It is also asserted that the implied finding of the jury that decedent exercised ordinary care for his own protection was not warranted, in that there was no evidence that he had protested to the driver concerning the manner in which he operated the machine or that he had offered to leave it. It was said in Carpenter v. Atchison, Topeka & S. F. Ry. Co. (Cal. App.) 195 Pac. 1073:

"In the absence of evidence to the contrary, the law presumes that he did everything that a reasonably prudent man would have done under the same circumstances for the protection of his own safety. Code Civ. Proc. § 1961; Crabbe v. Mammoth Channel G. Min. Co., 168 Cal. 500; Baltimore and Potomac R. Co. v. Landrigan, 191 U. S. 461."

Here there was no evidence as to the conduct of decedent, and nothing tending to show that, even if his position was unsafe, he did not so consider it, and accordingly take steps for his own protection. In view of this fact, together with the presumption arising, such a finding would be proper.

[9, 10] 4. Appellant specifies as error the denial of the court of its motion to strike out an answer, given by respondent Rachel Blackwell while testifying in her own behalf, that there was no union of the bone in decedent's leg, on the ground the answer was a conclusion of the witness. Assuming the ruling to have been erroneous, appellant could not have been prejudiced by it, for it is clear from the evidence that such was the fact. Appellant also specifies as error the overruling of its objection interposed to testimony by respondent Rachel Blackwell that Dr. Jones told decedent to go to the hospital and have the last operation. This ruling was correct. Decedent had placed himself under the care of a physician, and it was proper to show that in receiving treatment he was following instructions given by the physician. In proving this fact, it was competent to admit testimony that certain orders were given. The testimony was not admitted to prove the existence of any fact related by the doctor, but to prove that he made the statement in question. The admission of the testimony under such circumstances is similar to proof that a notice was given, and is not obnoxious to the hearsay rule. See 3 Wigmore on Evidence, § 1770, and cases there cited.

[11] 5. An asserted implied finding of the jury to the effect that decedent at the time of the accident was able to earn and was earning $300 a month is claimed to be erroneous. But we are of the opinion that no such finding may be implied from the verdict. It was alleged in the complaint that decedent's earning capacity was $300 a month, and this allegation was denied by the answer. No evidence was introduced on this issue. The complaint in the judgment roll in Blackwell v. American Film Company, supra, contained an allegation to the effect that his earning capacity was the amount stated. This could not be regarded as evidence of the fact, for the effect of that judgment roll was expressly limited by an instruction to a consideration of any damages allowed in that action for decedent's loss of time from his business and impairment of his earning capacity. It is well settled that all facts necessary to support the judgment and supported by the evidence will be presumed to have been found to exist. There being no evidence on this point, a finding in favor of the allegation of the complaint would be unwarranted, and would tend to defeat the judgment. The jury cannot be held to have made any such finding. In assessing respondent's damages they were not limited to evidence of decedent's earning capacity, for, as was said in Skelton v. Pacific Lumber Co., 140 Cal. 507, 74 Pac. 13:

"The proof of the value of the deceased as a wage earner might not alone justify the amount awarded; but there were other elements of damage to be considered by the jury, which they alone were competent to consider."

[12] 6. Fourteen asserted errors are specified with reference to the instructions given to the jury and those refused. The first was one proposed by respondent Rachel Black-

well to the effect that there was no question of contributory negligence under the evidence. Inasmuch as there was no such evidence, as already pointed out, it was proper for the court to withdraw this issue from the jury's consideration.

[13] It is insisted an instruction to the effect that, if decedent used ordinary care in the selection of a physician, and submitted to the treatment prescribed by him, it would be no defense to show that such physician failed to give him the best or proper treatment, conflicted with one to the effect that an error of treatment would not relieve the defendant, but, if the physician made use of the opportunity to perform an unnecessary and dangerous experiment on decedent, and the experiment alone resulted fatally to decedent, defendant would not be liable. These instructions are not in conflict. The former properly told the jury that mere concurring negligence on the part of the physician would not be a bar to respondent's recovery. The latter told the jury that, if the physician stepped out of the proper field of treatment to perform an unnecessary and dangerous operation, as an experiment for his own benefit, it would constitute an independent, intervening act of the physician for which appellant would not be liable.

[14] The jury were instructed that "for a person of 46 years of age the probable expectancy of life is 23.81 years, under the mortality tables." This is a correct instruction for a person of that age, but it is pointed out that the evidence showed decedent was only 36 years old, and the instruction therefore inapplicable. However that may be, appellant could not have been prejudiced, for even upon this theory the instruction was wholly favorable to it.

[15] In another instruction the jury were informed that the only element in the case decedent brought against appellant and respondent the United Stages which could be connected with the case at bar "is damages, if any, that were allowed by the jury in the original case for value of his loss of time from his business up to the time of the original trial, which was in May, 1919, together with any probable future loss therefor, and the impairment of his ability to earn money in the future, and should the jury believe that the plaintiffs in this case have been fully paid upon that issue, yet it leaves the element of damages for pecuniary value for loss of comfort, society, protection, nurture, and education that the deceased would probably have given respectively to the widow and infant children had he lived." It is appellant's contention that decedent was fully compensated in the former action for his inability thereafter to give comfort, society, protection, nurture, and education to respondent and their children, and that, in omitting to instruct the jury to that effect, the court erred. This position cannot be maintained, for these losses are personal to respondent and her children, and they alone may claim damages for them. In view of the fact that the judgment recovered by him was a proximate result of the same accident which resulted in his death, it was proper for the jury to have before them the verdict in decedent's case and to be informed as to the nature and effect of the former judgment. This instruction did not purport to deal fully with the question of damages, but merely to inform the jury that, even if the plaintiff in that case had been fully compensated for his loss of earning power, nevertheless the pecuniary value of his society, comfort, protection, nurture, and education could be recovered by the respondent, and the value of such benefits was left to the jury to determine.

[16] The instruction is also claimed to be erroneous in stating that decedent would probably have given comfort, society, protection, nurture, and education to respondent Rachel Blackwell and her children. Whether or not he would have done so, it is asserted, was a question for the jury. But in another instruction the jury were told that it was left to their judgment to say, "from a consideration of all the facts and evidence of the case, what amount is a just compensation for the financial loss which will probably be directly and proximately caused to the plaintiff by the death of said Edward W. Blackwell, deceased. This pecuniary loss may be * * * a loss arising from a deprivation of benefits which, from all the circumstances of the case, it could be reasonably expected the plaintiff would have received from the deceased Edward W. Blackwell, had his life not been taken. * * * The damages, if any, which plaintiff may recover, are to be based by you solely on the reasonable expectation of pecuniary advantage to the plaintiffs from the continuance of the life of the deceased Edward W. Blackwell." This instruction in effect informed the jury that they should consider what comfort, society, protection, nurture, and education the decedent would probably have given respondent and their children had he lived. In view of this instruction, it is not likely that the jury understood the one under review to mean other than that respondent Rachel Blackwell was entitled to compensation for the loss of such comfort, society, protection, nurture, and education as the decedent would probably have given, and the evidence would justify the inference that he would probably have given them in so far as he was able.

[17] Appellant asserts the court erred in giving an instruction that the money recovered by decedent did not go directly to his widow and children upon his death, but was an asset of the estate, which had to go

through administration and to pay the debts of the estate, the balance going to the widow and children. This is a correct statement of the law. Appellant maintained that the recovery in the action brought by decedent might be shown in mitigation of respondent Rachel Blackwell's damages in the case at bar, and with that evidence before the court it was proper to explain what benefit was derived by the widow and children therefrom.

[18, 19] The court refused to give two instructions requested by appellant, both to the effect that, if the jury found for the plaintiff, in estimating the amount of damages she was entitled to recover they could consider the physical condition of decedent immediately prior to his last operation in determining the probable amount of financial assistance he would have rendered to his widow and children. It is a sufficient answer to this specification of error that a third instruction of substantially similar import was given to the jury at appellant's request. Respondent disputes the soundness of these three instructions. But, as already pointed out, decedent was fully compensated for the injuries sustained by him, and for his resulting physical incapacity, and, in estimating the pecuniary loss resulting to respondent Rachel Blackwell by virtue of his death, it was necessary to take into consideration his crippled condition. The other instructions given by the court which appellant complains of were either correct in themselves or supplemented by others, or the errors were so unimportant that the jury could not have been misled thereby. The instructions which the court declined to give at appellant's request were properly refused, some being erroneous and the rest being substantially contained in those which were given. The errors assigned in this connection do not merit further consideration.

[20] 7. Appellant's last point is that the verdict of $10,000 is so excessive as to justify a reversal, and that the court erred in refusing to grant a new trial on that ground. But, as was declared in Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 Pac. 513:

"It is by this court said to be the correct rule, 'that it is only where the verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts, as to shock the sense of justice, and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment, that the judge is at liberty to interpose his judgment as against that of the jury.' Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 74 Pac. 1019."

Considering all the circumstances of the case, we cannot hold that the sum of $10,000 is disproportionate to the loss sustained by decedent's widow and two minor children, or that the verdict was the result of passion or prejudice.

Judgment affirmed.

We concur: WILBUR, J.; LENNON, J.; WASTE, J.; RICHARDS, Justice pro tem.

---

189 Cal. 741

## GRINBAUM v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.
## (S. F. 10421.)

(Supreme Court of California. Oct. 16, 1922.)

**1. Judges ⊜51(4)—Judge may pass on his bias or prejudice.**

A judge may pass on the question of his bias and prejudice raised by affidavit under Code Civ. Proc. § 170, subd. 4, for change of judge for trial.

**2. Judges ⊜51(4)—Late-filed counter affidavit as to bias and prejudice considered.**

On the hearing of affidavits of bias and prejudice of judge, counter affidavits, though not filed in the time fixed by Code Civ. Proc. § 170, subd. 4, may be considered, the statute in that regard being directory merely.

**3. Prohibition ⊜17—Objections to trial court proceeding to be presented to it before seeking prohibition.**

Objections to trial court proceeding must be presented to it before writ of prohibition against its proceeding may be sought.

**4. Prohibition ⊜3(1)—Refused because claimed res judicata was available on return to order to show cause.**

Prohibition, sought on the ground of allowance of fees being res judicata, will not lie to prevent the trial court proceeding on an order to show cause why the allowance should not be revoked; the question whether allowance was res judicata being a matter which can be determined on the return to the order to show cause.

In Bank.

Petition by Julie Grinbaum for writ of prohibition to the Superior Court of the City and County of San Francisco, to prevent Frank H. Dunne, as Judge thereof, from passing on the question of his disqualification. Writ denied.

John Francis Neylan, of San Francisco, for petitioner.

Maurice E. Harrison, Alfred Sutro, and Warren Olney, Jr., all of San Francisco, for respondents.

PER CURIAM. [1, 2] The application for a writ of prohibition to prevent the respondent from passing upon the question of his disqualification raised by affidavits filed in pursuance of subdivision 4, § 170, of the Code of Civil Procedure, and to prevent the court

from considering counter affidavits upon that question, filed after the expiration of the time fixed by the statute, but before the beginning of the trial, is denied.

The court below has jurisdiction to pass upon the question of bias and prejudice. The counter affidavits may be considered, notwithstanding they were filed after the period fixed by statute. The statute in that regard is directory. See Estate of Sutro, 143 Cal. 487, 491, 77 Pac. 402.

[3, 4] Prohibition is also prayed for to prevent the judge from proceeding on an order to show cause why the allowance of certain fees specified in the order should not be revoked. It seems to be conceded that the court had power of its own motion to institute an inquiry concerning the expenditures made on behalf of the ward, but it is claimed that these fees were fixed, settled, and allowed at the time of the settlement of accounts and therefore that the orders are conclusive and must not be inquired into.

The respondent argues that although these items were included in orders settling accounts that they were intermediate and not final accounts and therefore can be inquired into. It is not necessary for us to determine this question, for it is the duty of the parties to present these objections in the first instance to the trial court before seeking a writ of prohibition in this court and this was not done (Havemeyer v. Superior Court, 84 Cal. 402, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192), and for the further reason that the question whether or not the allowance of the fees specified in the order is res adjudicata is a matter which can be determined on the return to the order to show cause.

The writ is denied.

WILBUR, Acting C. J., LAWLOR, WASTE, and LENNON, JJ., and RICHARDS, Justice pro tem., concur.

---

189 Cal. 709

## JACOBS v. BOARD OF DENTAL EXAMINERS OF CALIFORNIA et al.
(S. F. 10252.)

(Supreme Court of California. Oct. 10, 1922. Rehearing Denied Nov. 9, 1922.)

**1. Physicians and surgeons ⟸11(1)—Under Dental Act, board may revoke license for unprofessional conduct.**

Notwithstanding that Dental Act, § 14, provides specific proceedings for revocation of license for reasons assigned in the first two subdivisions of section 13, it must be held to also provide procedure by which the board of dental examiners may hear and determine accusations made under subdivision 3 providing for revocation of license for unprofessional conduct or gross ignorance or inefficiency.

**2. Physicians and surgeons ⟸11(3)—Dental board may act on accusation filed by its agent.**

Where the dental board acted on the information of one of its paid investigators and revoked a license for unprofessional conduct, the petitioner in action to annul the judgment of the board cannot urge that the board had no jurisdiction because the proceeding was not "taken upon the information of another," as provided by Dental Act, § 14.

**3. Physicians and surgeons ⟸6(2)—Acts performed by unlicensed dentist not within permission of Dental Act; "operate"; "operation"; "practicing dentistry."**

Dental Act, § 11, provides that any person is understood to be practicing dentistry who shall for remuneration perform an operation of any kind, or treat diseases of the human teeth, etc., and in view of "operate," meaning "to perform or to be at work," and "operation," meaning action, working, etc., it does not require the performance of a surgical operation to bring one within the act, and where an unlicensed dentist made a plaster cast of a patient's mouth to measure it for a plat, took a "wax bite," and put a wax plate set with teeth in a patient's mouth for a "try-in," he was practicing dentistry within the meaning of the act, and his work did not fall within a class of work permissible by an unlicensed person.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Operate; Operation; Practicing Dentistry.]

In Bank.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action to annul judgment revoking license to practice dentistry by Saul R. Jacobs against the Board of Dental Examiners of California and others. From judgment for defendants, petitioner appeals. Affirmed.

Alfred S. Humphreys, of San Francisco, and Leon E. Gray and Markell C. Baer, both of Oakland, for appellant.

Oliver Dibble, of San Francisco, for respondents.

WASTE, J. A verified written accusation was filed with the state board of dental examiners, charging petitioner with unprofessional conduct. After a formal hearing the board found petitioner guilty of aiding and abetting an unlicensed person to practice dentistry unlawfully, and suspended his license for five years. Petitioner sought to test the legality of his trial and conviction upon a writ of review issued in the superior court. After a hearing on said writ, the judgment of the board was affirmed and the writ was dismissed. Petitioner now appeals from the judgment of the superior court. The salient facts are gathered from the return to the writ made in the court below.

Complaint being made to the board of dental examiners that one Finley, and others,

were unlawfully practicing dentistry in the city of Oakland, A. Boyiarides, an investigator employed by the board and acting under the direction of its attorney, was sent to investigate the matter, and if possible, to secure evidence of such unlawful practice. Boyiarides went to a dental office in the city of Oakland and found Dr. Jacobs, the petitioner, in charge. He submitted himself to the petitioner for the purpose of having a plate made. Dr. Jacobs made an examination of his mouth and told him that it would cost $25 or $30 for the plate. The price of $15 was finally agreed upon, and Boyiarides paid Dr. Jacobs $5. Thereafter Boyiarides visited the dental office several times. On the first visit Finley made a plaster paris mold or cast of Boyiardies' mouth for the purpose of getting the measure for the plate. On the next day Finley took a "wax bite" of the mouth of Boyiarides by placing a piece of wax in his mouth and telling him to bite into it. On the third visit Finley put a wax plate set with teeth in Boyiarides' mouth for a "try-in," causing the patient to bite into the wax mold for a "try in." On the fourth visit the finished plate was delivered by Finley to Boyiarides, who paid Finley $10, taking his receipt for the money. On one of his visits to the office Boyiarides observed Finley taking a plaster cast of the mouth of another patient. On another occasion he saw Finley "working in another man's mouth." It was established by the testimony of a witness connected with the dental office that Finley was employed there for the purpose of taking impressions of plates.

[1] The petitioner on this appeal attacks the action of the board of dental examiners upon the ground that its action was without due process of law and in excess of its jurisdiction. The contention, in brief, is that the Dental Act (Stats. 1915, 698, 106) does not confer power upon the board to revoke or suspend the license of a dentist for unprofessional conduct. He bases his contention upon the fact that section 14 of the act provides that proceedings to revoke or suspend any license, under the first subdivision of section 13, for the conviction of a felony or misdemeanor, must be taken by the board on the receipt of a certified copy of the record of conviction, and that the proceeding under the second subdivision of section 13, based upon the unskillful or negligent dental practice, may be taken upon the information of another; the statute being silent as to how the board may proceed on a proceeding to revoke or suspend a license of a dentist for unprofessional conduct, as provided in the third subdivision of section 13. Petitioner therefore contends that there is no provision by which the board may proceed to the trial of one charged with unprofessional conduct. There is nothing in this point. To apply such a construction to the statute would leave the board powerless to proceed in those cases which, no doubt, call for the largest intervention of its powers. Having conferred the power upon the board to revoke or suspend licenses for the three general causes specified, and having directed how the proceedings may be had under two of the provisions for revocation, it is not to be thought that the Legislature intended to leave the board helpless to proceed against dentists accused of unprofessional conduct. The provisions of section 14, relating to proceedings to revoke and suspend licenses, providing as to the first cause that such proceedings must be taken by the board on the receipt of a certified copy of the record of conviction, and that proceedings for the second cause may be taken upon the information of another, are followed by the general provision that—

> "All accusations must be in writing, verified by some party familiar with the facts therein charged, and three copies thereof must be filed with the secretary of the board."

The remainder of the section relates to the procedure to be followed by the board upon receiving such accusation. There can be no doubt that section 13 of the act confers full jurisdiction upon the board to revoke or suspend the license of a dentist for any of the causes specified in the section. Neither can there be any doubt that section 14 was intended to, and does, provide for a complete procedure by which the board may hear and determine an accusation made under any one of the three subdivisions of the preceding section.

[2] Another contention advanced by the appellant is that, conceding that the board of dental examiners had power to hear a complaint to revoke a license for unprofessional conduct, in the instant case the accusation filed against him is not one which the board has jurisdiction to hear, for the reason that the proceeding was not "taken upon the information of another." His argument in support of the point is that as Boyiarides was a paid investigator employed by the board, and acting under the direction of its attorney for the purpose of securing evidence upon which to base a charge against him, the accusation was in fact one made by the agent of the board, or, in other words, is but an accusation by the board itself, and results in the board sitting in judgment upon its own complaint. Even if the contention were worthy of serious consideration, the provision of section 14, relied upon, is permissive in the first instance and, in the next, relates only to proceedings upon an accusation, charging the dentist with grossly unskillful or negligent practice.

[3] Appellant also contends that there was no showing that he aided and abetted an unlicensed person to practice dentistry. The petitioner was the manager of the office

where Finley was employed, made the first examination of Boyiarides' mouth, and entered into the contract for the work to be done. That work was done by Finley. The only reasonable inference to be drawn from this is that the petitioner assigned Finley to do the work. It appears without contradiction that Finley was not licensed to practice dentistry. Section 11 of the Dental Act provides that any person shall be understood to be practicing dentistry within the meaning of the act who shall "* * * (2) for a fee, salary or reward, paid directly or indirectly either to himself or to some other person, perform an operation of any kind upon, or treat diseases or lesions of the human teeth or jaws, or correct malimposed positions thereof."

It does not require the performance of a surgical operation to bring one within the purview of the law. The words "operate" and "operation," technically used in connection with surgery, mean "to perform some manual act upon the body of the patient, usually with instruments, with a view to restore soundness or health, or otherwise improve the physical condition," and "the act or series of acts and manipulations performed upon a patient's body, as in setting a bone, amputating a limb, extracting a tooth, etc." Century Dictionary. They have also a plain ordinary meaning, in the light of which this act may and, we think, should be construed. According to the authority just quoted, "operate" means "to perform or to be at work"; "to produce an effect; act; work." And "operation" means "action," "working," "a specific act or activity," and "the course of action or series of acts by which some result is accomplished." The same dictionary defines "an operator" as "one who operates in any way, or on or against anything."

The ultimate purpose of the Dental Act is to bring about and insure skill and proficiency in the practice of the profession in this state. When all of it provisions are read together, and construed in the light of the plain ordinary meaning of the words and terms just noted, little difficulty is experienced in arriving at an understanding of what the Legislature intended by the enactment of section 11 of the act, defining what shall constitute "practicing dentistry."

The particular purpose to be accomplished by that portion of the section germane to this appeal is manifestly to prevent the doing of those things about or upon the human teeth, or jaws, which require skill, adequate training and understanding in their performance. The section provides that one who performs an operation of any kind upon those portions of the human anatomy shall be understood to be practicing dentistry, but that nothing within the act shall prohibit "an unlicensed person from performing merely mechanical work upon inert matter in a dental laboratory." The Legislature has very plainly indicated what work may be done by an unlicensed person in connection with the lawful practice of dentistry in this state. The acts done by the appellant in the present case do not fall within the permission of the statute.

The judgment is affirmed.

We concur: WILBUR, Acting C. J.; LENNON, J.; LAWLOR, J.; RICHARDS, Justice pro tem.

---

189 Cal. 715

## WHITEHEAD v. DAVIE et al. (S. F. 10198.)

(Supreme Court of California. Oct. 11, 1922.)

**1. Municipal corporations ⟸200—Charter providing retirement and pension for members of fire department retroactive as to period of service.**

Oakland Charter, art. 15, § 102 (St. 1919, p. 1369), providing for retirement on pension of members of fire department after service aggregating 25 years, or 20 years if 55 years old, is retroactive, so that the required service period dates from the beginning of the service.

**2. Municipal corporations ⟸200—Period member of fire department acted as chief considered as part of aggregate service, as affecting retirement and pension.**

Where a member of the fire department city of Oakland was reappointed battalion chief after serving as chief of the department the period of service as chief, his appointment not being subject to civil service rules, should be taken into consideration in determining the period of his aggregate service, under Oakland Charter, art. 15, § 102 (St. 1919, p. 1369), as affecting his right to retirement and pension.

**3. Municipal corporations ⟸142—Charter forbidding person holding two offices at same time does not affect eligibility of chief of fire department to appointment as battalion chief.**

Oakland Charter, § 38, providing that no person holding any office, position or employment under the city government shall be eligible to hold any other elective or appointive office under the city government, does not affect the eligibility of the chief of the fire department to position as battalion chief.

**4. Municipal corporations ⟸196—Chief of fire department may be appointed without reference to civil service rules and classifications.**

Under Oakland Charter, art. 13, § 73, providing that the board of trustees of fireman's relief and pension fund shall make rules for examinations for appointments and promotions, and section 80 thereof, providing that provisions of article 13 shall apply to all affairs and employees of the city except as enumerated in section 30, which enumerates chief of fire de-

partment, such chief may be appointed without reference to the civil service rules and classifications.

**5. Municipal corporations ⟸200—Fireman pension computed on basis of salary one year before retirement.**

Under Oakland Charter, § 102 (St. 1919, p. 1369), the pension of a retired member of the fire department is computed on the basis of his salary one year before date of retirement.

In Bank.

Petition for writ of mandate by Elliott Whitehead against John L. Davie and others, as the Board of Trustees of the Fireman's Relief and Pension Fund of the city of Oakland, to enforce his application for retirement from the fire department and a pension. Writ granted.

Fitzgerald, Abbott & Beardsley, of Oakland, for petitioner.

Leon E. Gray, City Atty., and Markell C. Baer, Deputy City Atty., both of Oakland, for respondents.

WILBUR, Acting C. J. The petitioner, having served 25 years in the fire department of the city of Oakland, from and after May 12, 1896, applied on October 17, 1921, to the respondents for an order retiring him upon half the pay of the chief of the fire department, a position he held one year before the application for retirement. The respondents having refused the application, petitioner seeks a writ of mandate to compel the making of such order. The petitioner began his connection with such department as an extra man. On July 1, 1915, he was appointed chief of the fire department, and served until July 1, 1921, when he was appointed battalion chief, the position which he occupied at the time of his advancement to the position of chief of the fire department. He continued to serve as battalion chief, and while such chief made his application for retirement and pension. It is contended that the provisions of article 15, § 102, of the Oakland charter (Stats. 1919, p. 1364) are not retroactive, and therefore petitioner, not having served 25 years from and after the date of the adoption of the amendment to the charter, is not entitled to retirement under this section.

It is not disputed that the Legislature had power to make provision for retirement based in part upon service rendered before the adoption of the statute or charter, and it is clear that this must be true where service is rendered after the adoption of the provision for retirement, for such pension plan operates as an increase of compensation for services performed after the time of the enactment of the law authorizing pensions. In other words, if a man who has served 20 years is informed by statute that, if he serves 5 years more, he will receive a pension, in effect he is induced to perform such service by the fact that his compensation for 5 years' service is increased to that extent. Hammitt v. Gaynor (Sup.) 144 N. Y. Supp. 123; People v. Abbott, 274 Ill. 380, 113 N. E. 696, Ann. Cas. 1918D, 450; State v. Love, 89 Neb. 149, 131 N. W. 196, 34 L. R. A. (N. S.) 607, Ann. Cas. 1912C, 542. Whether such pension could be granted to one who had already completed the term of service, and who was thus entitled to immediate retirement without the performance of additional services, is a question not involved in this case, for the petitioner had not completed his 25 years' service at the time of the adoption of the amendment to the charter in 1919.

Soon after the petitioner became a member of the Oakland fire department a law was passed providing for a pension scheme for members of such department. Stats. 1901, pp. 101, 102. This statute reads:

"Sec. 3. Whenever any person *at the taking effect of this act*, or thereafter, shall have been duly appointed or selected and sworn, and shall have served for twenty years or more, in the aggregate, as a member in any capacity or any rank whatever of the regularly constituted fire department of any such county, city and county, city or town, * * * said board may, *if it see fit*, order and direct that such person be retired from further service in such fire department, and from the date of the making of such order the service of such person in such fire department shall cease, and such person so retired shall thereafter during his lifetime be paid from such fund a yearly pension. * * *" (Italics ours.)

Thus, by the terms of section 3, 20 years' service eitner before or after, or in part before and after the passage of the law, authorized the board to retire a member of the department if it saw fit so to do. In 1905 (Stats. 1905, p. 412) a new law was enacted to take the place of the statute of 1901, authorizing the board to retire any person after such person became 60 years of age who at the time of the taking effect of the act or thereafter shall have served 20 years as a member of the department. It was provided in the Law of 1905 that relief and pension funds on hand should be paid into and constitute a part of the fund to be paid out under the Law of 1905.

The Oakland charter of 1911 provided for the continuance of the existing municipality (article 1, § 1), and for the assumption by it of "all the duties and obligations now pertaining to or incumbent on said city as a corporation, not inconsistent with the provisions of this charter" (article 1, § 2). It also provides for the retention in the fire department of all members appointed prior to September 1, 1910, in good standing at the time the charter goes into effect (article 15, § 97), and that new appointees shall not be less than 21 nor more than 35 years of age

(section 98). It is also provided that all lawful regulations in force at the time the charter takes effect, and not inconsistent with the provisions thereof, are continued in force. Article 24, § 198. It also provided (article 15, § 102, Stats. 1911, p. 1613) that the trustees of the pension fund might relieve any aged, infirm, or disabled member of the department who had arrived at the age of 55 years after an examination showing that they are unfit for the performance of duty, and further provides:

"Said board of trustees shall at the request of any member of the department who has arrived at the age of fifty-five years, retire and relieve such member making such application. * * * No such pension shall be paid unless such person has been an active member of the department for twenty years in the aggregate preceding his retirement, and the same shall cease at his death."

In 1919 the charter was amended in this respect, so that it now provides that the trustees shall, upon the request of any member of the fire department who has served 25 years in the aggregate, retire and relieve said member making such application. Stats. 1919, pp. 1369, 1370. The new provision authorizes retirement after 25 years of service, even if the member of the department has not attained the age of 55 years, but if he has attained such age he is then entitled to retirement after only 20 years of service in the department.

[1] In view of the fact that the charter provisions under consideration are but modifications of existing laws entitling the members of the fire department of Oakland to retirement after 20 or 25 years of service, as the case may be, it is clear that the charter provision as to service was intended to be retroactive. To hold otherwise would be to deprive the members of the department of compensation by way of pension given to them by the law under which they performed services. Such a construction should not be adopted unless the intent to commit such injustice is clear. It is true that the charter of 1911 did not permit retirement until the age of 55 was attained after 20 years of service, and that the amendment of 1919 permits retirement after 5 more years' service even if the age of 55 is not yet attained, and that the petitioner, who has not yet attained the age of 55, is thus entitled to a benefit not accorded to him under the charter of 1911, but this change does not justify the conclusion that in this specific case the period of service is to date from the adoption of the amendment and all others from the beginning of their actual service. The period of 25 years, therefore, dates from the beginning of service.

[2] It is claimed, however, that the reappointment of the petitioner to the position of battalion chief was not justified under the civil service rules, and that therefore the period he has occupied this position should not be taken into consideration in determining whether or not the petitioner has served 25 years in the fire department. Under the charter the position of chief of the fire department is not under the classified service, and the appointment may be made without reference to civil service rules. The practice under the rules adopted by the civil service commission has been to grant a leave of absence to a member of the fire department whom it was desired to appoint as chief of the department, and to continue such leave of absence from time to time by extension thereof, so that the chief should be deemed to hold his position of battalion chief so far as the civil service rules are concerned.

It is contended that the effect of this arrangement is to permit the chief of the fire department to hold two offices at the same time, that of chief of the fire department and that of battalion chief. This suggestion entirely overlooks the purpose of the so-called leave of absence, and the civil service rules with relation thereto. These rules mean nothing more or less than that, during the period while the battalion chief is acting as chief of the fire department, and thus continues as a member of the department, his position of battalion chief shall be deemed to be temporarily filled by his successor, and he retains the right to permanently occupy that place whenever his incumbency as chief of the fire department is terminated. The chief of the fire department did not hold two positions or draw two salaries or perform the duties of the two offices because of such leave of absence. The civil service rule in question is merely for the purpose of establishing that the chief of the fire department is continuously eligible to reappointment as permanent battalion chief, and also that his successor is appointed to fill a vacancy in that permanent employment existing by reason of the temporary transfer of the battalion chief to the higher office of chief of the fire department. So far as the charter provision concerning the retirement of officers of the fire department is concerned (article 15, § 102), the service of the petitioner was continuous in the fire department; his reinstatement in or reappointment to the position of battalion chief is authorized by civil service rules which permit the chief of the fire department to retain his civil service standing during his employment in a nonclassified position in the department.

[3] It is claimed that the provisions of section 38 of the charter make the chief of the fire department ineligible to appointment as a battalion chief. This provision reads as follows:

"No person holding any office, position or employment under the city government shall be eligible to or hold any other elective or ap-

pointive office under the government of the city of Oakland. * * *"

This section merely prohibits an officer from holding two offices at the same time. When he relinquishes one office he is eligible to any other office.

[4] It is claimed that the rules of the civil service board permitting the granting of leave of absence to a member of the fire department to accept the position of chief of the fire department is in excess of the jurisdiction and power of the civil service commission. This position cannot be maintained. Section 73 of article 13 of the charter provides as follows:

"The board shall make rules to carry out the purposes of this article, and for examinations, appointments *and promotions*. All rules and all changes therein shall be forthwith printed by the board for distribution." (Italics ours.)

Section 80 of the same article provides that the provisions of the article shall apply to all appointed officers and employees of the city in or under any of the departments enumerated in section 72 of this charter, except the following:

"The chief officials of the city enumerated in section thirty (30) of this charter. * * *"

Section 30 of the charter enumerates, among others, "a chief of the fire department."

It is clear, under these provisions of the charter, that the chief of the fire department may be appointed without reference to civil service rules and classification, and this is, no doubt, the purpose of the exception in section 80 above quoted. It is also true that the advance of any member of the fire department to the position of chief of the department is a promotion of such member of the fire department, and therefore, as such member is under the classified list, the civil service board have power to consider the effect of such promotion upon his standing as a member of the fire department, for to do so is to regulate the subject of promotion in the classified list of the fire department. In pursuance of these provisions of the charter the civil service commissioners have, in effect, provided by rule that the promotion of a member of the department to the position of chief of the department shall not be deemed to vacate permanently the office held by him under the classified civil service, but that, so far as that office is concerned, the period of such incumbency shall be deemed a mere temporary absence from the civil service position.

It follows that the transfer of the petitioner from the civil service position to that of chief of the fire department did not break the continuity of his service in the fire department, and did not operate to prevent his returning to his civil service position upon the termination of his incumbency as chief of the department.

[5] We are next required to consider the effect of the last sentence in section 102 of the charter as amended in 1919, found on page 1370 of the Statutes of 1919:

"Such retired member shall receive from the Firemen's Relief and Pension Fund a pension equal to one-half of the salary attached to the rank held by him one year prior to the date of said retirement, which pension shall be paid in equal monthly installments and shall cease at the death of such member."

The question is whether he is to be paid one-half of the salary of chief of the fire department, that being the rank held by him October 17, 1920, a date one year previous to his application for retirement, or whether he should be paid only upon the basis of a rank held continuously for one year previous to his retirement. On the whole it is clear that a day one year before the application for retirement is fixed by the charter as the basis of rank for retirement in order to prevent a retirement soon after a promotion.

The decision of the District Court of Appeal, First District, Division 2, in Rumetsch v. Davie, 190 Pac. 1075, holds that the pensioner is to be retired with the rank held one year before the date of retirement, and with one-half the pay attached to that rank at the time of retirement. That question is not involved here, for the pay of chief of the fire department was the same October 17, 1920, and October 17, 1921. That decision accords with our view that the rank held October 17, 1920, fixes the rank of petitioner for the purpose of retirement, although certain statements in the opinion would indicate that the rank must be held for the year immediately preceding the retirement; but this question was not involved in that case.

Let the writ issue as prayed.

We concur: WASTE, J.; SLOANE, J.; SHURTLEFF, J.; LENNON, J.; LAWLOR, J.

59 Cal. App. 46

## BISHOP v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

(Civ. 3913.)

(District Court of Appeal, Second District, Division 2, California. Sept. 5, 1922. Hearing Denied by Supreme Court Oct. 30, 1922.)

**1. New trial ⟸163(2)—General order granting new trial opens case as to all parties.**

Where an order granting a new trial is general in its terms, the effect is to open the case as to all the parties, though some of them have not moved for a new trial.

**2. Judgment ⟸395—Order setting aside judgment against one defendant does not affect another defendant where interests are distinct.**

An order setting aside a judgment against one defendant would not affect the judgment against a codefendant where the rights and interests of the defendants are distinct, as where a judgment is rendered against two or more defendants as joint tort-feasors; and the rule is not modified by Code Civ. Proc. § 579, providing that judgment may be entered against one party and action proceed as to the others.

**3. New trial ⟸163(2) — As exoneration of agent exonerates principal where fraud committed without knowledge or consent of principal, grant of motion as to one opens case as to other.**

Where an agent commits a fraud without the knowledge and consent of the principal, and in an action against both of them for the fraud the judgment against the agent is set aside and new trial granted, the judgment against the principal must be set aside, since the only wrong found to have been done by the principal was through the agent.

**4. Execution ⟸12—Will not issue after motion for new trial has been granted.**

An execution cannot issue upon a judgment after a motion for a new trial has been granted, as the order granting the motion for a new trial vacates the findings and judgment.

Petition for mandamus by James M. Bishop against the Superior Court of Los Angeles County, Albert Lee Stephens, Judge, and another. Writ denied.

Stuart M. Salisbury, S. A. McNeil, and Wm. B. Himrod, all of Los Angeles, for petitioner.

Newlin & Ashburn, of Los Angeles, for respondents.

CRAIG, J. This proceeding is one in mandate to compel the superior court of Los Angeles county and L. E. Lampton, the clerk thereof, to issue an execution against the defendant David Evans and his property on a judgment obtained by petitioner against Evans and one Grant McCartney in an action in the above-named superior court. Thereafter McCartney moved for a new trial, which motion the court granted. Evans did not join in this motion, and made none on his own behalf, but subsequently, and more than 10 days after notice of the entry of the judgment, moved the court to vacate and set aside the judgment as against him. This motion the court also granted. Thereafter the petitioner applied to the defendants herein for the issuance of a writ of execution against the property of Evans, which Lampton, as clerk, and the court both refused.

The nature of the original action was one for damages for breach of contract. The court in rendering judgment found that McCartney had acted as the representative of Evans in the sale to the petitioner of certain lands, and that McCartney, as such agent, with intent to deceive and defraud the petitioner, had made certain false representations to him concerning the desire of tenants to remain, and that these representations were an inducing cause which influenced the petitioner, Bishop, to enter into a contract for the purchase of the property. The findings contain no statement to the effect that Evans made any of these false representations himself or otherwise authorized McCartney to make them than by employing McCartney to make a sale.

The single issue presented is: Did the order granting a new trial made upon motion of McCartney which directed that the judgment be vacated and set aside have the effect of vacating it as to Evans? The order was worded:

"It is ordered that motion for a new trial be granted on the ground of the insufficiency of the evidence to justify the findings and judgment."

It was general in its terms.

[1, 2] The rule is that, where an order granting a new trial is general, the effect is to open up the case as to all the parties, even though some of them have not moved for a new trial. 1 Hayne on New Trial and Appeal, § 167; Kent v. Williams, 146 Cal. 3, 79 Pac. 527; Murphy v. Bridge, 43 Cal. App. 87, 184 Pac. 497. The effect of such an order is measured by the character of the motion upon which it is predicated. Mercantile Trust Co. v. Superior Court, 178 Cal. 512, 174 Pac. 51. However, in the instant case the motion, like the order, was in general terms. It is true that there are many cases in which it has been held that the granting of a motion for a new trial made by one defendant does not operate to set aside a judgment against a codefendant. They come within the exception to the rule. That exception is that, where the rights and interests of the defendants are distinct, an order setting aside a judgment against one will not affect the judgment against a codefendant. The cases cited by petitioner

are of this nature. Where the judgment rendered is against two or more defendants as joint tort-feasors, the case clearly comes within the exception. Preluzky v. Rittigstein (Cal. App.) 196 Pac. 917, Fearon v. Foddera, 169 Cal. 370, 148 Pac. 200, Ann. Cas. 1916D, 312, and others cited by petitioner are of this character. Lake v. Superior Court, 187 Cal. 116, 200 Pac. 1041, and Mercantile Trust Co. v. Superior Court, 178 Cal. 512, 174 Pac. 51, although not cases sounding in tort, were instances of defendants having severable interests in which a judgment against one did not involve a similar conclusion against another. The common-law rule, as before stated, is fully recognized in this state, and section 579, Code of Civil Procedure, does not modify it where the rights and liabilities of the codefendants are interdependent or those of one entirely dependent on the other.

[3] In the instant case the trial court found that Evans owned a house which he employed McCartney to sell; that McCartney misrepresented certain material facts to Bishop; that by reason of the false representations made by McCartney, and solely because of them, Bishop refused to consummate the purchase of the property; and that said false representations were made without the knowledge, consent, or acquiescence of the defendant Evans. Beside rendering judgment against McCartney, the trial court gave judgment that Evans should recover from McCartney any sum which Evans might be required to pay Bishop on the judgment rendered. It is too plain to require extended discussion that the liability of the principal in this case is entirely dependent upon that of the agent. If it be held that such findings and judgment were not supported by the evidence, surely there can be no basis for liability upon the part of the principal. An exoneration of the agent must exonerate the principal, since the only wrong found to have been done by the principal was through the agent.

However, petitioner insists that the cases cited by respondent have no application except where the issue is presented on appeal after a motion for a new trial. It is pointed out that in the case at bar Evans made no attempt to set aside the judgment until long after the period allowed for a motion for a new trial had expired.

[4] The motion which he made does not affect his rights. If the original order granting a new trial in general terms operated to vacate the judgment against Evans, it was unnecessary for him to make any motion. An execution cannot issue upon a judgment after a motion for a new trial has been granted. The order granting the motion for a new trial vacated the findings and judgment. Etchas v. Orena, 121 Cal. 270, 53 Pac. 798. If authority were needed for so obvious a proposition as the one that a court has no jurisdiction to issue an execution on a judgment which has been vacated, it is supplied by Long v. Garnett, 45 Tex. 400.

The writ is denied and the petition dismissed.

We concur: FINLAYSON, P. J.; WORKS, J.

---

59 Cal. App. 64

## PEOPLE v. MIT SINGH. (Cr. 899.)

(District Court of Appeal, Second District, Division 2, California. Sept. 6, 1922.)

**1. Rape ⟸53(3)—Evidence held to show intent to commit.**

In a prosecution for assault with intent to commit rape, evidence *held* to show defendant's intent, where the struggles of prosecutrix with defendant, although she broke away, were seen by three witnesses.

**2. Criminal law ⟸822(4) — Charge as to defendant's intent held not to assume proof of prosecutrix's seizure in assault with intent to commit rape.**

In a prosecution for assault with intent to commit rape, a charge, relating to defendant's intent, that to find guilt, "you must be satisfied that the accused, when he had hold of the prosecutrix," etc., was not an assumption of proof of prosecutrix's seizure by defendant, where the charge was otherwise plain that the jury must be satisfied defendant actually laid hands on prosecutrix.

**3. Criminal law ⟸822(1) — Charge must be considered in its entirety.**

The trial court's charge must be considered in its entirety, and if as a whole it contains a correct statement of law, it is free from criticism.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Mit Singh was convicted of assault with intent to commit rape, and he appeals. Affirmed.

Sebille & Sebille, of Brawley, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Lorrin Andrews, of Los Angeles, for the People.

CRAIG, J. The defendant was convicted of the crime of assault with intent to commit rape. He appeals from the judgment and the order denying his motion for a new trial.

[1] From the evidence adduced at the trial it appears that the prosecuting witness and her husband lived in a small tank house on the ranch of a man named Brown, which was about a block from a family named Carrillo. According to the prosecutrix, Singh came to her door about noon on December

25, 1921, in the absence of her husband. When she met Singh at the door he forcibly seized her and attempted to "hug and kiss" and throw her to the ground. After a struggle of some minutes duration in front of her house during which the dress of the prosecutrix was torn, she broke away and ran to the Carrillo house. The defendant followed her, with a pistol in his hand, until he fell to the ground, and she escaped. The prosecutrix is corroborated by three other persons who were at the Carrillo house (which was so situated as to give any one there a view of the front of the house of prosecutrix), and saw defendant and the prosecutrix struggling together. They further testified that they saw the prosecutrix break away from the defendant and run toward the Carrillo home pursued by the defendant, who had something in his hand, and that about halfway to their house the defendant fell and came no nearer. The defendant denies both the assault and that he was present at the house of the prosecutrix at the time it was alleged to have taken place.

Appellant first urges as a ground for reversal that there is no evidence whatsoever to show assault with intent to commit rape. This contention is devoid of merit. In the face of the testimony of the prosecutrix, corroborated by three other witnesses, it cannot with reason be said that the jury was unwarranted in determining that the defendant's actions constituted an assault with intent to commit rape. The intent with which an assault is committed is exclusively for the jury to determine from all the circumstances and acts of the defendant. People v. Bowman, 6 Cal. App. 749, 93 Pac. 198. Where, as in the instant case, there is a sharp conflict in the evidence it is too well settled to require citation of authority that the verdict will not be set aside upon appeal.

[2] Appellant relies principally on the claim that the trial court erred in giving the following instruction:

"You are hereby instructed that in order to find the defendant guilty of an assault to commit rape you must be satisfied that the accused, *when he had hold of the prosecutrix*, not only desired to gratify his passions upon her person, but that he intended to do so at all events and notwithstanding any resistance on her part. The assault must have been made with intent to commit a rape notwithstanding all possible resistance that could be made. Intent must have been to perpetrate the crime at all events, regardless of what the prosecutrix might or could do to prevent it, and the question of intent is a question for the jury to determine."

The court instructed the jury that the presumption of innocence was with the defendant, and that the burden of proving him guilty beyond all reasonable doubt rested upon the prosecution, and that the jury must acquit unless the evidence established the defendant's guilt beyond a reasonable doubt. This applied to the necessity of proof that defendant assaulted the prosecutrix, just as it did to other essentials of the offense charged. The court further informed the jury that—

"It is not enough for you to be convinced beyond a reasonable doubt that the defendant laid violent hands upon the prosecutrix."

It predicated other instructions on the necessity that the jury first find that defendant assaulted the prosecutrix. Appellant argues that the effect of the instruction first quoted was to assume that an essential element of the crime had been proved, i. e., the seizure of the prosecutrix by the defendant, and that as such it constituted an instruction to the jury on a matter of fact.

[3] It is of course true that the trial court must confine itself in its instructions to matters of law, but we do not think the instruction under consideration, construed with the entire charge, conflicts with this rule. It is well established by numerous decisions that the charge of the trial court must be considered in its entirety, and that if as a whole it contains a correct statement of the law it is free from criticism. People v. Wong Hing, 28 Cal. App. 230, 151 Pac. 1159; People v. Mendenhall, 135 Cal. 346, 67 Pac. 325; People v. Besold, 154 Cal. 363, 97 Pac. 871. In the case of People v. Wong Hing, supra, the court instructed the jury that—

"The law presumes that every one who deliberately and intentionally fires a gun at another, does such act willfully and with malice aforethought," etc.

It was there contended that the instruction told the jury that the defendant had actually fired at the deceased, and that because of his firing the natural consequence of his act, namely, the death of Gue Ton, was intended by him. In its decision the court used the following language:

"Considered alone, or without reference to other parts of the charge delivered by the court to the jury, the defendant's criticism would, of course, be sound and just, but it was the duty of the jury, as it is our duty in reviewing the instructions, to consider the entire charge of the court, 'and if, as a whole, it correctly states the law, it is free from error, notwithstanding selected passages may state a proposition without at the same time and in immediate connection stating the exceptions or qualifications to which it is subject in its application to the case in hand.' People v. Mendenhall, 135 Cal. 346, 67 Pac. 325. See, also, People v. Doyell, 48 Cal. 85; People v. Flynn, 73 Cal. 511, 15 Pac. 102; People v. Worden, 113 Cal. 569, 45 Pac. 844; People v. Quimby, 6 Cal. App. 482, 92 Pac. 493; People v. Del Cerro, 9 Cal. App. 764, 769, 100 Pac. 887; People v. Bruggy, 93 Cal. 476, 29 Pac. 26; People v. Besold, 154 Cal. 363, 370, 97 Pac. 871. The court, in its charge, repeatedly instructed the jury that the presumption of innocence was with the defendant, that consequently the burden of proving the defendant's

guilt beyond a reasonable doubt was upon the prosecution and that unless the evidence established guilt beyond a reasonable doubt the defendant would be entitled to a verdict of acquittal. Viewed by the light of these instructions, the criticized instruction must be construed to mean, as no doubt the jury so understood it, that if the evidence showed beyond a reasonable doubt that the defendant deliberately and intentionally fired a gun or pistol at the deceased, it was to be presumed that he did so willfully and with malice aforethought. As stated, the jury presumptively so understood the instruction and as so construed it was properly given in this case."

The situation in the case just discussed is singularly analogous to the one at bar. The trial court made it plain in its instructions to the jury that to convict the defendant they must be satisfied beyond a reasonable doubt that the defendant actually laid hands on the prosecutrix and, viewed by the light of these instructions, the instruction criticized must be construed to mean that if the evidence showed beyond a reasonable doubt that the defendant violently laid hands on the prosecutrix, then and in that case they must be further satisfied that he intended to commit a rape, notwithstanding all possible resistance that could be made. People v. Wong Hing, supra.

Appellant cites several cases to sustain the proposition that an erroneous charge which is not withdrawn is not cured by a subsequent correct charge on the same point. These cases are not in point, for, without exception, they involve conflicting and contradictory instructions which contain erroneous statements of the law. As construed, the instruction under consideration contains a correct statement of the law, and neither conflicts with nor contradicts any part of the trial court's charge to the jury.

No error appearing, the judgment and order appealed from are affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

---

59 Cal. App. 7

## BEYERLE v. CLIFT. (Civ. 3915.)

(District Court of Appeal, Second District, Division 1, California. Aug. 30, 1922. Hearing Denied by Supreme Court Oct. 26, 1922.)

**1. Trial ⊂=253(3)—Instruction in collision case disregarding defense of contributory negligence held erroneous.**

In an action for damages to plaintiff's motortruck, struck by defendant's automobile, wherein defendant relied on contributory negligence, an instruction to find for plaintiff if defendant violated any of the provisions of the law defining the duties imposed on operators of vehicles at the time of the accident, and if such violation was the proximate cause of the accident, *held* erroneous as failing to embrace all conditions necessary, including the defense of contributory negligence.

**2. Trial ⊂=253(6) — All things necessary to show legal liability of defendant to be embraced in instruction for plaintiff in the event of finding certain facts.**

An instruction directing a verdict for plaintiff in the event that the jury finds certain facts true must embrace all the things necessary to show legal liability of defendant, and to warrant the direction or conclusion herein that plaintiff is entitled to a verdict.

**3. Trial ⊂=296(3) — Instruction disregarding contributory negligence held not cured by other instructions given.**

In an action for damages to plaintiff's truck struck by defendant's automobile, an instruction purporting to state the conditions necessary to a verdict, but overlooking the defense of contributory negligence, *held* not cured by other correct instructions on contributory negligence, as they simply produced a conflict and it is not possible to say which the jury followed.

**4. Highways ⊂=184(3)—Submission of issue of contributory negligence in collision case held justified by evidence.**

In an action for damages to plaintiff's truck struck by defendant's automobile, wherein the defense of contributory negligence was relied upon, evidence as to the speed at which defendant was traveling and as to conditions surrounding the accident *held* to justify presentation to the jury of the question of contributory negligence.

**5. Evidence ⊂=17—Judicial notice taken of rising of moon and height at given time.**

The courts will take judicial notice of the time of the rising of the moon and of its height at a given time.

**6. Appeal and error ⊂=171(3)—Sufficiency of plea of contributory negligence will not be considered where case was tried on theory that such issue was properly pleaded.**

In an action for injuries to plaintiff's truck struck by defendant's automobile, the sufficiency of a plea of contributory negligence will not be considered where the answer plainly relied upon contributory negligence, and the case was tried and evidence offered for and against on the theory that contributory negligence was in issue, both parties asking for instructions on that question, especially in the absence of any demurrer to the answer.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by K. F. Beyerle against R. D. Clift. Judgment for plaintiff, and defendant appeals. Reversed.

W. I. Gilbert, of Los Angeles, for appellant.

Rohe, Yakey & Devin, of Los Angeles, for respondent.

CONREY, P. J. Action to recover damages for injuries to a truck owned by the

plaintiff, such injuries being caused, so it is alleged, by negligence of the defendant in the operation of an automobile driven by him, by reason whereof it became necessary for the operator of plaintiff's truck to drive the truck entirely off the highway, in order to avoid a collision with the defendant's automobile. As a result of its being so driven off the highway into soft ground, the truck turned over and was thereby damaged to the extent described in the complaint. The defendant, in addition to denying the alleged acts of negligence on his part, alleged that the plaintiff "was guilty of negligence in the manner in which he operated his automobile truck at the time and place of the accident, in that he did not exercise ordinary care or any care in the operation of said truck, all of which directly and proximately contributed to the accident in question." Pursuant to the verdict of a jury, judgment was entered in favor of the plaintiff. Defendant appeals therefrom.

The errors relied upon consist in the giving of two instructions to the jury. In each of these instructions the court stated certain provisions of law defining the duties imposed upon an operator of a vehicle, and then said:

"If, therefore, you believe that the defendant violated any of the provisions of the law above mentioned at the time of the accident complained of in this case, and that such violation was the proximate cause of the accident, you should find for the plaintiff."

[1-3] Assuming that the issue of contributory negligence was properly before the court, there is no doubt that these were erroneous instructions, because it is settled law that, if an instruction by its terms purports to state the conditions necessary to a verdict, it must state all those conditions and must not overlook pleaded defenses on which substantial evidence has been introduced.

"It is clear that an instruction directing a verdict for the plaintiff in the event that the jury finds certain facts to be true must embrace all the things necessary to show the legal liability of the defendant and to warrant the direction or conclusion contained therein that plaintiff is entitled to a verdict, and such is the rule in this state." Pierce v. United Gas & Elec. Co., 161 Cal. 176, 184, 118 Pac. 700, 704; Keena v. United Railroads (Cal. App.) 207 Pac. 35.

The court gave other instructions on the subject of contributory negligence, the correctness of which is not challenged. But this is not sufficient to overcome the prejudicial character of the erroneous instructions.

"It is true that other instructions were given at the request of defendant that stated the law in these respects as favorably to defendant as was warranted, if not more favorably. But the giving of these other instructions simply produced a clear conflict in the instructions given the jury by the court, and it is impossible for us to say which instruction the jury followed in arriving at a verdict in favor of plaintiff." Pierce v. United Gas & Elec. Co., supra, 161 Cal. at page 185, 118 Pac. at page 704.

Respondent suggest that the instructions here criticized did not ignore the defense of contributory negligence, because those instructions required that before finding for the plaintiff it must appear that defendant's violation, if any there was, of the stated provisions of law "was the proximate cause of the accident," and not merely that such violation proximately contributed to the accident. The contention is that, in order to be the cause of the accident, the defendant's wrongful act must have been the sole cause thereof, and that therefore the language used carried the implication that defendant's wrongful act alone, without any contributory negligence of the plaintiff, was in contemplation as the cause of the accident. We do not agree with this contention. The natural and ordinary meaning of the words used in this instruction was such as to draw the attention of the jury solely to the alleged negligence of the defendant, without taking into consideration any evidence from which contributory negligence of the plaintiff might have been inferred.

[4, 5] Respondent further replies that the evidence did not warrant the court in giving any instruction upon the question of contributory negligence, and that the fact of contributory negligence was not sufficiently pleaded by the defendant. The evidence was sufficient to present to the jury the question of contributory negligence of the plaintiff. The situation described was as follows: The plaintiff's truck was being driven in a northerly direction. Two automobiles, one immediately behind the other, had stopped on the westerly side of the road. The paved portion of the highway was 16 feet wide. The evidence is uncertain as to whether the standing machines were entirely off the paved road. At any rate, they were on the west side of the road. The plaintiff's driver admitted that there was an apron on the south side of the paved highway. As we interpret the evidence, he meant the southeast side. The context compels the inference that the road at that place ran in a northeasterly and southwesterly direction, so that the right hand side of the road, when traveling north, might be called either the south side or the east side. The defendant testified that this apron was 10 feet in width, consisting of solid, hard dirt road. If this be true, there would be 18 feet between the middle of the road and the edge of the apron, and probably at least 20 feet between the standing machines and the edge of the apron where the ditch begins. According to the plaintiff's testimony, in approaching the point where he must pass the standing machines, he traveled on a slightly down grade at the rate of 25 miles per hour. For the purposes of the pres-

ent question, we may further assume in favor of the plaintiff that the defendant at the time when he attempted to pass the standing machines (defendant moving in a southerly direction) was traveling at the rate of 50 miles an hour, and therefore that the defendant was operating his machine in a negligent manner. The time of the accident is fixed by the plaintiff at 4:50 p. m., and by the defendant at 5:15 p. m. It is stipulated that the sun had set at 4:47. The date was November 20, 1920. The defendant testified that the lamps on the plaintiff's truck were not lit. Defendant further testified that there was moonlight such that he was able by that light to read the time as shown by his watch. Under the rule that courts take judicial notice of the laws of nature and the measure of time, we take it to be the fact that (and so we are reliably informed) the moon rose at 19 minutes after 1 that afternoon, and was up 40 degrees or more at the time of the accident. The operator of plaintiff's automobile testified that as the defendant approached defendant came over onto the east side of the paved road; that there is a two-inch drop from the paved road to the dirt; that the dirt road is on a slant; that there is a ditch at the edge of the dirt road; that for this reason, in order to keep his truck straight while trying to avoid a collision with the defendant, plaintiff's driver had to pull the truck into the field, or go straight on and turn over in the ditch, and for this reason he took his chance and went on into the field. On the evidence before stated, the jury might have been warranted in finding that the truck driver of the plaintiff had sufficient room to pass safely without turning into the field, and that his own acts under the circumstances constituted negligence which contributed proximately to the accident. So far as the evidence was concerned, it was a question of fact fairly presented to the jury.

[6] Respondent's contention that the defense of contributory negligence was not pleaded in such manner as to raise the issue is answered by the decision of the Supreme Court in Kelly v. Santa Barbara, etc., R. Co., 171 Cal. 415, 421, 153 Pac. 903, 905 (Ann. Cas. 1917C 67). Answering certain objections to instructions given in that case, the respondent had claimed that the error, if any, was immaterial because the question of contributory negligence, on account of its faulty pleading in the answer, was not before the court. To this the court replied:

"But however imperfect the answer may be in its failure to allege the facts constituting the asserted contributory negligence, nevertheless the answer plainly relied upon contributory negligence. The case was tried and evidence was offered pro and con upon the theory that contributory negligence was in issue; both parties asked for instructions to the jury upon the question, and we will not here, especially in the absence of any demurrer to the answer for such imperfection, consider the question."

The statement thus made answers precisely to the conditions of the case at bar. From all of the foregoing, we conclude that the errors in the instructions given to which we have referred require a reversal of the judgment.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

---

59 Cal. App. 43

**PEOPLE ex rel. VAN VRANKEN, Dist. Atty., v. PIAZZA et al. (Civ. 2530.)**

(District Court of Appeal, Third District, California. Sept. 5, 1922.)

**Appeal and error ⟸479(2)—Power of appellate court to grant writ where a building is adjudged to be a nuisance is discretionary.**

Under Code Civ. Proc. § 949, as amended by St. 1921, p. 95, providing that an appeal of a case where a building is adjudged to be a nuisance, under St. 1913, p. 20, and closed, shall not operate as a stay, the power of the Appellate Court to grant a writ of supersedeas in such cases is discretionary, and the writ should issue only in exceptional cases.

Action by the People of the State of California, on the relation of Edward Van Vranken, District Attorney, against G. Piazza and another, to abate a nuisance. Judgment for relator, and Piazza appeals. Application by defendant for writ of supersedeas. Writ denied.

Walter F. Lynch, of Stockton, for petitioner.

R. C. Pardoe and Edward Van Vranken, both of Stockton, for respondent.

FINCH, P. J. This action was instituted under the "Red Light Abatement Act" (Stats. 1913, p. 20). The judgment rendered in the action declares a certain two-story building owned by defendant Piazza "to be a building where lewdness, assignation, and prostitution was, at the time of the filing of the complaint herein, carried on, and was then and there a public nuisance," and, further, orders that the sheriff "be, and he is hereby, authorized and directed forthwith to remove all occupants from said building, and to remove all personal property therefrom, and to keep said building closed for a period of one (1) year, or until released as provided by law." From this judgment Piazza appealed. He thereupon filed his petition herein for a writ of supersedeas, alleging that the trial court "refused to stay execution on said judgment, upon the ground

of want of jurisdiction so to do," and that, "unless a writ of supersedeas is granted staying execution on said judgment until the final determination of said appeal, petitioner will lose the sum of $200 per month in rental for said premises until the final determination of said appeal." It is not contended that the appeal operates as a stay, but that this court has inherent power to issue the writ prayed for. In the case of People v. Laine, 177 Cal. 742, 171 Pac. 941, decided March 19, 1918, it was held that, under the provisions of section 949 of the Code of Civil Procedure, the part of the judgment therein which was similar to that under consideration here was "stayed by operation of the appeal." In 1921 section 949 was amended, by adding the exception herein italicized, to read as follows:

"Stay of proceedings on perfecting appeal. *Exception when building declared nuisance.* In cases not provided for in sections nine hundred forty-two, nine hundred forty-three, nine hundred forty-four and nine hundred forty-five, the perfecting of an appeal by giving the undertaking or making the deposit mentioned in section nine hundred forty-one, stays proceedings in the court below upon the judgment or order appealed from, except where it directs the sale of perishable property; in which case the court below may order the property to be sold and the proceeds thereof to be deposited, to abide the judgment of the appellate court; and except, also, where it adjudges the defendant guilty of usurping, or intruding into, or unlawfully holding a public office, civil or military, within this state, and, except, also, where the order grants, or refuses to grant, a change of the place of trial of an action; and except also where it orders a corporation or its officers or agents, or any of them, to give to a person adjudged to be a director, stockholder or member of such corporation a reasonable opportunity to inspect or take copies of such books, papers or documents of the corporation as the court finds that such director, stockholder or member is entitled by law to inspect or copy; *and except, also, where it adjudges a building or place to be a nuisance and as a part of the judgment in the case orders and directs the closing of the building or place against its use for any purpose for any period of time.*" St. 1921, p. 95.

This amendment was probably intended to, and in fact does, change the rule as announced in People v. Laine, supra. Notwithstanding the amendment, however, petitioner contends that this court has inherent power to grant the stay applied for, citing Rogers v. Superior Court, 158 Cal. 467, 111 Pac. 357; Southern Pacific Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69; Halsted v. First Sav. Bank, 173 Cal. 605, 160 Pac. 1075; and Reed Orchard Co. v. Superior Court, 19 Cal. App. 648, 128 Pac. 9, 18. It is not necessary to decide whether the court has such power. If petitioner's contention be conceded, the issuance or denial of the writ is discretionary. Since the Legislature has provided that the appeal shall not operate as a stay, the writ should issue, if at all, only in exceptional cases. The grounds on which the writ is prayed for here would exist in every case where a building is ordered to be closed, and, hence, to grant the writ would be to nullify the statute. Without passing on the merits of the appeal, it may be said that an examination of the record discloses nothing to influence the court's discretion in favor of the issuance of the writ.

The order to show cause is discharged, and the writ prayed for is denied.

We concur: BURNETT, J.; HART, J.

---

(59 Cal. App. 31)

## ALTHOUSE et al. v. PROVIDENT MUT. BUILDING-LOAN ASS'N. (Civ. 3374.)

(District Court of Appeal, Second District, Division 1, California. Sept. 1, 1922. Hearing Denied by Supreme Court Oct. 31, 1922.)

**1. Appeal and error ⟸1036(3) — Complaint not demurrable for failure to join a possible party plaintiff, where no prejudice appears.**

A complaint is not demurrable for the omission of a party who might have been joined as plaintiff, merely because defendant may have been deprived of the benefit of equities arising out of transactions with such omitted party, particularly where no such equities are pleaded or any effort has been made to have the omitted party brought in, nor any allegations made which by consequence make it necessary to bring in such party.

**2. Money received ⟸12—Action not barred by laches.**

An action brought for money had and received two years after the cause of action accrues was not barred by laches, where no injury resulted.

**3. Dismissal and nonsuit ⟸60(1)—Remedy for failure to prosecute.**

The appropriate remedy for failure to prosecute with reasonable diligence is a motion to dismiss.

**4. Mortgages ⟸151(2) — Future advances with knowledge of other mortgage held subsequent thereto.**

Where vendor's agreement with vendee was that his trust deed for the price should be second and subject to a building loan of $3,000 by a building loan association and the trust deeds of vendor and the association were filed concurrently, loans made by the association under its trust deed in excess of $3,000, with actual notice of the terms and conditions of the vendor's trust deed, and without legal obligation to do so under its trust deed, were subsequent to the lien of vendor's trust deed, although the association's trust deed, given to secure vendee's $3,000 note, also purported to secure future advances not exceeding $6,000.

**5. Mortgages ⟸151(2) — Further advances under mortgage securing future advances held not prior as involuntary.**

Where mortgagor abandoned and failed to complete building on which building loan association had loaned $3,000 under trust deed securing that loan and further advances, subsequent expenditures by the association in excess of the $3,000, to complete the building, with knowledge of existence of another trust deed on the land, were not entitled to priority over such other trust deed, on the ground that they were further advances of an involuntary character, where the property as it stood when abandoned was of value sufficient to protect the original $3,000 loan.

**6. Mortgages ⟸183—Second mortgagee not estopped to assert his lien in preference to the lien of a first mortgagee for subsequent advances.**

A second mortgagee is not estopped to assert his lien in preference to voluntary advances for the improvement of the property, made by a first mortgagee under a clause as to future advances, and with notice of the second mortgage, where such advances were made without the second mortgagee's sanction, and with the knowledge that he claimed his second mortgage was a superior lien over such advances.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by John B. Althouse and others against the Provident Mutual Building-Loan Association. From judgment for plaintiffs, defendant appeals. Affirmed.

Milton K. Young, Lyndol L. Young, and William K. Young, all of Los Angeles, for appellant.

W. H. Jamison, of Los Angeles, for respondents.

CONREY, P. J. The defendant has filed appeals from six judgments entered in favor of plaintiffs in six actions brought for the recovery of several sums of money alleged to be held in possession by the defendant, subject to equitable liens which entitle plaintiffs to payment thereof. The cases are alike in the statement of facts relied upon. They differ only in that they relate to separate, though similar, transactions. They were tried together in the superior court. The parties are the same in all of the actions. Pursuant to stipulation, the records are presented in one transcript, and have been argued in one set of briefs. The decision in one case will determine the others. For this reason, we will discuss that case (superior court No. B–18520) in which the complaint is printed in the supplement to appellant's brief, as if it were the only action before the court, and then decide all of the appeals in accordance with the conclusions reached in that case.

Except as may be otherwise noted herein, our statement of facts will be taken from the findings of fact contained in the transcript. On the 28th day of June, 1911, the plaintiffs, being the owners of the north half of lot 2, in block 15, of Ramona Park, in the city of Alhambra, county of Los Angeles, entered into an agreement with the Ramona Park Building Company to sell said property to the company for the sum of $601.40, payable on or before three years from date, with interest as specified; payment thereof to be secured by a deed of trust to be executed at such time as the company might be able to secure a building loan on the property in the sum of $2,500, the proceeds of which were to be used exclusively for the purpose of building a residence on said land; said trust deed to be second to and subject to the building loan. Later it was agreed that the amount of the building loan could be increased to $3,000. The building company agreed to construct on the land a residence along such plans as might be acceptable to and approved by the plaintiffs. Plans for such residence were submitted by the building company to the plaintiffs, and were approved by them. An agreement was made between the defendant and the building company for a building loan of $3,000.

On July 11, 1911, plaintiffs conveyed the land to the building company. On the same day and for the purpose of securing the payment of a promissory note to the defendant in the sum of $3,000, with interest as specified therein, the building company, as party of the first part, executed a deed of trust to Title Guarantee & Trust Company as party of the second part, and the defendant as party of the third part. In said trust deed (this appears from the copy thereof annexed to the amended answer of the defendant), it was stated that the property was thereby conveyed to the trustee for the purpose of securing the payment of the note "and all costs and expenses incurred under the provisions of this instrument, and also of such additional sums as may hereafter be borrowed and received by the said party of the first part from the party of the third part, not exceeding the sum of six thousand and no/100 dollars, with interest thereon at the rate provided in the original note." It was further provided:

"In case said premises are neglected or abandoned, the party of the second part may, at its discretion, enter upon and take possession without notice and employ help to care for the same, using all available means to make productive the premises; and these trusts shall be and continue as security to the party of the second and third parts, or their successors or assigns, for the repayment of the money so borrowed by the party of the first part, and the interest thereon, and of all amounts so paid out and of costs and expenses incurred as aforesaid, whether paid by the party of the

second or of the third part, which shall be repaid on demand, and if not so paid, shall bear interest at the rate of one per cent. per month thereafter until paid."

The trust deed contains the usual power of sale in case of default—the particular terms whereof are not now in question. It was provided that the trustee, "out of the proceeds of sale shall pay, first, the expenses of making such sale; next, shall pay said third party the entire sum due it at the time of such sale, if said proceeds be sufficient, and lastly, any surplus remaining shall be paid to said first party, its successors or assigns."

On July 21, 1911, the Building Company, being indebted to the plaintiffs in the sum of $601.40 on account of the purchase price of said land, made its note therefor with interest payable to the plaintiffs on or before three years after date. At the same time, for the purpose of securing said note, the building company as party of the first part executed a deed of trust to Los Angeles Abstract & Trust Company as party of the second part, and the plaintiffs as parties of the third part; said trust deed being upon the same real property described in the first trust deed. At all times from and after July 21, 1911, the defendant had actual notice of the existence of said second trust deed and promissory note in favor of the plaintiffs, and of all the terms and conditions and stipulations contained therein. No part of said indebtedness to the plaintiffs has been paid.

There was no agreement or understanding between the plaintiff and the defendant that said land was to be improved by the construction of a residence building thereon by the building company, or that the money for such purpose was to be furnished by the defendant. There was no agreement or understanding between said parties that the trust deed of the plaintiffs and the indebtedness secured thereby was to be subject and subordinate in all respects to the repayment of any and all moneys borrowed from the defendant for the erection and completion of said building, or for moneys advanced or paid out by said association for the completion of said building under any of the provisions of the trust deed of said association other than this, that the plaintiffs' trust deed was made "subject to a trust deed for $3000 in favor of the Provident Mutual Building-Loan Association, filed for record concurrently herewith." The respective trust deeds were concurrently filed for record on August 19, 1911, at 9 a. m., at the request of the defendant, in the office of the county recorder of Los Angeles county.

The building company defaulted in payment of the sums due to the defendant, and the defendant on October 15, 1912, declared the whole of the indebtedness secured by its deed of trust to be immediately due and payable, and directed the trustee to sell the property under the terms and conditions of the trust deed. Due notice having been given, the property was offered at public sale on November 16, 1912, and was sold to the defendant, who was the only bidder at the sale, for the sum of $5,000. The deed was duly executed and delivered by the trustee to the defendant pursuant to said sale. No portion of the sum of $5,000 was paid in money, but the defendant accepted as a credit upon the note of the company to it the said sum of $5,000. On the 16th day of November, 1912, there was due from the building company to the defendant on account of the principal and interest of the note secured by defendant's trust deed the sum of $3,155.10, together with $75 charges and expenses of the sale, said aggregate sum being $1,769.90 less than the amount for which the property was sold by the trustee to the defendant.

In June, 1912, the plaintiffs had caused said premises to be advertised for sale under the trust deed made by the building company for their benefit, and had thereafter abandoned those proceedings; but such abandonment was not made with any understanding or agreement between plaintiffs and the defendant. The sale made under the trust deed of the defendant and said abandonment of proceedings by the plaintiffs under their trust deed was not made with any understanding or agreement between the plaintiffs and the defendant in relation thereto, nor with any understanding or agreement between said parties that defendant would sell said premises under said deed of trust, and that thereafter the plaintiffs would, if they so elected, have opportunity to sell said premises through the agency of Jonathan S. Dodge, one of their number. Said property was subsequently sold by defendant at its instance and request through the agency of Dodge to H. C. Cassidy, who was an innocent and bona fide purchaser, for the sum of $8,000. The said Dodge made said sale as a real estate broker, and entirely independent of his associates, the other plaintiffs, and he was not acting for or in behalf of said associates, or of any of them. At the time of said sale and long prior thereto plaintiffs demanded of the defendant that their claim against said property be paid from the funds or indebtedness arising by reason of said trustee's sale, and defendant made said sale to Cassidy with full knowledge of such claim.

On February 10, 1912, the building company borrowed and received from the defendant the additional sum of $1,000, giving its note therefor of that date. It was optional with the defendant as to whether or not it would make said additional loan of $1,000, and said additional loan was made by the defendant to the building company without the actual knowledge or consent of the

plaintiffs, or either of them. Said loan was not sanctioned or approved by the plaintiffs, or either of them. The amount due to defendant on said $1,000 note on November 16, 1912, was the sum of $1,060.30.

On or about April 20, 1912, the building company ceased construction work upon said residence before the final completion thereof, and said residence remained in that condition until on or about July 1, 1912, at which time defendant entered into an arrangement with the building company to supervise the completion of the building according to its original plans therefor. Between July 1 and November 16, 1912, defendant paid out to various persons other than the building company, on account of labor and material used and furnished by such persons in and about said building for the final completion of the same, the sum of $2,321.18. It was optional with the defendant as to whether or not it would make such payments. At all times between said two last-mentioned dates said premises were not abandoned by the building company, and during said time the same remained in its possession. Said sum of $2,321.18 was not borrowed or received by the building company from the defendant, and said sum was not expended by the defendant with the consent of the plaintiffs.

Plaintiffs are not guilty of laches, and are not estopped to claim anything against the defendant, or to prosecute this action.

All of the allegations of the plaintiffs' complaint are true except as in the findings specifically found to be otherwise, and all of the allegations of the defendant's amended answer are untrue except as in the findings specifically found to be otherwise.

This action was commenced on the 14th day of November, 1914. On November 6, 1915, the defendant demurred to the complaint on the grounds that the complaint did not state facts sufficient to constitute a cause of action; that the plaintiffs have been guilty of such laches in the commencement of the action as to bar a recovery therein; that there is a defect of parties plaintiff in that the Ramona Park Building Company was not made a party plaintiff thereto; and upon certain grounds of uncertainty, etc.

Appellant claims (a) that the demurrer should have been sustained, and that the court erred in not requiring that the building company be made a party defendant; (b) that the trust deeds made the property a first security for the payment of the sums expended by appellant for the completion of the building after work ceased thereon, and after it had been neglected and abandoned; (c) that the optional loan of $1,000 is a superior and preferred claim to respondent's "second mortgage," and that the same should be allowed in the particular action B-17599, where it becomes an important item; (d) that appellant's claims are superior to those of respondent as a matter of equity; (e) that the defenses of estoppel and laches should be sustained.

[1] The demurrer was properly overruled. No sufficient reason is suggested which would have made the building company a necessary party plaintiff. Counsel suggest that by the omission of such party appellant was deprived of any benefit which it might have received from any offset which the building company might have been able to assert against appellant's claim or any equity arising in favor of appellant by reason of the transactions occurring between plaintiff and the building company. It is not asserted that any such equity in fact existed. The answer of the defendant reveals no fact indicating the existence of any such equity. It does not appear that the defendant applied to the court to have the building company brought in as a party, or alleged any fact which by consequence made it necessary to bring in such party in order that there might be a complete settlement of the controversy between the parties to this action.

[2, 3] Neither is any reason suggested or argument made to support the claim that plaintiffs' right of action was barred by laches through delay in commencing the action. As well might this claim be made in any action brought, as for money had and received, after the lapse of a period of nearly two years after the cause of action accrued. The defendant was not injured by the fact that it remained in undisturbed possession of the fund from and after the time of the sale. It is true that one of the defendant's officers, Mr. Hunter, who had much to do with the transactions in question, died before the trial of this case, but that unfortunate event occurred nearly two years after the summons herein was served upon the defendant. The record does not show why the action was not brought on for trial until after his death. Laches of the plaintiff, by reason of such delay as there was in commencing the action, was not established. If the action was not prosecuted with reasonable diligence, the appropriate remedy of the defendant would have been by motion to dismiss for want of prosecution. Watterson v. Hillside Water Co., 42 Cal. App. 364, 183 Pac. 592. It does not appear that any such motion was made.

[4] It may be conceded that as between the parties to the defendant's trust deed the loan of $1,000 made by defendant to the building company, and also the expenditures made by the defendant for completion of the building after July 1, 1912, were secured by that trust deed. But here we are dealing with the rights of the plaintiff, which are defined and limited by another instrument. The agreement between the plaintiff and the building company was that the plaintiff's trust deed should be second and subject to the building loan of $3,000. The

plaintiff's trust deed did not state that it was made subject to any and all indebtedness which might be secured by the defendant's trust deed. The only proviso with reference to this matter contained in the plaintiff's trust deed was that it was to be "subject to a trust deed for $3,000 in favor of the Provident Mutual Building-Loan Association filed for record concurrently herewith." In making its loans or advances over and above said sum of $3,000, the defendant had actual notice of the terms and conditions of the plaintiff's trust deed.

The facts being as above stated, any loans or advances voluntarily made by the defendant without legal obligation so to do under the terms of its trust deed, were subject and subsequent to the lien of the plaintiff for the amount secured by the plaintiff's trust deed. This is the rule established by decision in this state. Sav. & Loan Society v. Burnett, 106 Cal. 514, 533, 39 Pac. 922; Valley Lumber Co. v. Wright, 2 Cal. App. 288, 291, 84 Pac. 58; The Seattle, 170 Fed. 284, 288, 95 C. C. A. 480.

[5] It cannot successfully be disputed that the item of $1,000 was a voluntary addition to the original loan made by the defendant. Appellant claims, however, that by reason of the fact that the owner ceased construction work about April 20, 1912, the premises were neglected and abandoned within the meaning of the provisions of appellant's trust deed, which gave to appellant in case of such abandonment the right at its discretion to enter upon and take possession of the premises and to use all available means to make the same productive; and which provided further that all expenses incurred for that purpose should be secured by appellant's trust deed. Appellant claims that the expenditures thus made by it for the completion of the building were not optional loans in any sense; that, while the mortgagee might make such expenditures or not, as it elected, the mortgagor was obligated to accept such expenditures as a loan for the protection of the mortgagee, "and the mortgagee makes the loan not altogether as a voluntary act, but as a necessity to protect the security." But we think that under the stated facts the making of these expenditures was the voluntary act of the defendant. Its refusal to advance money for the completion of the building would not have been the violation of any obligation imposed upon it by its trust deed. We fail to see how the advancements became obligatory in any sense, except that for its own interest appellant may have felt obliged to complete the building, so that the property might be sold to better advantage. But so far as the evidence shows, the property as it stood at the time when the work of construction was abandoned by the building company was sufficient in value to protect the $3,000 loan theretofore made by appellant.

[6] Neither do we think that respondent is estopped to claim priority for its lien, as against such advancements made by appellant with actual notice of the trust deed existing in favor of respondents. The court found that these moneys paid out by appellant for completion of the building were not so paid out or expended with the consent of respondents. There is evidence sufficient to support this finding. From the testimony of one of the respondents, Mr. Dodge, it appears that in his conversations with Mr. Hunter, who represented appellants, it was well understood that appellant claimed that it had the right to complete the building, and that its lien for the moneys expended would have preference over that of respondents; and that, on the other hand, Mr. Dodge claimed that respondents would be entitled to have their lien satisfied next after the payment to appellant of its $3,000 loan under its trust deed. With this open question between them, appellant made the advancements necessary to complete the building. These are not those circumstances of silence concerning an adverse claim which, by misleading the other party, or by leading him to do what otherwise he would not have done, should estop the claimant from asserting his right.

The judgments are affirmed.

We concur: SHAW, J.; JAMES, J.

---

59 Cal. App. 112

## COCKERILL v. TOBIN et al. (Civ. 2499.)

(District Court of Appeal, Third District, California. Sept. 14, 1922.)

**Landlord and tenant ⟸80(4)—Sublease "subject to" original lease held not to bind original lessees to furnish water for irrigation.**

Where a lease of rice land, binding lessors to furnish water for irrigation, was assigned to sublessees, the assignment being made subject to the terms of the original lease, the sublessees had no right of action against the original lessees for their failure to furnish water; to be "subject to" being subservient or subordinate to, and the original lease not binding lessees to furnish water.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Subject to.]

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by C. W. Cockerill against E. J. Tobin and others. From an order granting a change of venue, plaintiff appeals. Affirmed.

C. D. McComish, of Colusa, and R. C. McComish, of San Jose, for appellant.

Tobin & Tobin, of San Francisco, and Seth Millington, of Colusa, for respondents.

FINCH, P. J. The plaintiff has appealed from the order of the court granting defendant E. J. Tobin's motion for a change of the place of trial to San Mateo county. It is not disputed that the place of residence of defendants E. J. Tobin and Abby Parrott Tobin is in San Mateo county, and that of defendants Takata and Matsushige in Colusa county. The only question presented by the appeal is whether the complaint states a cause of action against the last-named defendants.

The complaint alleges that the Tobins leased certain lands to Takata and Matsushige for the purpose of growing rice thereon, and by the terms of the lease agreed "to furnish water in sufficient quantities to properly irrigate a crop of rice to be planted and grown upon said lands at all times when needed"; that Takata and Matsushige, with the written consent of the lessors, "assigned said lease and sublet said premises in so far as the westerly 390 acres thereof were concerned to the plaintiff C. W. Cockerill and one Dean M. Cockerill, and said assignment and sublease were expressly made subject to all the terms and conditions of said original lease except as to the rental to be paid thereunder"; that the Cockerills planted a crop of rice on the 390 acres, and that they and the original lessees "duly performed all the conditions of said original lease on their part," and that the sublesses "performed all the conditions of said assignment and sublease on their part"; and that "the defendants herein have wholly failed, neglected, and refused to furnish water in sufficient quantities to properly irrigate a crop of rice on the land leased by said assignment and subleased to the damage of the plaintiff and said Dean M. Cockerill in the sum of $59,300."

There is no allegation that the original lessees agreed to furnish any water to the Cockerills, but appellant contends that the allegation that "said assignment and sublease were expressly made subject to all the terms and conditions of said original lease" amounts to an allegation that the lessees agreed to furnish water. It is clear that this contention cannot be sustained. "To be 'subject to' is 'to become subservient to' or 'subordinate to.'" Coffey v. Superior Court, 147 Cal. 535, 82 Pac. 79. The original lease did not bind the lessees to furnish water, and it is not perceived by what course of reasoning it can be said that the provision of the sublease making it subject to the terms of the original lease could impose an obligation on the lessees not assumed by them in the original lease. Since there is no allegation in the complaint from which an inference can be drawn that the lessees agreed to furnish the Cockerills with water, the complaint fails to state a cause of action against Takata and Matsushige, and the motion for a change of venue was properly granted.

The order appealed from is affirmed.

We concur: ANDERSON, Justice pro tem.; BURNETT, J.

---

59 Cal. App. 100

## PEOPLE v. SHERMAN. (Cr. 638.)

(District Court of Appeal, Third District, California. Sept. 12, 1922.)

**1. Criminal law ⟸1130(4)—In absence of argument or brief, court not required to examine record with same care as where appeal is supported by argument.**

Where an appeal is submitted upon the record without argument or brief, the appellate court is not required to examine the record with the care and circumspection requisite in cases where the appeals are supported by oral or written argument.

**2. Insurrection and sedition ⟸2—Evidence held to sustain conviction for criminal syndicalism.**

In prosecution for criminal syndicalism under St. 1919, p. 281, evidence *held* to sustain conviction.

**3. Criminal law ⟸1144(12)—Appellate court may assume from defendant's failure to attempt to sustain appeal that record is free from prejudicial error.**

In the absence of a brief or argument on the part of appellant, the appellate court is not required to search the record to ascertain whether errors were made in rulings upon the evidence of sufficient magnitude to require a reversal, but may assume that the record is free from prejudicial errors.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Frank Sherman was convicted of criminal syndicalism, and from the judgment of conviction and from order denying a motion for a new trial, he appeals. Affirmed.

William B. Cleary and William F. Cleary, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was convicted under an indictment presented to and filed in the superior court of Yolo county, charging him with the crime of "criminal syndicalism," as said crime is defined by an act of the Legislature of 1919, entitled "An act defining criminal syndicalism and sabotage, proscribing certain acts and methods in con-

nection therewith * * * and providing certain penalties * * * therefor." Stats. 1919, p. 281. He appeals from the judgment and the order denying him a new trial.

The transcript on appeal was filed May 25, 1922, the cause was placed on the calendar of the term of this court commencing on September 5, 1922, and the parties and their attorneys were previously and in due time notified thereof.

On the day last named the cause was regularly called for hearing and argument, but there was no appearance in behalf of the defendant. Nor was there then, or has there since been, a brief filed in this court in support of the appeal, and, the legal time for filing a brief having long since expired, the cause, upon the motion of the Attorney General, was submitted upon the record.

[1] The record is voluminous, and, while we have not, as we are not required to do where the state of the appeal is such as it is herein, examined the record with the care or circumspection requisite in cases where the appeals are supported by argument, oral or written, we are justified in saying from such examination of the case as we have given it, that we have not discovered any violation of the fundamental rights of the accused, and that he seems to have been accorded a fair trial.

The indictment, following, substantially, the language of the statute, charges the defendant with the commission of acts declared by subdivisions 3 and 4 of section 1 of said statute as constituting criminal syndicalism; there being two counts in the indictment, the one charging the acts specified in subdivision 3 and the other the acts specified in subdivision 4. The verdict was based entirely on subdivision 3.

[2] The evidence, of which a large amount was brought into the record, is of the same general character as that presented in the case of People v. Roe (Cal. App.) 209 Pac. 381, and, as there, consisted largely of books, pamphlets, booklets, magazines, and other publications, containing statements of the general principles of the I. W. W. organization, of which the defendant was shown to be a member, and arguments supporting those principles and advocating, in the most vigorous fashion the practical application thereof with a view of overthrowing our present system of government. There was also, as was so in the Roe Case, introduced as witnesses certain ex-members of the I. W. W. organization, and they testified at length as to the violent methods advocated by said organization, or the members thereof, as the means for accomplishing the avowed ultimate purpose and end of said organization. These methods, according to those witnesses, involved acts of sabotage as the same are defined in the statute. But further reference to the testimony in this case is not necessary. It is sufficient to say that, from our examination of the evidence, the verdict is amply fortified evidentially. The charge of the court was full and fair, and involved, generally speaking, a correct statement of the principles of law pertinent to the charge and the case as it was made by the proofs.

[3] As to the rulings of the court upon the evidence, it is to be said that, if there was or is ground for complaint on that score, it has not, of course, been pointed out, and, under such circumstances, it does not rest upon this court to search the record for the purpose of ascertaining whether any such errors were made, and, if so, whether they are of sufficient magnitude to require a reversal. In fact, we may assume that the record is free from such errors, or for that matter all errors of a prejudicial character, from the fact that counsel for the accused have not attempted to sustain the appeal, which may well be taken as a concession that no errors damaging to the substantial rights of the accused were committed by the trial court. People v. Sanchez (Cal. App.) 206 Pac. 760.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; BURNETT, J.

---

59 Cal. App. 76

## PACIFIC ACCEPTANCE CORPORATION v. BANK OF ITALY, FRESNO BRANCH, et al. (Civ. 4078.)

(District Court of Appeal, First District, Division 2, California. Sept. 8, 1922. Hearing Denied by Supreme Court Nov. 6, 1922.)

**1. Payment ⇐47(1)—Pledgor not entitled to have payments on contracts held as collateral applied otherwise than on the contracts on which made.**

Where a dealer in automobile trucks borrowed money from a bank on his note with conditional sale contracts as collateral security, and earnings of the trucks covered by the contracts were paid over to the bank, the bank was bound to credit each of the contracts with such amounts only as represented the earnings contributed by the respective obligors, and the dealer's right under Civ. Code, § 1479, to prescribe how payments should be applied, did not entitle it to require that the earnings be credited on one of such contracts so as to discharge and release it, as the bank would then have been forced to give credit twice for the same amount.

**2. Pledges ⇐22—Pledgee entitled in absence of agreement to hold all collateral until full payment.**

Where a borrower deposited as collateral security a number of conditional sale contracts, the pledgee, in the absence of an agreement for release of a part of the collateral upon a partial payment of the indebtedness, had a right

to hold all the collateral and make collections thereon until the borrower's note was paid.

**3. Estoppel ⟹75—Power of disposition essential to right of possessor to give better title than he has.**

Civ. Code, § 1142, providing that when possession of personal property with a power to dispose thereof is transferred by the owner to another person, his executed sale while in possession to a buyer in good faith transfers title, is inapplicable, unless power to dispose of the property is given the possessor.

**4. Estoppel ⟹75—Bank held not estopped as against subsequent purchaser to assert title under conditional sale contract held as collateral.**

Where a dealer in automobile trucks deposited a number of conditional sale contracts with a bank as collateral security for the payment of his own note and thereafter one of the obligors of the contracts became delinquent, and by direction of the bank the dealer took possession of the truck, and without the bank's knowledge made another conditional sale contract, which he assigned to plaintiff, the bank was not estopped to assert its title, and it is immaterial that plaintiff's judgment against the dealer was valueless.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by the Pacific Acceptance Corporation against the Bank of Italy, Fresno Branch, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Brownstone & Goodman, of San Francisco, and Elmore Winkler, of Fresno, for appellant.

Jos. P. Bernhard, of Fresno, for respondents.

LANGDON, P. J. This appeal is taken by the plaintiff from a judgment against it in an action to recover the value of an automobile truck, alleged to have been converted by the defendant, Bank of Italy.

The facts are, substantially, as follows: T. H. Peniston was an automobile dealer engaged in the business of selling automobile trucks in Fresno during the period between the months of June and November, 1919. The course of his business was such that in lieu of cash upon the sale of an automobile truck, he would enter into a conditional sale contract of the ordinary kind with the purchaser, whereby he reserved title in himself until the partial payments provided by the contract were completed. In June, 1919, Peniston borrowed from the defendant, Bank of Italy, the sum of $17,203 and executed and delivered to the bank his note for the said sum. As collateral security for the payment of this note, he deposited with the bank a number of automobile conditional sale contracts which he had executed as seller in the course of his business. The total of the balances due from the vendees in all of these contracts was the same amount as the amount of the note.

All of the trucks described in these contracts were being operated by the vendees named in the contracts under what was known as the "Goodfellow Hauling Contract." The payments due for the hauling were paid over to the bank, by virtue of an assignment of said contract, and a certain amount was allowed to the vendees of the trucks for the operating expenses thereof. The balance was applied by the bank on the Peniston note. The bank credited these various sums as they were received upon the Peniston note.

Among the contracts deposited as collateral security for the Peniston note was one dated June 4, 1919, made between Peniston as seller and one Collins as purchaser, covering a giant truck. At the time this contract was deposited with the bank as collateral security the balance due upon it was $2,800. This contract was pledged with the bank some time in June, 1919. During the month of July, 1919, Collins became delinquent in his payments on the contract and this fact was called to the attention of the bank by Peniston. Mr. Birge, manager of the bank, directed Peniston to take possession of the truck. Peniston did so, and placed another driver on it, and continued it at work upon the Goodfellow Hauling Contract. On September 23, 1919, Peniston made a conditional sale contract covering this truck with a man named Hopper. Hopper was in the employ of Peniston as a truck driver. He had no property, and paid nothing upon the truck, but entered into a contract with Peniston by which Peniston acknowledged the receipt of $2,100 paid upon the truck, and Hopper promised to pay an additional $2,200 for the same in monthly installments. On or about September 23, 1919, Peniston assigned and transferred this contract to the plaintiff for $2,134, and plaintiff notified Hopper that all payments thereunder were to be made to it. Hopper never made any payments. In November, 1919, the bank seized the truck, which was in the possession of Hopper, and sold it for $2,250, which amount was credited on the Peniston note. Plaintiff demanded the truck from the bank, and upon a refusal to surrender same brought this action for conversion.

[1, 2] The trial court has found that plaintiff acquired no title to the truck. The record on appeal presents but two questions. The first question is: Was the bank paid in full for its claim to the Collins contract held by it, and therefore no longer had any claim to the automobile truck at the time the plaintiff purchased the Hopper contract? The appellant answers this question in the affirmative, and urges in support of its posi-

tion the fact, appearing in the record, that when the bank had received about $6,000 or $7,000 as the proceeds of the Goodfellow Hauling Contract, and had credited said amount upon Peniston's note, Peniston went to the bank and undertook to assist its note teller in distributing this amount in proper credits upon the contracts held as collateral security. Peniston states in his deposition that he told the note teller to credit $2,800 of the amount received from the hauling contract to the Collins contract, and that he was thereafter under the impression that the Collins contract was satisfied so far as the bank was concerned. It is not claimed, and cannot be, on the record, that $2,800 had been paid by Collins, or that Collins had in fact paid his contract up by the earnings of his truck, and owed nothing more thereon. On the contrary, it is admitted that Collins was delinquent in his payments, or in other words, that his truck did not earn enough upon the Goodfellow Hauling Contract, over and above expenses, to keep up his payments on the truck, and it is apparent, therefore, that his obligation as a vendee, under his contract, was a subsisting one, and of substantial value to the bank as collateral for the payment of Peniston's note. It is also perfectly apparent that had the bank been compelled to comply with Peniston's request and credit the $2,800 on the Collins contract (which amount had not been earned by Collins' truck, but represented, in large part, the proceeds of the work of the other trucks), and had it been compelled, in consequence, to discharge and release the Collins contract, then the vendees, under some of the other sales contracts whose earnings had been diverted to pay the Collins contract, would have had a right to insist upon the proper credits on their contracts. Thus the bank would have been forced to allow credit twice for the same amount received by it, and would have found itself, in consequence, with inadequate collateral to protect Peniston's note. Clearly, such a situation could not be forced by Peniston or plaintiff either as a matter of justice or reason and is not brought about by the application of any principles of which we are aware.

Appellant seeks to apply to the situation presented by the above facts the well-settled principle that one who is indebted to the same person on several obligations may, in making a payment, require that it be applied toward the extinction of one of the obligations in preference to the others. Civil Code, § 1479. It is contended that this is what was done by Peniston in the present case, and therefore the liability on the Collins contract was extinguished so far as the bank was concerned. The principle contended for is established by the Code section above cited, but it has no application to the facts here. This is for the reason that Peniston was indebted to the bank on but one obligation, the obligation of his note, and not upon several obligations. He had assigned the five conditional sale contracts as collateral security, but he was not the principal debtor under these contracts. He had no legal right to impair in any way the value of this collateral, nor to insist upon a release thereof until the contracts were actually paid up by the obligors. Assuredly, he might have paid off his own obligation in full and demanded a release of the collateral, but in the absence of an agreement for a release of a part of the collateral upon a partial payment of the note, the bank had the right to hold all the collateral and make collections thereof until Peniston's note was paid. As the collateral consisted of five different contracts for the sale of trucks, and as the amount received by the bank was the aggregate earnings of all the trucks, it necessarily followed that the bank was under obligation to credit the contracts, respectively, with such amounts only as would represent the earnings contributed by their respective obligors.

Appellant's contention amounts to this: That where a debtor has deposited with his creditor as collateral for the payment of his debt a number of contracts of third persons, upon which payments are being made from time to time, said debtor may insist that the payments made by one of the third persons be credited upon the obligation of another one. Obviously, the person making the payment has an absolute right to have his payment credited upon his own obligation, and if appellant's contention is correct, the creditor would be forced to make credit twice for the same payment.

[3] The second point urged is that the bank is estopped from asserting its title to the truck as against appellant, because it intrusted the possession of the truck to Peniston, and appellant is an innocent purchaser for value. Section 1142 of the Civil Code is relied upon to sustain this contention. That section reads as follows:

"When buyer acquires better title than seller has. Where the possession of personal property, *together with a power to dispose thereof*, is transferred by its owner to another person, an executed sale by the latter, while in possession, to a buyer in good faith and in the ordinary course of business, for value, transfers to such buyer the title of the former owner, though he may be entitled to rescind, and does rescind the transfer made by him."

Conceding that the bank transferred the possession of the truck to Peniston, there is no evidence that it gave him power to dispose of this truck, which is also a condition to make the statute above quoted applicable.

In the case of Greene v. Carmichael, 24 Cal. App. 27, 140 Pac. 45, following the case of Wright v. Solomon, 19 Cal. 64, 79 Am. Dec. 196, it is held that possession of personal property is only prima facie evidence

of ownership, and never prevails over the true owner except in cases of negotiable instruments or a case warranting the application of the doctrine of estoppel. A number of cases on the subject are collected in the note to Davis v. First Natl. Bank, 25 L. R. A. (N. S.) 760, and the conclusion there reached, after a consideration of the cases, is that—

"Nothing is better settled than that possession of personal property is prima facie, not conclusive, evidence of title and that the maxim caveat emptor applies."

[4] Nor do we think that the present case presents the features requisite to create an estoppel. The bank did nothing which could have misled the appellant, save and except that it allowed its truck to be used in the hauling work, together with the trucks which were in the possession of other vendees. It knew nothing of appellant's contemplated entrance into the situation. This general question is also discussed in the note above cited, 25 L. R. A. (N. S.) at page 770. Numerous cases are collected there upon the general proposition. Two of them appear to be particularly in point because of the fact that in the present case Peniston was in the business of selling trucks, and this circumstance is made much of by appellant. In the case of Forrestal v. McDonald, 9 Can. S. C. 12, it was said:

"No case has ever decided that the owner of goods is estopped merely because he has intrusted with the possession of his property a person who, being engaged in a business in the course of which he sells goods of the same kind, as those which have been delivered to him as a bailee, in breach of his duty has wrongfully sold the goods of his bailor as his own. If this were so, no man could safely leave his watch with a watchmaker who sells watches, or his carriage with a carriage maker who sells carriages, to be repaired."

In the case of Levi v. Booth, 58 Md. 305, 42 Am. Rep. 332, the court said that it was very clear that the bare possession of goods by one, though he may happen to be a dealer in that class of goods, does not clothe him with power to dispose of the goods as though he were the owner, or as having authority as agent to sell or pledge the goods, to the preclusion of the right of the real owner. If he sells as owner, there must be some other indicia of property than mere possession; there must be some act or conduct on the part of the real owner, whereby the party selling is clothed with the apparent ownership or authority to sell, and which the real owner will not be heard to deny or question to the prejudice of the innocent third person, dealing on the faith of such appearances.

It is apparent that the appellant has mistakenly trusted to Peniston's good faith. It had its remedy against him, and the record shows that it pursued this remedy and secured judgment for the amount paid him for the Hopper contract upon the ground of fraud and misrepresentation. The fact that this judgment may be valueless, for any reason, is but an incident in the particular case, and cannot enlarge the substantive rights of the appellant.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

---

59 Cal. App. 72

## PEOPLE v. SANDER. (Cr. 1046.)

(District Court of Appeal, First District, Division 2, California. Sept. 8, 1922. Hearing Denied by Supreme Court Nov. 6, 1922.)

**1. Criminal law ⊜372(9), 1169(11)—Theory of prosecution of common plan permitted evidence of similar transactions, and admission of such evidence was harmless.**

Where prosecution for passing a fictitious check was on the theory that defendant had entered on a common plan or scheme to defraud dealers in bonds by issuing fictitious checks either signed with a fictitious name or drawn on banks in which insufficient funds were deposited, the crime of uttering a check upon a bank with insufficient funds was not so dissimilar to the crime charged as to render evidence of the uttering inadmissible, even though the acts are defined in the Penal Code as constituting distinct offenses; but evidence of the uttering was without prejudice, where evidence of three similar transactions had been received without objection.

**2. Criminal law ⊜941(1)—Newly discovered evidence merely cumulative not ground for new trial.**

No error arises from the refusal of a new trial for newly discovered evidence which was merely cumulative.

**3. Criminal law ⊜1144(17)—Presumed on appeal that judgment of conviction speaks the truth and variance between it and reporter's notes immaterial.**

Where appeal was from judgment of conviction of passing a fictitious check, a violation of Pen. Code, § 476, it must be presumed that the judgment speaks the truth, and that the verdict of the jury recited in the judgment is the true verdict returned by the jury, and any error in the reporter's notes showing that defendant was convicted of drawing a bank check with intent to defraud, a violation of section 476a, did not prejudice defendant's rights.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

A. A. Sander, true name Robert L. Bradford, was convicted of passing a fictitious check, and he appeals. Affirmed.

T. L. Christianson, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

NOURSE, J. Appellant was convicted of the crime denounced by section 476 of the Penal Code—the making, passing, and uttering a fictitious check with intent to defraud. The facts are that on April 8, 1921, he appeared in the office of certain bond dealers in the city of Oakland and arranged for the purchase of $10,000 worth of Victory bonds, and delivered to the dealers his check, made payable to their order, in the sum of $9,912.91, signed "A. A. Sander." In return he received from the dealers Victory bonds of the par value of $10,000. In this transaction he gave a fictitious name and address. In June of the same year he obtained from certain bond dealers in the city of Los Angeles $3,000 worth of Liberty bonds by delivering a check bearing the name of C. H. Fisher, drawn upon a Los Angeles bank. The check purported to be certified, but the certification was forged, and Fisher, if not a fictitious person, at least, had no account in the bank upon which the check was drawn. About the same time he obtained from another bond dealer $5,000 worth of bonds by the same method. He then presented a similar check for $5,000 drawn on the same bank in the name of the same person and containing a forged certification, whereby he obtained $3,000 worth of bonds from another dealer. In October, 1921, he appeared at the Central National Bank in Oakland and made a deposit therein of $5,000. On November 1st he made an additional deposit of $1,000. These two deposits were both made in the name of Gray. After making these deposits the defendant purchased $5,000 worth of Liberty bonds and arranged for the purchase of $10,000 worth additional. On November 2d he offered for deposit to his account a check drawn on the Citizens' National Bank of Los Angeles in the sum of $10,000, payable to the order of Gray, and purporting to be signed by one Platt. At the same time he made and uttered to the Central National Bank his check in the sum of $10,009.96, to which he signed the name of Gray. Before honoring the check the bank ascertained through inquiry at the Citizens' National Bank of Los Angeles that the check drawn upon that bank was worthless and the defendant was immediately taken into custody. He was tried on the transaction of April 8, 1921.

[1] Upon this appeal two assignments of error were originally made. First, that the testimony relating to the so-called Central National Bank transaction occurring on October 31 to November 2, 1921, was improperly admitted; second, that the trial court erred in refusing defendant's motion for a new trial on the ground of newly discovered evidence.

As to the first, the prosecution was conducted upon the theory that the defendant had entered upon a common plan or scheme of defrauding dealers in bonds and securities by the issuing of fictitious checks either signed by him with a fictitious name or drawn by him upon banks in which insufficient funds were deposited. Under this theory the crime committed in the Central Bank transaction—the uttering of a check upon a bank with insufficient funds—is not so dissimilar to the crime charged in the information as to render evidence of the former inadmissible, even though such acts are specially defined in different sections of the Penal Code as constituting distinct offenses. In each case the plan to defraud was the same, and the same method of using a fictitious name as the drawer of the check was used. In any event, the appellant suffered no prejudice from the admission of this evidence. Testimony had been given of the three transactions in Los Angeles without objection.

[2] The motion for a new trial was based upon newly discovered evidence which would have been merely cumulative to that already presented. The trial court was called upon to determine whether the testimony was such as would justify the granting of the motion. We find no error in the court's determination of the question.

[3] At the oral argument the objection was made for the first time that the verdict returned was not in harmony with the information. The point is that the appellant was charged with a violation of section 476 of the Penal Code while the reporter's notes of what occurred when the jury returned into the court with its verdict showed that the appellant was convicted of a violation of section 476a. When the case was first presented these notes were not certified. A rehearing was granted at appellant's request to enable him to perfect the record. With these notes before us we see no reason for changing the judgment of affirmance originally entered. The clerk's transcript contains the judgment and a copy of the verdict. This judgment recites that a verdict was returned finding the appellant guilty of a violation of section 476 of the Penal Code as charged in the information. The written verdict from which the foreman of the jury read states a conviction of a violation of section 476 as charged in the information. This verdict was filed with the clerk, and is a part of the record. The verdict entered and recorded by the clerk in the minutes is the same. The appeal is from the judgment. The motion for a new trial did not suggest the point. We must presume that the judgment speaks the truth, and that the verdict of the jury recited in the judgment is the true verdict returned by the jury. It is apparent that the error was one of the reporter only, and that it has not prejudiced the appellant's rights. If in truth and fact the jury returned a ver-

dict on section 476a, instead of 476, then the judgment should have been modified on motion to the trial court.

The judgment and order denying a new trial are affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

---

59 Cal. App. 50

## PEOPLE v. BANNON. (Cr. 881.)

(District Court of Appeal, Second District, Division 2. California. Sept. 6, 1922. Hearing Denied by Supreme Court Oct. 30, 1922.)

**1. Criminal law ⟹1159(3)—Verdict supported by substantial evidence will not be disturbed in absence of erroneous rulings.**

Where defendant's story, if believed, would exculpate him, and the story of the witnesses for the prosecution, if true, would justify a conviction, the verdict of the jury, having substantial evidence to support it, would not be disturbed on appeal, unless vitiated by some erroneous ruling of the court.

**2. Criminal law ⟹404(2) — Physical objects which serve to explain transaction generally admissible.**

In criminal prosecutions, as a general rule, physical objects which constitute a part of the transaction, or which serve to unfold or explain it, may be accepted in evidence, if properly identified, whenever the transaction is under judicial investigation.

**3. Criminal law ⟹404(2) — Deceased's passbook perforated by bullet held admissible.**

In a prosecution for murder, where accused and his wife were both charged with shooting deceased, a passbook, showing a bullet hole, taken from the pocket of deceased, was admissible as tending to show the direction of the bullet that had pierced it.

**4. Criminal law ⟹438 — Photograph of deceased inadmissible to show deceased's character.**

In a prosecution for murder, a photograph of deceased, offered in evidence to show deceased's appearance in his lifetime and to allow the jury to see his character from the picture, *held* properly excluded.

**5. Criminal law ⟹1169(5)—Rejected offer of deceased's photograph in evidence held not prejudicial.**

In a prosecution for murder, where deceased's photograph was offered to show his appearance in his lifetime and to allow the jury to see his character from the picture, but was excluded on objection, defendant was not prejudiced.

**6. Criminal law ⟹438—Photograph of deceased admissible to show identity of purchaser of pistol found after shooting.**

In a prosecution for murder, a photograph of deceased was properly admitted to show that deceased was not the man who had purchased a pistol found near him after the shooting.

**7. Homicide ⟹166(9)—Evidence as to defendant's jealousy and motive held admissible.**

In a prosecution for murder, wherein defendant claimed that deceased had debauched his wife, evidence as to a contemplated separation between defendant and his wife and as to statements by defendant that he would no longer live with his wife, since another man had been seen coming out of defendant's house, which defendant's wife denied, *held* admissible to show defendant's jealousy and motive.

**8. Homicide ⟹159—Evidence as to movements of defendant prior to homicide admissible.**

In a prosecution for murder, wherein defendant claimed that deceased had debauched his wife, evidence that, shortly before the shooting, a man and a woman were seen scuffling in the street, and that the man grabbed something from the woman and then ran towards the scene of the shooting, *held* properly admitted in connection with other facts justifying the inference that the man and woman were defendant and his wife and that defendant ran to the place where deceased had been seen shortly before intending to shoot him.

**9. Witnesses ⟹240(5)—Question as to statements by witness to defendant held not objectionable as leading.**

In a prosecution for murder, wherein defendant claimed that deceased had been intimate with his wife, a question put to a witness as to whether he had ever told defendant that he saw deceased coming from defendant's house *held* not erroneous as leading; the form of the question being within the discretion of the trial court.

**10. Criminal law ⟹448(12)—Question in laying predicate for evidence of confession held not objectionable as calling for conclusion.**

In laying a predicate for the introduction of evidence of confessions made by one accused of murder, the question as to whether there were any promises, threats, or inducements made to defendant before the statements were made by him was not objectionable as calling for a conclusion.

**11. Criminal law ⟹472—Expert evidence that signature of purchaser of pistol found near deceased was not that of deceased held admissible.**

In a prosecution for murder, wherein it was claimed that the pistol found near deceased's body had been placed there by defendant, evidence by a handwriting expert that deceased's signature was not in the same handwriting as the fictitious signature of the purchaser of the pistol *held* admissible.

**12. Witnesses ⟹337(2)—Defendant, testifying as witness, may be impeached by showing of bad general reputation for veracity.**

When defendant in a criminal case testifies for himself, and gives testimony to exonerate him from the crime with which he is charged, he becomes a witness, and may be impeached by testimony that his general reputation in the

community for truth, honesty, and integrity is bad.

**13. Criminal law ⊂=829(9)—Refusal of correct instructions proper where covered by other instructions given.**

In a prosecution for murder, it was not reversible error to refuse an instruction correctly stating the law as to presumption of innocence and burden of proof; such subjects having been fully covered in other instructions given.

**14. Criminal law ⊂=805(1)—Defendant not entitled to instructions in any set form of words.**

A defendant is not entitled to an instruction in any set form of words, and any form of instruction which fully and fairly presents the point at issue meets the requirements of the statute.

**15. Criminal law ⊂=829(1)—Instructions, emphasizing propositions already covered in charge, properly refused.**

Proffered instructions, intended simply to emphasize propositions which are covered by the court in his charge to the jury, are properly refused.

**16. Homicide ⊂=151(1)—Statute as to burden of proof construed.**

Pen. Code, § 1105, as to burden of proof in murder cases, means that, if the proof on the part of the prosecution tends to show that the homicide amounts only to manslaughter, or that it was justifiable or excusable, then no burden is placed on defendant to prove any circumstances of mitigation or that justify or excuse it.

**17. Homicide ⊂=300(8)—Instruction that plea of self-defense was unavailable held justified by evidence.**

Where, in a murder trial, defendant claimed that deceased had debauched his wife, an instruction that the plea of self-defense was not available to a defendant, who had sought a quarrel with design to force a deadly issue, *held* justified by the evidence.

**18. Criminal law ⊂=763, 764(9)—Instruction to acquit of murder in first or second degrees properly refused.**

In a prosecution for murder, it was not error to refuse to instruct to find defendants not guilty of murder in either the first or second degree; testimony of the prosecution, if believed, showing that the killing was unlawful and with malice aforethought, and such question being for the jury.

**19. Criminal law ⊂=825(4), 829(14)—Instruction to disregard evidence stricken held unnecessary in view of instructions given and failure to ask more specific charge.**

In a prosecution for murder, where defendant's motion to strike all testimony that deceased was unarmed at times other than that of the homicide was granted, it was not error to refuse to specifically instruct the jury to disregard the evidence so stricken, in view of a general charge that the jury should not be influenced by evidence admitted, but afterwards stricken, and where defendant failed to ask for a more specific instruction.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Edward Bannon was convicted of murder in the second degree, and he appeals. Affirmed.

O. N. Hilton, of San Francisco, Dan M. Critchley, of Los Angeles, Caesar A. Roberts, of Denver, Colo., and L. M. Roberts, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Lorrin Andrews, of Los Angeles, for the People.

FINLAYSON, P. J. The appellant, Edward Bannon, and his wife, Elizabeth Bannon, were charged with the murder of James H. Brigham, alleged to have been committed on September 10, 1921, at Sawtelle, in Los Angeles county. The two defendants were tried jointly. Elizabeth Bannon was acquitted, but her husband was convicted of murder in the second degree. He appeals from the judgment of conviction, and likewise from the order denying his motion for a new trial.

That Edward Bannon shot and killed Brigham is an undisputed fact; but it is claimed that he shot in self-defense. The record here is very voluminous. We shall not attempt to give more than a bare outline of the case, sufficient, however, to make understandable the points to be discussed. It seems that appellant, a young man about 27 years of age, was employed as a motorman on the Pacific Electric Railway. The deceased, who was about 40 years old and employed as a terminal foreman for the same company, was Bannon's superior. Bannon claims that shortly prior to the tragedy his wife confessed to him that she had been debauched by Brigham, who, it was claimed, had forced his way into the Bannon home during the husband's absence. On the day preceding the homicide Bannon and his wife called on Brigham at the freight office of the company, and there Bannon taxed Brigham with having forced Mrs. Bannon to submit to his unlawful embraces. Brigham ordered the Bannons out of his office. Bannon then told the superintendent and assistant superintendent that Brigham had compelled Mrs. Bannon to have intercourse with him at the latter's home. The superintendent, with a view to investigating the charge, sent word to Brigham to call at his office on the following Saturday, September 10th. Brigham did not call. He was killed on the evening of that day. The homicide took place at 10 o'clock at night, in Sawtelle, at or near the intersection of Santa Monica boulevard with Tenth street, which was about two blocks from the home of the Bannons, who lived on Ohio street near Ninth.

According to the testimony of J. M. Parker, a witness for the people, Brigham, about noon of September 10th, had made an appointment to call that evening on Mr. and Mrs. Parker and bring Mrs. Brigham with him. Parker lived about seven blocks from the scene of the tragedy. Mrs. Brigham, who lived with her husband in Santa Monica on Santa Monica boulevard, testified that she and her husband started to call on the Parkers on the evening of September 10th; that they got off the car at First street, intending to make the call, but that they were late, and for that reason, as well as because it was a beautiful moonlight evening, they concluded not to call on the Parkers, and instead, walked back to where Santa Monica boulevard intersects Ninth street, and there sat on a bench to rest; and that while she and her husband were sitting on the bench, Mr. and Mrs. Bannon drove by in their automobile. It seems that after passing the spot where the Brighams were seated, Bannon and his wife drove to their garage in the rear of their home, a block distant from where Mr. and Mrs. Brigham had been sitting. After putting the automobile in the garage, the Bannons, it would seem, returned to the spot where, a few minutes previously, they had seen the Brighams sitting on the bench. Meanwhile Mr. and Mrs. Brigham had walked one block along Santa Monica boulevard to where that thoroughfare is intersected by Tenth street, the scene of the homicide. Presently the Bannons appeared. What then took place is described variously by the witnesses. Mr. and Mrs. Bannon testified that when they arrived at the intersection of Santa Monica boulevard with Tenth street Brigham stepped out, said "Bannon," and immediately commenced shooting, and that then Bannon, in self-defense, drew his Colt's automatic revolver and returned the fire, killing Brigham.

Mrs. Brigham, testifying as a witness for the people, described the circumstances of the killing of her husband substantially as follows:

> My husband and I got up from the bench on the corner of Ninth and Santa Monica boulevard and walked down the boulevard as far as Tenth street, when the Bannons came up from behind; Bannon calling to Mr. Brigham. As Mr. Brigham turned around in response to the call, Bannon "grabbed a firearm or something from Mrs. Bannon's coat and commenced firing at Mr. Brigham." Before Bannon commenced shooting I heard him say to some one, "Give me them," or, "Give me those." Mr. Bannon was on one side of me, and Mrs. Bannon was on the other. Shots were fired on each side of me. Many shots were fired. I know Bannon fired. Mr. Brigham was unarmed. He was shot in four places, and fell to the ground —"crumpled right down in a heap."

Three revolvers figure in the case, one a Colt's automatic. Bannon admitted using this pistol, and that he fired a number of shots from it. Shortly after the slaying, a 32 caliber, long-barrel, short-cartridge revolver made by the American Revolver Company, was picked up. It was found on the ground on the left side of Brigham's body a foot or 18 inches distant from where the body lay. Later another revolver, a 32 caliber Iver Johnson pistol, was found. It seems that shortly after her arrest, which followed on the heels of the tragedy, Mrs. Bannon, according to witnesses for the prosecution said to an officer at the police station "I am sure Mr. Brigham had a gun, and you will find a gun over the fence, or around the fence where he fell." The officer then went to the place described by Mrs. Bannon, and there found the Iver Johnson revolver, lying aginst the fence near the scene of the killing. It was a five-cylinder pistol, from which three shots had recently been fired, as shown by the empty shells and the smell of recently burned gunpowder. When the officer returned to the police station Mrs. Bannon, according to the testimony of the people's witnesses, exclaimed, in the presence of her husband, "You are safe now, Ed; they found the revolver." Bannon testified that the pistol which was found a foot or 18 inches from Brigham's body—the pistol made by the American Revolver Company—was a weapon which Mrs. Brigham had in her left hand at the time of the shooting and claims that Mrs. Brigham dropped it as she leaned over to pick up her husband's head after the firing had ceased. Appellant also claims that the Iver Johnson pistol—the weapon which was found lying against the fence—was used by the deceased, and that from it Brigham had fired three shots at appellant. Mrs. Brigham, on the other hand, testified positively that her husband was not armed that night, and that he did not fire a shot. It seems to have been the theory of the prosecution that the Iver Johnson pistol and likewise the long-barreled revolver which lay near where Brigham's body fell were "planted" by either Mr. or Mrs. Bannon in order to lay the foundation for the claim that the killing was done in self-defense.

[1] As is usual in such cases there is a sharp conflict in the evidence. And though we have not deemed it necessary to narrate the defendants' description of the circumstances attending this fatal occurrence, appellant's own story undoubtedly exculpates him. It was for the jury, however, to say whether his story should be believed. The testimony of Mrs. Brigham, together with that of other witnesses for the prosecution was sufficient, if true, to justify the verdict. The facts testified to by the witnesses and their significance were for the jury to weigh and determine; and their verdict, having substantial evidence to support it, cannot be disturbed, unless it is vitiated by some erroneous ruling of the court.

It is not contended that the facts related by Mrs. Brigham, if true, would not warrant appellant's conviction, but that her testimony is not to be believed. The truth or falsity of her testimony, however, was exclusively for the determination of the jury and the trial court. The office of a reviewing court in a case such as this is very clearly stated in People v. Emerson, 130 Cal. 562–563, 62 Pac. 1069:

"The principal ground of the appeal is that the verdict is contrary to law and the evidence, and upon this point counsel contend that all the evidence—that introduced by the prosecution no less than the evidence of the defendant himself—shows clearly and without conflict that the killing (which is admitted) was done in necessary self-defense, or at least under circumstances which negative the existence of any deliberate purpose on the part of the defendant to take the life of the person slain. Necessarily, this contention as to the absence of any conflict in the evidence must be made good in order to sustain the appeal upon the ground stated; *for if the evidence which bears against the defendant, considered by itself, and without regard to conflicting evidence, is sufficient to support the verdict*, the question ceases to be one of *law*—of which alone this court has jurisdiction—and becomes one of *fact* upon which the decision of the jury and the trial court is final and *conclusive*." (Italics ours.)

There was sufficient evidence to justify the verdict, and it, therefore, may not be disturbed by us unless the rulings of the trial court, presently to be considered, disclose prejudicial error.

[2, 3] Appellant complains of the admission in evidence of a passbook taken from the body of the deceased, and which had been perforated by one of the bullets entering the body. Because the killing was not denied, it is claimed that this evidence was not material, and could only serve to prejudice the jury against the defendants. The people rested under the necessity of establishing a tragedy involving the violent death of a human being from mortal wounds, unlawfully inflicted with malice aforethought. Any of the details of such a horrifying affair must necessarily have a tendency to cause a normal person to recoil with repugnance. But, as was said by the Supreme Court of Kansas in State v. Moore, 80 Kan. 232, 102 Pac. 475:

"A court cannot arrange for lively music to keep the jury cheerful while the state's case in a murder trial is being presented, and gruesome evidence cannot be suppressed merely because it may strongly tend to agitate the jury's feelings."

As a general rule, physical objects which constitute a part of the transaction, or which serve to unfold or explain it, may be exhibited in evidence, if properly identified, whenever the transaction is under judicial investigation. Thus, clothing worn by the deceased at the time of the homicide is admissible in evidence as a part of the res gestæ. People v. O'Brien, 78 Cal. 44, 20 Pac. 359. According to the testimony of Mrs. Brigham, she and her husband were flanked by the Bannons—Mrs. Bannon firing from one side and her husband from the other. Mrs. Bannon, who was on trial for the murder, denied having fired a shot. The passbook, therefore, was important as tending to show the course and direction of the bullet that had pierced it. It was not error to admit the book in evidence.

[4-6] Appellant claims to have been prejudiced by the conduct of the district attorney, who offered a photograph of the deceased for the purpose of showing, as he stated, "Brigham's appearance in his lifetime, * * * to allow the jury to see his character from the picture." Defendants' counsel objected to the introduction of the photograph for any such purpose. The objection was very properly, and, we may add, very promptly, sustained. We fail to see how this incident could possibly have prejudiced appellant's case. Subsequently the photograph was admitted in evidence for a legitimate and proper purpose—for the purpose of showing that Brigham was not the man who had purchased the Iver Johnson pistol.

[7] The justice of the peace at Sawtelle, William G. Bryce, a witness for the people, was permitted to testify that Mr. and Mrs. Bannon had called on him at his office two days prior to the homicide; that Bannon, who was very nervous, said that he and his wife had been having trouble, and that he wanted the witness to draw up an agreement of separation or divorce; that there was considerable argument between them as to what grounds they had for divorce, and as to the disposition of their property; that Mrs. Bannon commenced to cry, and said that if her husband left her she would kill herself; that Bannon said he would not live with her any longer; that she had once left him in a hospital in the East and had gone away with another man; that she could not have any children, and that some one had said he had seen another man coming out of his (Bannon's) house early one morning; and that Mrs. Bannon said, "Judge, there is no such person; it is only his imagination." This testimony went in over defendants' strenuous objection. Its admission was not error. It doubtless was received to show the state of mind of the Bannons at the time of the shooting. It tended to bear out the prosecution's contention that Edward Bannon, the husband was enraged by his wife's supposed adultery with Brigham, and, further, that his dominant personality overpowered her volition, and thus prevailed upon her, first to admit her intimacy with Brigham, and then to participate in the homicide two days later. The testimony not only tended to show Bannon's all-consuming jealousy, and thus disclosed a motive on his part for tak-

ing the life of Brigham, whom he had charged with having debauched his wife, but, by disclosing Mrs. Bannon's extreme repugnance to being cast off by her husband, it likewise had some tendency to show that she might do her husband's bidding, even to the point of assisting him in the slaying of Brigham. For these reasons, the testimony was both relevant and material.

[8] Appellant next complains of the admission in evidence of the testimony of Sadie Smith, a witness for the prosecution, who testified that her home is a few doors from that of the Bannons; that on the night of September 10th, at about 10 o'clock, she heard an automobile pass by her house and stop; that a few minutes later she heard scuffling in the street about two houses from her home; that she went to her bedroom window, looked out, and saw a man and a woman scuffling in the street, in Ohio street, right across the way; that she saw the man grab something and start to run; that the woman followed him, screaming; that they ran down Ohio street; that she could not identify the man or the woman; and that a few minutes later she heard the shooting. On motion of defendants, the court struck out all of the testimony of this witness on the ground that there was no evidence which identified the man and woman whom she saw scuffling and running in the street. The ruling, however, was immediately reversed, the court being assured by the prosecutor that he later would supply the necessary identification. Subsequently Officer Mahoney was called, and testified that after the shooting he followed the tracks made by defendants' machine, and found that they had stopped nearly in front of Mrs. Smith's house. At the conclusion of the case defendants again moved to strike out the testimony of Sadie Smith. The motion was denied. It was for the jury to consider and weigh all of the circumstances testified to by Sadie Smith and Officer Mahoney. Those circumstances, in conjunction with other facts brought out by the testimony of other witnesses, were sufficient to justify the inference that the man and woman seen by Mrs. Smith were Mr. and Mrs. Bannon, and that Bannon, repelling his wife's vehement objections, with malignancy in his heart and bent on murdering the man whom he supposed had been intimate with his wife, ran to the place where he had seen Mr. and Mrs. Brigham but a few moments previously, intending to shoot down the victim of his jealous rage.

[9] Bannon claimed that about three days prior to the tragedy a workman of the name of Border, a resident of Sawtelle, who seems to have been somewhat of a scandalmonger, related to him certain information from which he (Bannon) suspected that Brigham might have been at his home with Mrs. Bannon during the husband's absence. The prosecution put Border on the witness stand and propounded to him this question:

"Now, did you ever tell Bannon at any time that you saw Brigham coming from Bannon's house? A. No, sir."

Defendant's counsel objected to the question on the ground that it was leading. There was no error here. The matter of the form of the question was within the discretion of the trial court. People v. Fong Ah Sing, 70 Cal. 12, 11 Pac. 323; People v. Goldenson, 76 Cal. 349, 19 Pac. 161; People v. Nunley, 142 Cal. 445, 76 Pac. 45.

[10] There was no error in the admission of the declarations made by the defendants at the police station while under arrest and shortly after the homicide. The evidence shows that the statements were freely and voluntarily given. There may be some question as to whether they were so far inculpatory as to amount to confessions of guilt. But, be this as it may, the prosecutor, who assumed that the declarations might possibly be construed as confessions, and that therefore it would be necessary to lay a foundation for their admission by proving their voluntary character, asked one of the witnesses if any threats were made against either Mr. or Mrs. Bannon at the time when they made the statements, or if any force or violence was used against either, or if any promises of reward or hopes of immunity were held out to them. To this form of question counsel for defendants objected, upon the ground that it called for the conclusion of the witness. The court overruled the objection, and told counsel for the defendants that they would be accorded the privilege of cross-examining the witness with respect to the voluntary character of the statements. There was no error in the ruling. People v. Rodundo, 44 Cal. 538, 540; People v. Goldenson, supra, 76 Cal. 350, 19 Pac. 161; Crain v. State, 166 Ala. 1, 52 South. 31. In Crain v. State the court said:

"In the laying of a predicate for the introduction of evidence of confessions made by the defendant, the question, 'Were there any promises, threats or inducements made to the defendant before the statements were made by him?' is not open to the objection that it called for a conclusion of the witness, and was properly allowed by the court."

[11] Mrs. Brigham, it will be recalled, testified that her husband had no weapon upon his person on the evening of the slaying. Whether, therefore, the Iver Johnson revolver—the pistol which was found leaning against the fence—was the property of the deceased or of one of the defendants was a material fact in the case. As we have had occasion to say, it evidently was the theory of the prosecution that the defendants, or one of them, for the purpose of fabricating a counterfeit setting for a plea of self-defense, "planted" the Iver Johnson pistol and like-

wise the 32 caliber long-barreled revolver which was picked up near the spot where Brigham fell. The man who sold the Iver Johnson revolver testified that it was sold about 20 months prior to the homicide. An employee who was present when the pistol was sold testified that it was purchased by a man who stated his address and gave his name as "C. M. Johnson." Another witness testified that he had gone to the address given by "C. M. Johnson" and had found it to be fictitious. To show that the slain man had not purchased the revolver under the false name of "C. M. Johnson," the prosecutor, over defendants' objection, called a handwriting expert, who testified that he had compared the signature of James H. Brigham with the signature "C. M. Johnson," signed to the record of the sale of the revolver, and that in his opinion the two signatures were not made by the same person. Appellant contends that this evidence of the handwriting expert was immaterial, and tended to confuse the issues. There is no merit in the objection. When the Iver Johnson pistol was found three shots appeared to have been recently fired from it. It was essential to the people's case, therefore, to show, if possible, that Brigham was not the owner of this revolver. To do that it was proper to show that Brigham had not signed the name "C. M. Johnson," given by the purchaser when the revolver was sold.

[12] Appellant took the witness stand in the court below and gave testimony in his own behalf. On rebuttal the prosecutor called witnesses who were permitted to testify, over defendants' objection, that they knew appellant's general reputation for truth, honesty, and integrity in the community in which he lived, and that it was bad. Appellant, contending that this ruling was erroneous, has cited us to 16 Corpus Juris, p. 580, § 1122, but he evidently has confounded the rule respecting the impeachment of an accused, *as an accused*, with the rule respecting the impeachment of an accused *as a witness*. From a very early date it has been held, time and again, that when the defendant in a criminal case testifies for himself and gives testimony to exonerate him from the crime for which he is on trial, he, for the time being, removes from himself the character of a defendant, and takes on that of a witness. He becomes "subject to the same rules for testing his credibility before the jury, by impeachment or otherwise, as any other witness," and may be impeached by testimony that his general reputation in the community for truth, honesty, and integrity is bad. People v. Hickman, 113 Cal. 80, 45 Pac. 175; People v. Arnold, 116 Cal. 687, 48 Pac. 803,

[13] Finally, it is claimed that the court erred in giving, and likewise in refusing, certain instructions. It is strenuously insisted that the court erred in refusing a proffered instruction on the presumption of innocence and the burden of proof. The instruction correctly states the law, and might well have been given; but this is far from saying that the refusal to give it constitutes reversible error. The court fully and fairly instructed the jury in general terms on these subjects, and to more than that appellant is not entitled. Among other charges, the court gave the following:

"A defendant in a criminal action is presumed to be innocent until the contrary is proved. This presumption of innocence attaches at every state of the case and to every fact essential to conviction, and goes with you in all your deliberations as jurors, in arriving at your verdict. And in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. * * * The defendants have pleaded that they are not guilty, and you are instructed that such plea puts in issue every material allegation of the information, and casts on the state the burden of proving every essential fact constituting the crime charged, to your satisfaction, and to the satisfaction of each juror, beyond a reasonable doubt."

[14, 15] A defendant is not entitled to an instruction in any set form of words. Any form of instruction which fully and fairly presents the point at issue meets the requirements of the statute. Proffered instructions, intended simply to emphasize propositions which are covered by the court in its charge to the jury, are properly refused.

[16] Defendants proposed, and the court refused, an instruction charging the jury that if they should find from the evidence on the part of the people that the crime amounts only to manslaughter, or was "justifiable or excusable," then "no burden is placed on the defendant to prove to you, by testimony on his part, any of the circumstances that excuse him." Though refusing to give an instruction in this particular form, the court did, nevertheless, charge the jury upon this subject in an instruction which fully and fairly presented the law. This the court did by charging the jury, in the language of section 1105 of the Penal Code, that—

"Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it [as defined by instructions heretofore given] devolves upon him, *unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.*" (Italics ours.)

It is clear that the meaning of section 1105 is this: If the proof on the part of the prosecution tends to show that the homicide amounts only to manslaughter, or that it was justifiable or excusable, then no burden is placed on the defendant to prove any circumstances of mitigation, or that justify or

excuse it. That, therefore, is what the court, in effect, told the jury when it gave an instruction substantially in the language of this Code section. The instruction presented by the defendants but stated the same rule of law in a somewhat different form. It could not have thrown any more light upon the question than that which was furnished by the instruction which was given.

[17] The court charged the jury that the plea of self-defense is not available to a defendant who has sought a quarrel with the design to force a deadly issue, and thus, through contrivance or fault, has created a real or apparent necessity for the killing. Counsel concede the unimpeachableness of the instruction as an abstract statement of the law, but claim that it is not pertinent to any theory based upon the evidence. In this they are in error. Facts testified to by Mrs. Brigham, if true—and the jury evidently accepted her version—justified the jury in inferring a situation which warranted the court in giving this instruction.

[18] There is no merit in the claim that the court erred in refusing to advise the jury to find the defendants not guilty of murder in either the first or second degree. Counsel's argument in support of this claim, like much of the argument advanced in support of other points made in appellant's behalf, is based upon the untenable assumption that truth, and only truth, came from the lips of the witnesses for the defense, and that the testimony given by Mrs. Brigham and other witnesses for the prosecution is "false as dicers' oaths." That the truth or falsity of the testimony of any witness rests exclusively with the jury, and with the trial court on motion for a new trial, is a proposition too firmly founded in our jurisprudence to necessitate the citation of authority. The jurors, as was their right, regarded Mrs. Brigham's testimony as credible. They evidently accepted her account of the circumstances attending the killing of her husband. The facts as testified to by her show, without doubt, that the killing was unlawful and with malice aforethought.

[19] Witnesses for the prosecution testified that Brigham never had a "gun" *prior* to the killing. At the conclusion of the evidence defendant's counsel moved to strike out all testimony that the deceased was unarmed at times other than at the time of the homicide. The motion was granted. Notwithstanding the motion was granted in the presence of the jury, appellant now insists that there should have been a specific instruction to disregard the evidence so stricken from the record. The court did charge the jury in general terms that it "should not consider nor be influenced * * * by evidence admitted but afterwards upon further consideration by the court stricken out." By this general instruction the jury was charged, in unmistakable language, that it was not to consider *any* evidence which, after being admitted, was stricken out. There was nothing ambiguous about the instruction. If counsel for defendants desired a more specific charge upon the point they should have asked it; failing to do so, the responsibility rests with them.

There are no other points worthy of mention. A careful consideration of the record satisfies us that the trial of appellant was in all respects fair and free from any substantial error, and that the verdict was fully justified by the evidence.

The judgment and order denying a new trial are affirmed.

We concur: WORKS, J.; CRAIG, J.

---

59 Cal. App. 69

## PEOPLE v. MERCADO. (Cr. No. 890.)

(District Court of Appeal, Second District, Division 2, California. Sept. 7, 1922.)

**1. Criminal law ⟸1159(2) — Appellate court will not weigh testimony where sufficient for jury.**

The appellate court will not weigh testimony of witnesses where there is sufficient evidence, if believed by the jury, to justify a verdict.

**2. Receiving stolen goods ⟸8(3) — Evidence held to support conviction.**

In a prosecution for receiving stolen goods, evidence *held* to support conviction.

**3. Receiving stolen goods ⟸3, 9(1)—Guilty knowledge that goods were stolen need not be actual and is a jury question.**

While guilty knowledge of the larceny is an essential fact to be proved in a prosecution for receiving stolen goods, such knowledge need not be that actual and positive knowledge which is acquired from personal observation of the fact and is a question for the jury.

**4. Criminal law ⟸878(2)—Verdict of guilty as charged in second count sufficient though not describing offense; "stated."**

Pen. Code, § 954, declares that if an information charges two or more offenses, under separate counts, defendant may be convicted of any number of offenses charged, and each offense on which defendant is convicted must be "stated" in the verdict, and where a verdict found defendant not guilty on a first count and "guilty as charged in the second count," it was not objectionable in that it only referred to the count without describing the offense and as failing to meet the definition of "stated" as used in the Code, "state" meaning "to aver; allege; declare as a matter of fact."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Stated.]

**5. Criminal law ⊜875(1)—Form of verdict immaterial if intention to convict of crime charged is expressed.**

The form of a verdict is to be regarded as immaterial, provided the intention to convict of the crime charged is unmistakably expressed.

**6. Witnesses ⊜242—Permitting state to refresh witness' memory from transcript of his testimony not error.**

In a prosecution for receiving stolen goods, where, to refresh the memory of a state witness, the state was permitted to read from a transcript of testimony previously given by the witness, there was no error.

**7. Criminal law ⊜1144(12)—All intendments in favor of regularity of proceedings in lower court.**

All intendments are in favor of the regularity of proceedings in the lower court, and in the absence of any showing to the contrary, it is the duty to assume on appeal that a transcript of testimony previously given by a witness, used to refresh the witness' memory at a subsequent trial, was an official transcript of the witness' previous testimony, as is contemplated by Pen. Code, § 869.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Joe Mercado was convicted of receiving stolen goods, and he appeals. Affirmed.

Edward J. Kelly, of San Diego, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Lorrin Andrews, of Los Angeles, for the People.

FINLAYSON, P. J. The appellant, Joe Mercado, and his codefendants Gillermo Juardo and Ed Fifer were charged, in an information filed by the district attorney of San Diego county, with the crime of burglary (charged in the first count), and likewise with the crime of receiving stolen goods (charged in the second count). The record does not show whether Juardo ever was tried. Fifer and appellant were tried jointly. At the conclusion of the trial of these two the charges against Fifer were dismissed upon motion of the district attorney, on the ground that, as to him, the evidence was insufficient. The jury acquitted appellant of the charge of burglary, but found him guilty of receiving stolen goods. Judgment was entered accordingly, and Mercado now appeals therefrom and from the order denying his motion for a new trial. He contends: (1) That the evidence is insufficient to support that part of the verdict which finds him guilty of receiving stolen goods; (2) that, in the form in which it was returned by the jury, the verdict is contrary to law; and (3) that the court erred in permitting the district attorney to refresh the memory of one of the people's witnesses by reading from a transcript of testimony previously given by him.

[1] It is conceded that the evidence is sufficient to sustain a finding that the goods were stolen, that appellant received them, and that he disposed of a part of them for his personal gain; but it is claimed that it is insufficient to show that appellant knew, at the time when he received them, that the goods had been stolen. This court, as we often have said, will not weigh the testimony of witnesses where there is sufficient evidence, if believed by the jury, to justify the verdict. We will reverse a judgment on the ground of the insufficiency of the evidence only when, giving full credence to all the inculpatory evidence, it falls short of that which the law requires. In view of this well-settled rule, we think there was ample evidence to justify the conviction.

[2, 3] The testimony leaves absolutely no doubt that on November 23, 1921, the dwelling of one Frank B. Stillson, in the city of San Diego, was burglarized and there was stolen therefrom a number of articles, including a suit of clothes, a pair of shoes, a pair of clippers such as are used by barbers, a razor, a pair of opera glasses, cuff links, and a fountain pen.

Upon the question of appellant's guilty knowledge, we have the following: Theodoro Martinez, a barber, testified that in the latter part of November, 1921—he could not remember the precise date—appellant came into his barber shop and sold him a pair of clippers, a pair of opera glasses and a fountain pen—all for the sum of $2.75. The articles were identified as those which previously had been stolen from the Stillson home. This witness further testified that, at a previous trial of appellant for this same offense, the latter told the witness that the man who actually stole the articles (presumably the defendant Juardo) had already been sent to state's prison and requested the witness, when he should be placed upon the stand by the prosecution, to deny that he knew appellant. Another witness, H. Kahn, the keeper of a secondhand clothing store, testified that on November 23, 1921, at 11:20 o'clock a. m., appellant came into his store and sold him a pair of shoes for $3.50. The shoes were identified as a part of the stolen goods. Stillson had left his home that morning at about 10 or 10:30 o'clock, which was prior to the burglary. Appellant, therefore, must have sold the shoes to Kahn within less than a hour and a half after they were stolen. Kahn further testified that, pursuant to the requirements of an ordinance of the city of San Diego, he had caused appellant, as the vendor of secondhand goods, to sign a receipt for the price which the witness paid him for the shoes, and that appellant signed the fictitious name "Antonio Moreno," and

gave as his address the "Santa Rosa Hotel." In justice to appellant it should be stated that at the trial he claimed that he had sold the shoes for a man of the name of Antonio Moreno. The jury, however, evidently did not believe his story.

J. L. Berg, a detective on the San Diego police force, testified that on November 24, 1921, appellant told him that he had obtained the shoes from a Mexican who had slept with him at the Frey Hotel the night before the sale of the shoes and that this Mexican had asked him to sell them. But appellant, according to this witness, did not know the name of the Mexican who, he claimed, had asked him to sell the shoes. Berg further testified that when he made the arrest on November 24th he took from appellant's pocket a pass-key, and that appellant told him that he (appellant) had loaned the key to Juardo. Berg also testified that appellant told him that Juardo had borrowed the key for the purpose of entering the Stillson dwelling. The witness further stated that he found in appellant's room at the Frey Hotel some clothing, a heavy overcoat and the very razor which was identified by Stillson as that which had been stolen from his home; also that appellant claimed not to know anything about the razor. It also is in evidence that shortly after appellant's arrest he told Berg that the clippers which he had sold to Martinez were received by him from Juardo, who, it seems, was an ex-convict, and that, though he had not participated in the burglary, he (appellant) was of the opinion "that Juardo had committed the burglary—got the stuff out of the house." It also appears from the testimony of witnesses for the prosecution that appellant, with Juardo and Fifer, was noticed near the scene of the burglary shortly prior thereto.

While guilty knowledge of the larceny is an essential fact to be proved in a prosecution for receiving stolen goods, such knowledge need not be that actual and positive knowledge which is acquired from personal observation of the fact. In People v. Clausen, 120 Cal. 381, 52 Pac. 658, our Supreme Court quoted approvingly from Wharton's Criminal Law as follows:

"Whether the defendant knew that the goods were stolen is to be determined by all the facts of the case. It is not necessary that he should have heard the facts from eyewitnesses. He is required to use the circumspection usual with persons taking goods by private purchase; and this is eminently the case with dealers buying at greatly depreciated rates. That which a man in the defendant's position ought to have suspected he must be regarded as having suspected, as far as was necessary to put him on guard and on his inquiries. * * * The proof in any case is to be inferential, and among the inferences prominent are inadequacy of price, irresponsibility of vendor or depositor."

To the same effect see Cobb v. State, 76 Ga. 664, in which the court says:

"Knowledge may well be deduced from conduct and behavior, the character of the person from whom received, and the kind of goods, and the hour when received."

See, also, Huggins v. People, 135 Ill. 243, 25 N. E. 1002, 25 Am. St. Rep. 357; Frank v. State, 67 Miss. 125, 6 South. 842; Hester v. State, 103 Ala, 83, 15 South. 857; People v. Schooley, 149 N. Y. 99, 43 N. E. 536; Commonwealth v. Finn, 108 Mass. 466; and State v. Richmond, 186 Mo. 71, 84 S. W. 880.

In view of this array of authority as to the quantum of evidence sufficient to support a verdict on a charge of receiving stolen goods knowing them to be stolen, we think the jury was justified in finding appellant guilty. The fact that he gave a fictitious name and an incorrect address when he sold the shoes to the secondhand clothing dealer; that he told the arresting officer, not long after the burglary, that it was his opinion that Juardo (an ex-convict) had stolen the goods, and that he had loaned the pass key to Juardo, who, he said, had obtained it for the purpose of entering the house; that he, together with Juardo and Fifer, was observed near the scene of the burglary; that the stolen goods not disposed of were found in appellant's room; and that appellant had asked Martinez, the barber, not to identify him—all these are concurring circumstances which furnish evidence to support the inference that appellant had knowledge that the goods had been stolen. It was a question of fact for the jury, whose province it was to draw the inference of guilty knowledge from the incriminating circumstances.

[4] The next point is based upon a supposed defect in the form of the verdict, which was as follows:

"We, the jury in the above-entitled cause, find the defendant, Joe Mercado, not guilty of burglary in the second degree as charged in the first count of the information, and guilty as charged in the second count of the information."

Appellant's argument against the sufficiency of this verdict, as a conviction of the crime of receiving stolen goods, is made to turn upon the meaning of the word "stated" as used in section 954 of the Penal Code, wherein it is declared that if the information charges two or more different offenses, under separate counts, the defendant may be convicted of any number of the offenses charged, and that "each offense upon which the defendant is convicted must be stated in the verdict." Because the verb "state" is defined by Webster as meaning "to represent fully in words; to set down in detail," it is claimed that a verdict which merely refers to a count in the information, without further

description of the offense, fails to meet the definition of the word "stated" as used by the Legislature. The argument lacks force. Even according to Webster's definition, the verb "state" does not always mean detail. It may mean to set down in gross. See City of Utica v. Richardson, 6 Hill (N. Y.) 300, where it was held that an act which makes it lawful for a pleader to "state" the section of an ordinance means that it shall be lawful merely to "refer" to the section by its number. As used in legal phraseology, the verb "state," according to the Standard Dictionary, means "to aver; allege; declare as a matter of fact."

[5] The form of a verdict is to be regarded as immaterial, provided the intention to convict of the crime charged is unmistakably expressed. People v. McCarty, 48 Cal. 559; People v. Swenson, 49 Cal. 390, 391; People v. Holmes, 118 Cal. 448, 50 Pac. 675; Pen. Code, § 1404. It should be construed in connection with the information and the plea of the defendant. People v. Tilley, 135 Cal. 62, 67 Pac. 42. If this verdict be construed in connection with the information and appellant's plea thereto, it is clear that the offense upon which he was convicted is "stated" in the verdict. By finding him guilty "as charged in the second count of the information," the verdict, in effect, finds appellant guilty of the crime of receiving stolen goods—the only crime that is alleged in the second count.

[6] There is no merit in the claim that the court erred in permitting the district attorney to refresh the memory of one of the people's witnesses by reading from a transcript of his testimony. When Berg, the detective, was on the witness stand, he testified that he had been told by appellant that Juardo had asked him for the pass-key and that he (appellant) had given it to Juardo. The witness then was asked by the prosecutor if appellant had stated where he and Juardo were when the latter asked for the pass-key. The witness replied that as to that he was not sure. Thereupon the prosecutor, for the purpose, as he said, of refreshing the witness' recollection. was permitted to read from a transcript of testimony previously given by the witness. Defendant objected to such use of the transcript on the ground that it was not a proper method of refreshing the memory of a witness. The objection was overruled. There was no error in the ruling. As was said in the Durrant Case, 116 Cal. 213, 48 Pac. 84:

"The witness would have had the undoubted right to read his testimony given upon the examination for the purpose of refreshing his memory. Code Civ. Proc. § 2047. Such a transcript may at least be regarded as a private memorandum. Reid v. Reid, 73 Cal. 206. When a witness called by a party fails to testify to matters previously within his recollection, or gives evidence in apparent variance with that formerly given, it is not incumbent upon the party producing the witness to wait for the assaults of the cross-examination to expose seeming inconsistencies and discrepancies. While he may not impeach his witness (saving under certain exceptional circumstances), he may with propriety refresh his recollection, to the end that the witness and his present evidence may both be put fairly and in their proper light before the jury."

To the same effect are People v. McFarlane, 138 Cal. 487, 71 Pac. 568, 72 Pac. 48, 61 L. R. A. 245, and People v. Izlar, 8 Cal. App. 602, 97 Pac. 685.

[7] There is no force in the suggestion that the document from which the district attorney read may not have been an official transcript of the testimony that had been given by the witness at the preliminary examination. In making his objection to the use of the transcript for the purpose of refreshing the memory of the witness, defendants' counsel did not suggest that the document was not an official transcript. Nor is there anything in the record here tending to show that it was not such a duly authenticated transcript as is contemplated by section 869 of the Penal Code. All intendments are in favor of the regularity of the proceedings of the lower court. Error is never presumed; and in the absence of any showing to the contrary, it is our duty to assume, what is altogether probable, that the transcript used to refresh the memory of the witness was a duly authenticated official transcript of the witness' previous testimony.

The judgment and the order denying a new trial are affirmed.

We concur: WORKS, J.; CRAIG, J.

# CALIFORNIA REPORTER

210 PACIFIC REPORTER

189 Cal. 732

## DIAMOND v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 10046.)

(Supreme Court of California. Oct. 16, 1922. Rehearing Denied Nov. 14, 1922.)

**1. New trial ⟸1—Grantable only on statutory grounds and not for death of shorthand reporter; "irregularity in proceedings of the court."**

New trial is grantable only for a ground enumerated in Code Civ. Proc. § 657, and so not for death of the shorthand reporter, preventing the obtaining of a transcript of his notes for appeal; this not being an "irregularity in the proceedings of the court," which relates to matters occurring during the trial, and not after it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Irregularity.]

**2. New trial ⟸5—In view of other method than by transcript of preparing record on appeal, new trial for death of official stenographer not justified.**

Even if new trial, because of death of the official stenographer preventing the obtaining of a transcript for appeal, could be granted, though it is not a statutory ground, it would not be justified, there being other method than by such transcript of preparing record on appeal.

**3. Certiorari ⟸5(1)—No remedy by appeal to review granting of new trial in court case.**

Since amendment of Code Civ. Proc. § 963, by St. 1915, p. 209, appeal is not allowable from order granting new trial in an ac-

tion tried by the court, so that certiorari to review the order may not be refused on the ground of remedy by appeal.

On Petition for Rehearing.

**4. Certiorari ⊜28(2)—Lies to review granting of new trial for nonstatutory ground.**

The court, in granting new trial solely for a cause not designated in the statute as shown by its order, acts without and in excess of its jurisdiction and beyond the scope of its power, so that certiorari lies.

In Bank.

Original certiorari proceedings by E. F. Diamond, administrator of John H. Diamond, deceased, against the Superior Court of California in and for the City and County of San Francisco, James M. Trout, Judge, to annul an order. Order annulled.

Charles J. Heggerty, Knight & Heggerty, and Wm. M. Madden, all of San Francisco, for petitioner.

E. T. Cooper, and H. K. Eells, both of San Francisco, for respondents.

WASTE, J. Petitioner applies for a writ of certiorari to annul an order of the superior court granting a new trial, or, in the alternative, for a writ of mandate requiring the trial court to vacate such order. In an action wherein E. F. Diamond, as administrator, the petitioner here, was plaintiff, and Edward H. Geib was the defendant, the court sitting without a jury, judgment was entered in favor of the plaintiff and against the defendant. Thereafter defendant filed his notice of appeal under the alternative method, and duly demanded a transcript of the evidence and proceedings. He also served and filed his notice of intention to move for a new trial, the notice setting forth all the statutory grounds, specifying many particulars wherein the decision was against law, many alleged errors of law occurring at the trial, and, in addition thereto, as ground for such new trial, the death of the court reporter and the defendant's inability to secure any record of the evidence or proceedings. In support of the last ground, affidavits were filed, showing that the reporter had died about 18 months previously, without transcribing the testimony, and that no one else could read his notes. These facts were known to the defendant before he took any steps toward a new trial or appeal, and it seems that he made no effort to prepare or have settled a bill of exceptions. In due time the court granted the motion. The order for a new trial, which is the matter here under review, is in the following language:

"In the above cause, the motion of the defendant Geib for a new trial, upon the following grounds, to wit: that he was prevented from having a fair trial because of irregularity in the proceedings of the court, irregularity in the proceedings of the adverse party, orders of the court, abuse of discretion by the court, and upon the grounds of accident, surprise, newly discovered evidence, insufficiency of the evidence to justify the decision, that the decision is against law, and errors of law occurring at the trial and excepted to by defendant, is hereby denied; and that the said motion for a new trial is hereby granted solely and only upon the ground that the court stenographer, who took the testimony, died before the judgment and decision, and it is impossible to have the testimony transcribed, and that his notes cannot be read or transcribed."

[1] In seeking to have the order annulled, petitioner contends that the jurisdiction of the court to grant a new trial is limited strictly to the grounds therefor, specified in the statute, and as the respondent denied the motion as to all those grounds, and granted it solely upon a ground not so specified, its action in so doing was in excess of its jurisdiction.

The question presented by the application has never before been considered by this court. Respondent relies on a decision of the District Court of Appeal, holding that where a party desiring to appeal was unable to procure a transcript of the evidence, owing to the loss of the reporter's notes, a motion for a new trial should be granted. Snell v. Neilson, 194 Pac. 530. The court in that case advanced no statutory authority for its opinion, and relied solely upon decisions from other jurisdictions, to the effect that, under such circumstances, not to grant a new trial would work an injustice to a party through no fault of his own. A hearing in this court was not petitioned for after the decision in the district court, and the ruling has stood unchallenged until the present time. We have carefully considered the opinion referred to, and have examined many of the cases cited by the court. From such consideration and examination, in the light of the enactments of the Legislature of this state, as construed by this court, we are satisfied that Snell v. Neilson, supra, should not be considered an authority on this point. It is a distinct departure from the general understanding of appellate procedure which prevails in this state, to the effect that when a party has failed to preserve his exceptions by a bill of exceptions, transcript of the evidence, or other statutory method, the motion for a new trial will be denied or the appeal dismissed.

The authorities are not agreed on the question. From the cases cited in Snell v. Neilson, many of which are considered in Richardson v. State, 15 Wyo. 465, 89 Pac. 1027, and in the note to that case found in 12 Ann. Cas. 1056, all from other jurisdictions, there seems to be a divergence of opinion on the

question. According to many of the decisions, the rule, as announced in the above case, is that where a party has lost the benefit of his exceptions from causes beyond his control, a new trial is properly awarded. We have not examined all of the decisions which appear to support that rule. Some of them appear to be based upon the fact that in the instance there considered, the complaining party was absolutely precluded from presenting the merits of his contention to the appellate tribunal otherwise than through the medium of the particular record he alleged himself unable to furnish. Others rest upon the circumstance that the statutes in those jurisdictions do not define the causes for which a new trial may be granted, thereby permitting a freedom of interpretation as to what is cause for a new trial. Still others depend upon the fact that the appellate courts in such jurisdictions have independent powers to grant new trials. The Supreme Court of Connecticut, which had occasion to examine this question, upon the appeal of a party deprived of the opportunity to present a bill of exceptions because of the death of the judge who tried the case, refused to follow the rule announced in these decisions, and concisely expressed our own view as to their weight, saying:

"Rulings in other jurisdictions, to which our attention has been called as applicable to the case before us, are so generally based upon statutory regulations or rules of court in regard to appeals and new trials different from our own, as to be of little weight as authorities under our laws and practice." Etchells v. Wainwright, 76 Conn. 534, 541, 57 Atl. 121, 124.

The doctrine announced in Snell v. Neilson, supra, and followed by respondent has never prevailed in this state. The rule has always been that the right to move for a new trial is statutory and must be pursued in the method pointed out by the statute. California Imp. Co. v. Baroteau, 116 Cal. 136, 138, 47 Pac. 1018; Simpson v. Budd, 91 Cal. 488, 491, 27 Pac. 758; Burton v. Todd, 68 Cal. 485, 9 Pac. 663. Soon after this court was created it held that the loss of instructions given by the court to the jury was not a ground for a new trial. Visher v. Webster, 13 Cal. 58, 61. In another early case it said that the power to grant a new trial, and the mode of its exercise, are dependent mainly, if not entirely, upon the statute, in both civil and criminal actions, and that the grounds upon which it may be obtained, and the manner of applying for and procuring it, are therein prescribed. Dorsey v. Barry, 24 Cal. 449, 455. It has frequently pointed out that certain causes relied upon by appellants are not statutory grounds for a new trial. Kepfler v. Kepfler, 134 Cal. 205, 206, 66 Pac. 208; McGuire v. Drew, 83 Cal. 225, 228, 23 Pac. 312; Benjamin v. Stewart, 61 Cal. 605, 608. In another case it is held:

"That the provisions of the Code do define the powers of the court in granting a new trial, and limit the exercise of those powers, we entertain no doubt." Townley v. Adams, 118 Cal. 382, 383, 50 Pac. 550, 551.

In considering appeals from orders granting or denying motions for a new trial, when such appeals were permissible, this court held that it would consider only such matters as were made grounds upon which the superior court is authorized to grant or deny the motion. Green v. Duvergey, 146 Cal. 379, 384, 80 Pac. 234; Crescent, etc., Co. v. United Upholsterers, 153 Cal. 433, 434, 95 Pac. 871.

The Legislature has recognized and passed laws in accord with this construction of the law. Realizing that new trials could only be granted in this state on statutory grounds, and that a serious situation was thereby presented in many cases pending in court at the time of the fire in San Francisco in 1906, it enacted a statute providing that when any proposed bill of exceptions, or statement of the case on motion for a new trial, was "lost or destroyed by reason of conflagration or other public calamity," and no other record of the proceedings upon the trial could be obtained, the court might grant a new trial if at the time of such loss or destruction the motion was pending. Stats. 1907, p. 998. The statute was held by this court to operate retroactively, and to be applicable only to conditions existing at the time of its passage. Bassford v. Earl, 172 Cal. 653, 657, 158 Pac. 124.

The causes for which a new trial may be granted, in this state, are enumerated in section 657 of the Code of Civil Procedure. The inability of a party to present a bill of exceptions, or a transcript of the evidence, by reason of the death of the shorthand reporter, or for any cause, is not one of them. The grounds of "irregularity in the proceedings of the court," upon which the court is authorized to grant the motion clearly relate to matters occurring during the trial, and not after it. It is intended to refer to matters which an appellant cannot fully present by exceptions taken during the trial. Woods v. Jensen, 130 Cal. 200, 205, 62 Pac. 473; Gay v. Torrance, 145 Cal. 144, 150, 78 Pac. 540. That an aggrieved party has, by the death of the stenographer who reported the case, been prevented from obtaining a transcript of the proceedings, and testimony taken, perparatory for a motion or for an appeal, is not a matter occurring during the trial. The causes for which new trials may be granted, described in the section, are only such as show that the parties did not have a fair and full hearing at the first trial.

[2] For another reason the order of the trial court was without justification. All of the cases we have examined which support the rule relied on by respondent rest fundamentally upon the ground that the appealing

party has lost the benefit of regularly taken or allowed exceptions through no fault or negligence of his own. In this case the aggrieved party was not deprived of his remedy looking to an appeal by the death of the shorthand reporter, and the inability to secure a transcript of his notes. He did not thereby lose the right to present his case to the appellate court. There are two methods of taking an appeal in this state, either one of which was available. The defendant, not being able to secure the reporter's transcript, could have prepared from memory, and such notes and data as he had, a proposed bill of exceptions to be used on the motion for a new trial or on the appeal. It would then have been incumbent upon the plaintiff to present such amendments as he saw fit. The proposed bill and the amendments having been presented to the court within due time, it would have become the duty of the court to settle the bill. In view of the long delay between the trial and decision this procedure might have been vexatious and inexpedient, but the fact remains that such course was open to the defendant. The only result of the inability to obtain a transcript of the stenographer was to give the parties a little more trouble in preparing the case for the motion or for an appeal. To set aside a judgment on such grounds would be an act of great injustice to the petitioner. Lidgerwood Manufacturing Co. v. Rogers (Super. Ct.) 4 N. Y. Supp. 716, 717. While the law contemplates that either party may have the stenographer transcribe his shorthand notes, it does not contemplate that such is the only method of preparing a record on appeal. Butts v. Anderson, 19 Okl. 367, 372, 91 Pac. 906.

There may be an occasional hardship in denying a new trial in cases such as this. An injustice might easily be worked if the rule were otherwise. Every presumption is in favor of the fairness, impartiality, and regularity of the proceedings of the trial court, which led to the judgment and in denying the motion for a new trial on the grounds enumerated in the statute. The party in whose favor the judgment was rendered, and who successfully resisted the motion for a new trial would, on an appeal, be entitled to the benefit of those presumptions. To permit the application of the rule contended for by the respondent would be to deprive such party of his judgment, and the intendments in its support, and to force him to reestablish his claim, because, it is asserted his adversary has been, without his own fault, deprived of the means of pointing out errors which are said to have been committed on the former trial. Alley v. McCabe, 147 Ill. 410, 415, 35 N. E. 615. The precise question was presented to the Supreme Judicial Court of Maine. It was asked to remand certain cases for a new trial for the reason that the death of the official court stenographer, before he had transcribed his notes of the evidence, prevented a presentation of the record. The court said:

"If we set aside these verdicts as urged, what do we decide? Not that they were wrong, but that they were possibly wrong, and that we can never know certainly whether they were wrong or right. The statute has not vested us with authority to make such a decision. The presumption that a verdict is right until shown to be wrong should protect it at least, until the defeated party brings himself within the statute. That he cannot bring himself within the statute is the party's misfortune, and it may be to his injury. But, however grievous it may seem to him, we think the statute has not confided to us the power to relieve him from his misfortune, any more than it has in other instances to relieve litigants of their many other misfortunes. The statute might have done so. The statutes do provide expressly in many cases for relief when parties have lost their rights by accident or mistake. In other instances parties are left to suffer the chances of litigious war, and the hardships, if any, must be borne by those upon whom they accidentally fall." Stenographer Cases (Morin v. Claflin, and other cases) 100 Me. 271, 276, 61 Atl. 782, 784.

[3] Respondent resists this application upon the ground that jurisdiction to entertain and dispose of motions for new trials is vested in the superior court, and that therefore certiorari will not lie, the remedy of the aggrieved party being by an appeal from the order. It relies upon a number of cases so holding, but those decisions are no longer authority on the precise point which arises here. Since the amendment to section 963 of the Code of Civil Procedure (Stats. 1915, p. 209) an appeal is no longer allowed from an order granting a new trial in an action tried by the court. The respondent had jurisdiction to determine the motion for a new trial, but the exercise of its power to grant the motion was limited to the grounds specified in the statute. When it granted the new trial for a cause not so designated it acted without and in excess of its jurisdiction, and beyond the scope of its power. Under such circumstances certiorari will lie. Estate of Paulsen, 179 Cal. 528, 529, 178 Pac. 143.

The order granting a new trial is annulled.

We concur:

WILBUR, Acting C. J.; LAWLOR, J.; LENNON, J.; RICHARDS, Justice pro tem.

On Petition for Rehearing.

PER CURIAM. [4] It is ordered that the following passage be added to the opinion:

If the order granting the new trial had not shown on its face that it was denied on all the grounds mentioned in the notice of intention, and that it was granted solely on the ground that the court stenographer who

took the testimony had died before the judgment and decision, the court would have had jurisdiction to grant the new trial. But since it did show that it was granted solely on a ground not covered by the statute, the court was acting beyond its jurisdiction. It is only for this reason that certiorari will lie.

The petition for rehearing is denied.

SHAW, C. J., and LENNON, SHURTLEFF, WILBUR, LAWLOR, WASTE, and SLOANE, JJ., concur.

---

59 Cal. App. 119

## LEVY v. KAHN. (Civ. 4298.)

(District Court of Appeal, First District, Division 2, California. Sept. 20, 1922.)

**Sales ⇐340—On buyer refusing tender, seller may resell and recover difference between market value and contract price.**

Though title passed to buyer on his refusal of tender of the property by seller, who had fully performed his contract, so that Civ. Code, § 3310, fixing contract price as the measure of damages, applied if the seller chose to sue for the contract price, yet where the seller resold the property without notice to buyer, he could recover the contract price less the market value at time and place for delivery, either on the theory of the contract's being executory, under sections 3311 and 3353, or on the theory of seller's liability for conversion, that is, for the market price, set off against buyer's liability for the contract price under section 3310.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Louis L. Levy against Carrie L. Kahn. Judgment for plaintiff, and defendant appeals. Affirmed.

Edward Myers, Frank E. Powers, and Frank J. Hennessy, all of San Francisco, for appellant.

Brownstone & Goodman, of San Francisco, for respondent.

NOURSE, J. Plaintiff recovered judgment upon several causes of action for damages for the breach of several executory contracts for the purchase of personal property. Prior to the time when delivery was had under the contracts the defendant repudiated each and all of the contracts. Within due time plaintiff made a valid tender of all the property sold, and the defendant refused to accept delivery, denying all liability under the contract. Thereafter, and without notice to the defendant, the plaintiff resold the property at private sale. In each cause of action the plaintiff pleaded the execution of the contract, performance on the part of plaintiff, the tender and defendant's refusal to accept delivery thereof, the market value of the property at the time and place when and where delivery should have been made, and the difference between its market value and the contract price, for which sum plaintiff prayed and recovered judgment.

On this appeal the defendant urges that because of the tender made by the vendor title actually passed to the vendee. From this it is argued that plaintiff's measure of damages is the contract price in accordance with the provisions of section 3310, Civil Code.

A similar case was presented in Phillips v. Stark, 186 Cal. 369, 199 Pac. 509, and what was said there controls the decision in the case at bar. In the Phillips Case, as here, the defendants, after tender and part payment, repudiated an executory contract of sale. The plaintiff sold the property at public auction without notice to the defendants. Thereafter plaintiff sued to recover the difference between the contract price and the amount realized on the auction sale. It was held that the title had passed to the defendants, and that section 3310, Civil Code, applied for the purpose of fixing the measure of damages, but that it had no application for the purpose of fixing plaintiff's remedy. It was also held that section 3310, Civil Code, in fixing the measure of damages as the full contract price where title had vested in the vendee, did so on the assumption that because the title had passed the vendor had nothing but his claim against the vendee without any offsets.

"But where, as here, although the title has passed, the vendor still retains the property, the value of the property must be offset against the purchase price. The vendor may not have both the full purchase price and the property. It is quite immaterial in the present case upon what theory this is worked out, whether upon that suggested by us, that, by repudiating the contract and thrusting the property back on the plaintiff, the defendants put him in the situation of a vendor under an executory contract, in which case the measure of damages is the difference between the contract price and the market value of the property (Civ. Code, §§ 3311, 3353), or upon that suggested by Bennett v. Potter, that the vendee is responsible for the full purchase price under section 3310 of the Civil Code, but the vendor is liable to the vendee in damages for a conversion. The result is the same in either case, since the measure of damages for a conversion is the market value of the property. Civ. Code, § 3337." 186 Cal. 374, 375, 199 Pac. 512.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

---

(59 Cal. App. 93)

## ALLEN v. SAN FRANCISCO WHOLESALE DAIRY PRODUCE EXCH. (Civ. 4066.)

(District Court of Appeal, First District, Division 2, California. Sept. 12, 1922. Hearing Denied by Supreme Court Nov. 9, 1922.)

**1. Appeal and error ⊂⊃1011(1)—Findings of court on conflicting evidence conclusive.**

Where although conflicting inferences might be drawn from some of the testimony, where such conflict has been resolved by findings of the trial court, such findings are conclusive on appeal.

**2. Principal and agent ⊂⊃101(1) — Employer held not bound by employee's subscription for reports, where complaining party did not know conditions of employment and was not misled by them.**

Under Civ. Code, § 2317, defining ostensible authority, the fact that an employee was permitted to open the mail of his employer and intrusted with the duty of bringing to the attention of proper officers correspondence addressed to employer was insufficient to bind the employer by a letter subscribing for reports, written by employee without authority, in the absence of evidence that complaining party knew such facts or was misled by them.

**3. Principal and agent ⊂⊃99—Third person's belief that agent had authority must be generated by some act or neglect of principal.**

Under Civ. Code, § 2334, as to principal's liability for acts of agent with only ostensible authority, there are two essential features of ostensible authority; the third person must believe that the agent had authority, and such belief must be generated by some act or neglect of the principal.

**4. Principal and agent ⊂⊃99—One cannot by acts make himself agent of another without knowledge and consent of latter.**

One cannot make himself the agent of another simply by writing letters and acting as agent without the knowledge and consent of the latter.

**5. Principal and agent ⊂⊃166(2)—Acts of employer held not to ratify unauthorized contract of clerk.**

Where a clerk by an unauthorized letter and without the knowledge or consent of his employer subscribed to official reports of the Interstate Commerce Commission, which were mailed in the name of and to the office of the employer from time to time over a period of several months, and received by the employee, who piled them unopened around his desk or in a corner of the room, and when the attention of the employer was called to the reports he promptly disavowed the contract, and sought to return the reports unopened, which were refused, there was no ratification of the contract by the employer, as the element of actual knowledge was lacking.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Franklin W. Allen, an individual doing business under the name and style of Hulse & Allen, against the San Francisco Wholesale Dairy Produce Exchange. Judgment for defendant, and plaintiff appeals. Affirmed.

Arnold C. Lackenbach, of San Francisco (Paul A. McCarthy, of San Francisco, of counsel), for appellant.

I. I. Brown and Vogelsang & Brown, all of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against him in an action to recover from the defendant the sum of $1,218 for a transcript of the official stenographic report of proceedings before the Interstate Commerce Commission on the perishable freight investigation.

The plaintiff is the official reporter of the Interstate Commerce Commission, and is engaged in the business of reporting and selling transcripts of the reports of said commission to persons interested therein, at prices fixed by said commission for such services. On June 20, 1919, plaintiff sent to defendant a circular letter, stating that proposed changes in tariff applicable to perishable products of all kinds would be investigated by the Interstate Commerce Commission at hearings to be held in several cities from July 7 to September 18, or later. The letter then offered to supply copies of the official reports of the commission at 12½ cents a page, the charge authorized and approved by the commission. In response to this communication the plaintiff received the following letter:

"San Francisco, Cal., June 27/19.

"Messrs. Hulse & Allen, Official Reporters of the Interstate Commerce Commission, Federal Trade Commission, 244 Madison Ave., New York City, N. Y.—Gentlemen: Answering yours of June 20, 1919, in re official reports: concerning proposed perishable protective tariff No. 1 (Docket 10664) and other matters referred to in your communication: have to say: kindly consider this our subscription for the copy referred to, and forward at your earliest convenience to this address.

"Very truly yours, J. R. Kinsman, Sec."

This letter was written upon a letter head of the defendant, and the signature was affixed by a rubber stamp. Acting upon this letter, the plaintiff prepared and mailed to defendant numerous volumes of typewritten transcript of the proceedings before the commission, amounting to $1,218.50 at the rate quoted. The complaint was in two counts, in the first of which it was alleged that the transcript was furnished to defendant at its special instance and request at an agreed price; and in the second count recovery was sought for the same amount as the reasonable value of plaintiff's services in preparing the transcript, which services, it was alleged,

were rendered at the special instance and request of defendant.

Appellant urges that the trial court erred in refusing to admit in evidence the letter hereinbefore set out, dated June 27, 1919, addressed to the plaintiff and signed, with rubber stamp, "J. R. Kinsman, Sec." Counsel for defendant objected to the introduction of this letter upon the ground that there was no proof that it had been authorized, and it was not admissible against the corporation. The evidence disclosed that J. R. Kinsman had not written this letter, nor seen it at all until the time of the trial; that he had not authorized it to be written, and did not know that it had been written, but that a clerk in the employ of the defendant, one Henri B. Laidlaw, on his own initiative, without any direction from the board of directors or from any officer of the defendant, had written the letter, to which he had affixed, by rubber stamp, the signature "John R. Kinsman, Sec."

[1] It was not contended that Laidlaw had actual authority to act for the defendant in making a contract of this kind, and the proof was to the contrary. Also, we think, it cannot be successfully contended, on the record that he had ostensible authority to do so. Upon this latter question, although conflicting inferences might be drawn from some of the testimony, such conflict has been resolved against appellant by the findings of the trial court. These findings are of ultimate facts; but they imply that there was no ostensible agency established as against the defendant. This, in itself, would conclude that question before this court, but it may be well to add that, even though we were to give effect only to the portion of the testimony which is relied upon by appellant as establishing ostensible agency, it would avail him nothing, because such facts are not shown to have been known to the plaintiff when he furnished the transcripts.

[2] Section 2317 of the Civil Code defines ostensible authority as such authority as a principal intentionally or by want of ordinary care causes or allows a third person to believe the agent to possess. Appellant's argument, based upon the fact that Laidlaw was in charge of the office of the defendant and permitted to open its mail and intrusted with the duty of bringing to the attention of the proper officers the correspondence addressed to the defendant, loses its force because there is no evidence in the record that plaintiff knew these facts or was misled by them.

[3, 4] Section 2334 of the Civil Code provides that a principal is bound by the acts of his agent under a merely ostensible authority to those persons only who have in good faith and without want of ordinary care incurred a liability or parted with value upon the faith thereof. The decisions in this state have made clear that there are two essential features of ostensible authority, viz. the third person must believe that the agent had authority, and such belief must be generated by some act or neglect of the person to be held. Harris v. San Diego Flume Co., 87 Cal. 526, 25 Pac. 758; Gosliner v. Grangers' Bank of Cal., 124 Cal. 225, 227, 56 Pac. 1029; Luft v. Arakelian, 33 Cal. App. 463, 165 Pac. 712; Rodgers v. Peckham, 120 Cal. 238, 52 Pac. 483; So. Pac. Co. v. City of Pomona, 144 Cal. 350, 77 Pac. 929. It is well settled that he who seeks to charge a supposed principal with the obligations resulting from the acts and conduct of an alleged ostensible agent must show that he himself was cognizant of the facts which gave color to the alleged ostensible agency and caused him to believe that the person with whom he dealt was acting in the capacity of an agent. 1 Cal. Jur. § 40, and cases hereinbefore cited. A person cannot make himself the agent of another simply by writing letters and acting as agent without the knowledge and consent of the latter. Lambert v. Gerner, 142 Cal. 403, 76 Pac. 53.

[5] Another argument of the appellant for a reversal of this judgment is that, even though the contract be conceded to have been unauthorized by the defendant, it was ratified by said defendant. This position is based upon the showing made that the transcripts were mailed from time to time over a period of several months, by the plaintiff to the defendant, and were delivered at the office of the defendant. They were received by the clerk, Laidlaw, and piled up unopened around his desk or in a corner of the office. These packages were not opened, and became quite bulky in the course of a few months, as they included over 9,000 pages of typewritten matter. When the clerk finally, and, we concede, rather tardily, realized how extensive had been the hearings before the commission, and what a bulk of typewritten matter was being sent to the office of defendant, he called the attention of one of the directors to these transcripts, and the defendant thereupon immediately disavowed the contract, and attempted to return the transcripts unopened, but the plaintiff refused to accept them.

However, it is argued that as the transcripts were necessarily bulky, and as some of the directors visited the offices of the defendant for a short time every day, the defendant is to be charged with knowledge that the transcripts were being delivered, and its failure to repudiate the contract for several months amounted to a ratification. The record contains the positive testimony of the directors that they did not know the transcripts had been sent to the defendant, and knew nothing of the entire transaction between Laidlaw and plaintiff until about the time they repudiated the contract and

attempted to return the transcripts. Appellant's argument, then, is, in effect, that although the evidence is that the defendant had no actual knowledge, through its directors or officers, of the delivery of the transcripts, it must be charged with knowledge because it had an opportunity to know the facts, and its silence, under such circumstances amounts to a ratification. This presents, squarely, the question of whether ratification may exist where there is no actual knowledge of facts which must suggest or imply the transaction in controversy, but merely constructive knowledge of such facts. We find no case in which the rule has been carried to the extent contended for by appellant. It is true that ratification need not be express, but may be implied from the acts and conduct of a party. Ralphs v. Hensler, 97 Cal. 296, 302, 32 Pac. 243; Union Trust v. Best, 160 Cal. 263, 116 Pac. 737. But it is an inherent element of ratification that a party to be charged with it must have had full knowledge of what he was doing. Brown v. Rouse, 104 Cal. 672, 676, 38 Pac. 507; Hall v. Wells, 24 Cal. App. 238, 250, 141 Pac. 53; Munroe v. Fette, 1 Cal. App. 333, 334, 82 Pac. 206; Puget Sound Lumber Co. v. Krug, 89 Cal. 237, 26 Pac. 902; Dupont v. Wertheman, 10 Cal. 354; Billings v. Morrow, 7 Cal. 171, 175, 68 Am. Dec. 235; Hutchinson v. Scott, 35 Cal. App. 171, 174, 169 Pac. 415; Brown v. Wrightman, 5 Cal. App. 391, 90 Pac. 467.

The case of Ballard v. Nye, 138 Cal. 598, 72 Pac. 156, might, at first glance, seem to give some support to appellant's position; but a reading of the facts recited in the opinion in that case convinces us that it is inapplicable here. That case states, quoting from Mechem on Agency, that while knowledge of material facts is necessary before the doctrine of ratification can be applied, nevertheless, ignorance of such facts can avail nothing, where it is intentional and deliberate, or where the circumstances are such as reasonably to put the principal upon inquiry. But a reading of that case makes it apparent that, in order to make it apply as authority in the present case, it would have been necessary for plaintiff to have proven, in the present case, that defendant had actual knowledge of the delivery of the transcripts by plaintiff. The proof is to the contrary. In the case of Ballard v. Nye, supra, the principal had actual knowledge of a number of facts from which it was impossible to escape the conclusion that a certain payment had been made to her purported agent. In the present case the defendant had no actual knowledge of the delivery of the transcripts. If it had had such knowledge appellant might have argued, with success, that defendant had constructive notice of the contract or course of dealings with the plaintiff and actual knowledge of the making of the contract was unnecessary; but in the absence of actual knowledge of facts to put the defendant on inquiry as to any contract outstanding, we think the trial court was correct in its conclusion that no showing of ratification had been made.

We think that upon no possible theory was the letter, sought to be introduced by plaintiff, binding upon the defendant, and its exclusion by the trial court was proper. In connection with the ruling on this point, we have disposed of all the matters urged by appellant which require discussion.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

---

59 Cal. App. 29

## BRADEN v. MITCHELL. (Civ. 3826.)

(District Court of Appeal, Second District, Division 1, California. Aug. 31, 1922.)

**I. Evidence ⊂=450(8)—Contract for purchase of a specified lot of goods held sufficiently definite to preclude extraneous testimony.**

A contract for the purchase of "a certain salvage stock, consisting of the following approximate articles, to wit," *held* sufficiently clear and certain in its terms to preclude extraneous evidence of the intents of the parties and the quantity of the goods deliverable under it.

**2. Sales ⊂=261(1)—Contract for sale of specified lot of goods of approximate amount held not a warranty of quantity.**

A written contract for the sale of "certain salvage stock" described, stating that "the approximate amounts of said goods are as follows," stating the quantities of the various articles, was the sale of a specific lot of salvaged goods of which the probable amount was only estimated, so that, the good faith of the seller being unquestioned and the entire "certain salvage stock" being delivered, the buyer could not recover for any deficiency in the quantity of the items listed.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

Action by A. Claude Braden against L. D. Mitchell. From a judgment for plaintiff, defendant appeals. Reversed.

Clark, Law & Clay, of Los Angeles, for appellant.

Hahn & Hahn, of Pasadena, for respondent.

CONREY, P. J. Action to recover damages for failure of the defendant to deliver a part of certain personal property, alleged to have been included in an agreement of sale. The plaintiff recovered judgment, and the defendant appeals therefrom.

[1] The court found that the defendant

agreed to sell and deliver to the plaintiff, and the plaintiff agreed to purchase from the defendant, "a certain salvage stock consisting of the following approximate articles, to wit," the same being certain stated quantities of glass jars and other articles.

The court found that the defendant refused and failed to deliver to plaintiff certain items contained in that list. Appellant contends that these findings are not sustained by the evidence.

[2] The contract was in writing. It described the property sold as follows: "A certain salvage stock from Willets & Green. The approximate amounts of said goods are as follows"—stating the quantities of the various articles. Overruling objections of the plaintiff, the court permitted the defendant to introduce testimony and correspondence of the parties, for the purpose of establishing the actual intention of the parties, and then decided on the evidence that the facts were as above quoted from the findings. This evidence was immaterial to the issues presented if the contract was clear and certain in its terms. We find in the contract nothing that justified a resort to extraneous evidence for the purpose of interpreting the terms of the writing. On the written contract the question to be determined is whether or not the description of the property sold was such that the quantity was warranted. We are of the opinion that the sale was of a specific lot of salvaged goods, of which the probable amount was only estimated. Therefore, since the good faith of the vendor is not questioned, and since the entire "certain salvage stock" was delivered, the plaintiff cannot recover damages for any deficiency in quantity of the items indicated in the contract. The rule which should be applied here is stated in Brawley v. United States, 96 U. S. 168, 24 L. Ed. 622, as follows:

"Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, * * * and the quantity is named with the qualification of 'about,' or 'more or less,' or words of like import, the contract applies to the specific lot, and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it. In such cases, the governing rule is somewhat analogous to that which is applied in the description of lands, where natural boundaries and monuments control courses and distances and estimates of quantity."

Taking the written contract as constituting the only material evidence on the principal fact in issue, it is not sufficient to sustain the finding on which the judgment rests.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

(59 Cal. App. 86)

## SANFILIPPO et al. v. LESSER et al.

(Civ. 4282.)

(District Court of Appeal, First District, Division 2, California. Sept. 11, 1922.)

**1. Master and servant ⟸330(1)—Burden of showing wife's agency in operating husband's automobile on plaintiff.**

In an action against a husband for injuries caused by his wife's negligence in the operation of his automobile, the plaintiff has the burden of proving that the wife in operating the car was the husband's agent.

**2. Master and servant ⟸332(1)—Evidence of automobile driver's agency for her husband owner of car held insufficient for jury.**

In an action against a husband for his wife's negligence in the operation of his automobile, undisputed testimony that he was not present, and that she had taken the car to drive to her mother's home, and had taken her mother to do some shopping, and then for a drive, *held* to entitle the husband to a directed verdict, such evidence being sufficient to overcome prima facie agency established by proof of husband's ownership of automobile and permissive use thereof by wife.

**3. Death ⟸58(2)—Proof of damages to surviving husband and children essential.**

In an action for death under Code Civ. Proc. § 377, the jury is not warranted in awarding damages to deceased's husband and children, in the absence of evidence as to whether the husband and children were living with the deceased, or whether her society was of any pecuniary value to them, or whether she rendered any services to them.

**4. Death ⟸89—Damages not awarded for mental suffering.**

In an action for death under Code Civ. Proc. § 377, no recovery can be had for grief, sorrow, and mental suffering.

**5. Appeal and error ⟸232(3)—Insufficiency of evidence ground for reversal, where urged as objection to instructions notwithstanding failure to specify insufficiency.**

The appellate court will reverse a judgment for insufficiency of evidence to justify the verdict, though appellants did not specify wherein the evidence was insufficient, as required by Code Civ. Proc. § 648, where they raised the question of the insufficiency of the evidence by objection to instructions, and urged such objections on appeal.

**6. Appeal and error ⟸1170(1)—Appellate courts will not foreclose substantial rights of appellants on technical grounds, where empowered to reach decision on merits.**

It is not the policy of the appellate courts to foreclose substantial rights of appellants upon technical grounds, where they are empowered to reach a decision in any manner upon the merits.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action by Philipp Sanfilippo and others against Irving Lesser and another. Judgment for plaintiffs, and defendants appeal. Reversed.

Hartley F. Peart and Gus L. Baraty, both of San Francisco, for appellants.

Harry I. Stafford, of San Francisco, for respondents.

LANGDON, P. J. This is an appeal by the defendants from a judgment for $2,500, rendered upon a verdict of a jury in an action by the heirs of Carmela Sanfilippo to recover damages alleged to have been suffered by them by reason of the negligence of defendants in operating an automobile, which negligence, it is alleged, resulted in the death of said Carmela Sanfilippo.

The complaint alleged that the defendants were husband and wife; that on the 9th day of July, 1919, said defendant Irving Lesser was the owner of a certain automobile, which he purchased, possessed and maintained for the comfort, pleasure, and enjoyment of himself and his wife, said defendant Ruth Lesser; that the said defendant Ruth Lesser, on the 9th day of July, 1919, was allowed, permitted, and authorized by said Irving Lesser to use and operate said automobile for her pleasure, and that the said defendant Ruth Lesser was driving said automobile with the knowledge, consent and authority of her said husband, and in pursuance of the purposes for which he bought, possessed, and maintained the same; that on said 9th day of July, 1919, said defendant Ruth Lesser, with the consent and authority of said defendant Irving Lesser, drove and operated said automobile along said Ellsworth street at a rate of speed of about 35 miles an hour, and while so doing failed and neglected to keep said automobile under control, with the result that she drove and operated the said automobile from the roadway of said street upon and along the sidewalk thereof, and struck said Carmela Sanfilippo, who was then and there walking along the sidewalk of said street; that said automobile struck said Carmela Sanfilippo with great force and violence; and that she thereby sustained injuries which caused her death. A demurrer was interposed to the complaint upon the ground, among others, that it did not state a cause of action against the defendant Irving Lesser. The demurrer was overruled and answer filed, which denied, substantially, all the allegations of the complaint.

[1, 2] There was absolutely no proof made by the plaintiff that the defendant Ruth Lesrer was acting as the agent of Irving Lesser in driving the automobile. It was not disputed that the defendant Irving Lesser was not present at the scene of the accident, and he could be charged with the negligence, if any, of his wife only upon the theory of an agency between them. The burden of proof upon the issue of agency was on the plaintiff. Fahey v. Madden (Cal. App.) 206 Pac. 128, 209 Pac. 41. Concerning that the proof of the ownership of the automobile by defendant Irving Lesser and the permissive use of it by his wife made out a prima facie case of agency, that case was based merely upon a possible inference that might be drawn by the jury, and when the defendant introduced evidence, which stands in the record uncontradicted, to the effect that Mrs. Lesser had used the car to drive to her mother's home and had taken her mother down town to do some shopping and then for a drive through the park, and that her husband was at his office at the time, plaintiff's prima facie case of agency was overcome by such direct and positive testimony. Fahey v. Madden (Cal. App.) 206 Pac. 128, 209 Pac. 41; Brown v. Chevrolet Motor Co., 39 Cal. App. 738, 741, 179 Pac. 697.

Under this state of facts, the case is within the rule announced in the case of Spence v. Fisher, 184 Cal. 209, 193 Pac. 255, 14 A. L. R. 1083, wherein it is said:

"But it seems to us that it cannot reasonably be held that a member of the family using a car so provided, kept, and maintained by the father for the pleasure and convenience of his family, solely on his own mission for his own personal pleasure or convenience, is acting for his father or is engaged on the father's business, notwithstanding that such use was one of the purposes for which the car was provided and maintained. In such a situation we would have simply a permissive use of the father's car by another, solely on that other's business, practically the same use of the owner's automobile that is had by one not a member of his family to whom he loans it for such third party's own use or enjoyment, the only difference being that in the latter case the car is not provided, kept, and maintained by the owner for the purpose of allowing others to use it. It seems to us that this is an immaterial factor."

See, also, Hill v. Jacquemart (Cal. App.) 203 Pac. 1021.

The instruction of the trial court to the jury that "if you find that the automobile in this case was owned by Irving Lesser, and that the said Irving Lesser kept and maintained said automobile and authorized and permitted the use of it by his wife, Ruth Lesser, then and in that event Irving Lesser is liable in damages for any injury or death occasioned by the negligent operation of the said automobile by his said wife, Ruth Lesser," was erroneous. The motion of the defendant Irving Lesser for a directed verdict should have been granted. The judgment against him cannot stand.

[3] As to the judgment against Ruth Lesser, numerous objections, are urged, but a

consideration of the first one called to our attention is decisive of this appeal. That is, that there is not a scintilla of evidence upon which the jury could arrive at an estimate of the pecuniary damages of the plaintiffs. The statute limits damages in a case like the present one to such an amount as under all the circumstances of the case may be just. Section 377, Code of Civ. Proc. The damages allowable must depend upon the circumstances of the particular case. Bond v. United Railroads, 159 Cal. 270, 113 Pac. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50. The allegations of the complaint, in the present case, upon the subject of damages are:

"That by reason of the negligence of said defendants as aforesaid, the plaintiff Philipp Sanfilippo on account of the loss of services of his said wife and the help and comfort of her society and companionship, and the plaintiffs Salvatore Sanfilippo, Mamie Mercuria, and Josephine Sanfilippo on account of the help and comfort and loss of companionship of their said mother have been damaged in the sum of $20,000."

In the case of Bond v. United Railroads, supra, 159 Cal. at page 286 thereof (113 Pac. 373, 48 L. R. A. [N. S.] 687, Ann. Cas. 1912C, 50), it is said:

"It was not necessary to specifically allege the loss of society, comfort, protection or services. Evidence could be given of the facts relating thereto and allowance could be made therefor under the general allegation of damages."

But let us search the record in the present case for any evidence at all upon which to base an allowance of damages for loss of society and companionship. The first witness called by plaintiffs was Josephine Sanfilippo. She testified that she was 17 years old; that her mother was Carmela Sanfilippo, who was killed on July 9, 1919, in an automobile accident. She continued:

"My father's name is Philipp Sanfilippo. He is 62 years of age and resides in San Francisco. My sister's name is Mamie Mercuria. She is 36 years of age, and resides in San Jose. My brother's name is Salvatore Sanfilippo. He is between 33 and 34 years of age, and resides in San Jose. My brother Salvatore Sanfilippo is married. My sister Mamie Mercuria is also married. My mother at the time of her death was about fifty-four years old."

The next witness was Constantino Mercuria. She described the accident, which she witnessed while sitting in her mother's store. She stated that deceased was her grandmother. Salvatore Sanfilippo testified that his mother was killed in the accident under consideration; that he lived in San Jose; that he arrived at the scene of the accident about 20 minutes after it occurred and examined the automobile; that his mother was 53 years old, and his father was living.

[4] This testimony includes all of the plaintiffs' case, and it appears therefrom that there is no evidence that Philipp Sanfilippo, the husband, was living with deceased at the time of her death, or that her society was of any pecuniary value to him, or that she rendered any services to him. It appears that plaintiffs Mamie Mercuria and Salvatore Sanfilippo were married, and did not reside with deceased. There is no evidence that they suffered the slightest pecuniary loss by her death. As to the minor child, 17 years of age, there is also no evidence that she resided with her mother, and not the faintest suggestion that she suffered any pecuniary loss by her death. It is always to be borne in mind that no recovery can be had for grief, sorrow, and mental suffering of the heirs of deceased.

The unequivocal holding in the recent case of Parsons v. Easton, 184 Cal. 764, 195 Pac. 419, compels a reversal of the judgment in the present case because there is not a particle of evidence to support an allowance for damages. On the question of the necessity of evidence tending to show circumstances indicating a pecuniary loss to surviving heirs in a case such as this one, the court said in the above-cited case:

"It is also held that in addition to the pecuniary loss arising from deprivation of direct financial assistance or services, while nothing can be allowed for grief, sorrow, and mental suffering of the heirs of a person whose death is caused by negligence, additional damages may be given where the 'circumstances' referred to in section 377 indicate that there may be a pecuniary loss to a parent from the death of a child or to a wife from the death of her husband arising from the deprivation of the 'society, comfort, and protection' of such child or husband. Beeson v. Green Mountain G. M. Co., 57 Cal. 38; Munro v. Pacific Coast, etc., Co., 84 Cal. 525. But this is not a universal right existing in every case. It is allowable only where the 'circumstances' show a reasonable probability that the 'society, comfort, and protection' afforded to the surviving parent or wife was of such a character that it would be of pecuniary advantage to the parent or wife, and that a deprivation thereof would entail a pecuniary loss to them. Thus in the Beeson Case the court said: 'The loss of a kind husband might be a considerable pecuniary loss to a wife; she loses his advice and assistance in many matters of domestic economy.' Manifestly, no allowance can be made because of a possible loss arising from circumstances which do not appear from the evidence and which rest upon conjecture or imagination. The evidence in this case does not show circumstances indicating that the society, comfort, and protection of the son had been of any appreciable pecuniary advantage to the plaintiffs, or any reasonable probability that it would be so in the future. It may be that they dearly loved him and that they loved him the more because of

his infirmities and helplessness. But it is pecuniary loss only, and not the loss of an object of love and affection, that the law recognizes as ground for allowing damages to the heirs of one whose death has been caused by the negligence of a third person."

In the absence of any evidence as to the mode of living of the deceased and the plaintiffs, and as to their relations and pecuniary advantage one to the other, there is no justification for the allowance of any damages which must take account only of pecuniary loss. Because of this, the case must go back for a new trial.

[5, 6] Respondents do not contend that there is any evidence justifying an award of damages, but seek refuge in the position that this court is precluded from examining that question because it is not specified as one of the particulars wherein the evidence is insufficient to justify the verdict. While it is true that defendants did not specify that the evidence was insufficient in this particular, as they should have done (section 648, Code Civ. Proc.), they raised the same question in their objection to the giving of certain instructions by the trial court upon the question of the elements of damages that might be allowed by the jury. It is urged that these instructions were improperly given because there was no evidence upon that subject before the jury, and instructions upon the matter, in the absence of any evidence, misled the jury into believing that a proper showing had been made by the plaintiffs, and that the court should not have instructed upon matters not touched upon by the evidence. This objection is urged upon appeal, and in passing upon it, we are compelled to examine the record for evidence upon the question of damages, with the result heretofore stated. It is not the policy of the appellate courts of this state to foreclose substantial rights of appellants upon technical grounds where they are empowered to reach a decision in any manner upon the merits. We are of the opinion that the instructions complained of were improper in view of the record, which contains no evidence sufficient to warrant an award of damages to plaintiffs. We must conclude that these instructions misled the jury into awarding damages, because there is nothing in the evidence to explain the verdict.

There are numerous other matters urged by appellants for a reversal of the judgment, but they are not such matters as are likely to recur upon a new trial. It is therefore unnecessary to pass upon them in this opinion, as the judgment must be reversed as against both defendants for the reasons mentioned herein. It is so ordered.

We concur: NOURSE, J.; STURTEVANT, J.

59 Cal. App. 40

## FIDELITY SAVINGS & LOAN ASS'N v. SCHAEFER et al. (Civ. 3958.)

(District Court of Appeal, Second District, Division 1, California. Sept. 2, 1922.)

**1. Appeal and error ⊜1050(1)—Admission of evidence concerning prior adjudicated rights held immaterial.**

In an action to quiet title, where the Supreme Court had, on appeal of a prior action, finally established the priority of plaintiff's rights in the premises, as against any claim arising under the lien asserted by defendant, the admission of evidence of an agreement by the party through whom defendant claimed to make his lien subject to the rights of plaintiff was immaterial.

**2. Abatement and revival ⊜46—Action may be continued in name of original plaintiff in case of transfer of interest.**

Where, in an action to quiet title, the objection that at the time of the trial the title to the property was in one other than plaintiff, raised only by statement of counsel, with no showing that it was presented at the trial, was without merit, especially in view of Code Civ. Proc. § 385, providing for the continuance of an action in case of any transfer of interest in the name of the original party.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by the Fidelity Savings & Loan Association, a corporation, against Lida A. Schaefer and others. Judgment for plaintiff, and defendants appeal. Affirmed.

S. C. Schaefer, of San Pedro, for appellants.

Milton K. Young, Lyndol L. Young, and William K. Young, all of Los Angeles, for respondent.

CONREY, P. J. This is an action to quiet title to two lots in the Wolfskill Orchard tract in Los Angeles county. The plaintiff's claim of title is derived from a trustee's sale and trustee's deed under the provisions of a trust deed made by one Howard, the former owner of the property. Appellant Lida A. Schaefer claims adversely to plaintiff under a certificate of sheriff's sale of the same real estate as the property of Howard; said sheriff's sale having been made under the purported authority of an order of sale issued out of the superior court in a mechanic's lien foreclosure action of one Hartfield, plaintiff, against Howard and others as defendants. In this action to quiet title, judgment was entered in favor of the plaintiff. The defendant Lida A. Schaefer appeals from this judgment.

The trust deed was made by Howard in June, 1915. The trustee's sale and conveyance to respondent were made on the 15th day of January, 1916. It is not denied that respondent thus obtained a clear title, except

as it may have been subsequent and subject to the rights of Hartfield. In September, 1914, Howard had entered into a contract for the erection of a hotel building on these lots. In October, 1914, the contractor made a subcontract with Hartfield for the plumbing work of that building. On the 23d day of July, 1915, Hartfield commenced an action for the foreclosure of a lien claim held by him, arising out of that plumbing contract and the work done and materials furnished thereunder. In the year 1916, subsequent to the date of the trustee's deed to respondent, a decree of foreclosure was entered in the case of Hartfield against Howard et al. By that decree the court declared that Hartfield's lien was "subsequent and subservient to the interest of the defendant Fidelity Savings & Loan Association, a corporation, which said last-named defendant's interest is superior to the said claim of the plaintiff herein"; and also provided that the interest of the defendant Title Guarantee & Trust Company in and to the property described in the plaintiff's complaint was subject and subsequent to the interest of the plaintiff Hartfield. On appeal by Hartfield from that part of the decree adjudicating his lien to be subsequent to the interest of defendant Title Guarantee & Trust Company, the Supreme Court directed that the decree be modified by striking out the provisions last above mentioned and substituting a provision to the effect that the claim of the plaintiff and this judgment and decree in that behalf were and are prior and superior to any right, title, interest, or estate of the defendant Charles W. Howard and certain other defendants—

"but that said claim of the plaintiff herein and this judgment and decree in that behalf was and is subsequent and subservient to the interest of the defendant Fidelity Savings & Loan Association (a corporation), which said last-named defendant's interests are superior to said claim of the plaintiff herein; provided that nothing in this judgment shall be construed or held to prejudice or affect the rights of the Title Guarantee & Trust Company accruing prior to the date when the plaintiff's lien attached to the property." Hartfield v. Howard, 180 Cal. 376, 380, 181 Pac. 385, 386.

The remittitur on that appeal was filed in the superior court on the 25th day of June, 1919. Thereafter, on the 7th day of August, 1919, the order of sale was issued pursuant to which the sheriff made the sale under which appellant makes her claim adversely to the title of the plaintiff.

[1] Counsel for appellant in his brief informs us that the decision on the appeal and the judgment as modified thereby left the question open as to whether the title of Fidelity Savings & Loan Association was superior to the claim of Hartfield as asserted in his foreclosure action. Assuming this to be the fact, he claims that the court erred in admitting in evidence a purported contract of Hartfield whereby it was claimed by respondent that at the time when Howard's trust deed was made Hartfield agreed with the Fidelity Savings & Loan Association that if it would make further advances of funds for the completion of said hotel building, all of Hartfield's claims then or thereafter existing for labor or materials furnished by him should be deemed subordinate and subsequent to the lien for any moneys theretofore or thereafter to be advanced by the Fidelity Savings & Loan Association. We are of the opinion that the claimed error of the court in the reception of this evidence is not material to this appeal. It is immaterial for the reason that the judgment as modified under the order of the Supreme Court finally established the priority of the rights of respondent under its trust deed as against any claims arising under the lien asserted by Howard. Any rights acquired by appellant as the purchaser at the sheriff's sale under the decree of foreclosure were subject to the prior rights established by that decree. Having acquired title by the trustee's deed of January 15, 1916, at a sale made on account of default in performance by Howard of the conditions of his trust deed, respondent thus acquired a title superior to and unaffected by the adverse claim asserted herein by appellant.

[2] There is no merit in the claim of appellant that plaintiff cannot recover for the reason that the plaintiff had no title or ownership of the property at the time of the trial. There is nothing in the record concerning this fact except the statement of respondent's attorney that one Bates was then the present owner of the property; he having acquired by mesne conveyance from respondent. It is not claimed that this objection was presented to the court at that time. If made, it would have been properly overruled. Code Civ. Proc. § 385; Knobloch v. Associated Oil Co., 170 Cal. 144, 147, 148 Pac. 938. If Bates was the owner, he had the clear right to continue the action in the name of the plaintiff.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

59 Cal. App. 114

## SIEGMAN et al. v. FETTERS et al.
(Civ. 4300.)

(District Court of Appeal, First District, Division 2, California. Sept. 19, 1922.)

**1. Theaters and shows ⟸6—Finding of negligence in condition of approach warranted.**

Evidence of broken condition of a cross-slat on an inclined wooden walk leading from defendants' show house, on which plaintiff, a patron, slipped and fell, *held* sufficient to warrant finding of negligent failure in the duty of defendants to keep approach reasonably safe for those having occasion to use it.

**2. Theaters and shows ⟸6—Patron injured on broken walk not contributorily negligent.**

A patron of a show house injured in slipping on a broken cross-slat on an inclined wooden approach, being required only to exercise ordinary care, was not guilty of contributory negligence in not examining each separate slat before treading on it.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by Rachel Siegman and husband against Emma Fetters and husband. Judgment for plaintiffs, and defendants appeal. Affirmed.

W. F. Cowan, of Santa Rosa, for appellants.

Brownstone & Goodman, of San Francisco, for respondents.

LANGDON, P. J. This is an appeal by the defendants from a judgment rendered on a verdict of a jury in favor of plaintiffs, for the sum of $500 damages, alleged to have been caused by reason of the injury of Rachel Siegman, due to the negligence of defendants. Plaintiffs are husband and wife, as are defendants.

Defendants operated a hotel, moving picture house, and summer resort at Fetters Hot Springs, Sonoma county, Cal. On August 14, 1920, the plaintiff Rachel Siegman had attended the moving picture theater operated by the defendants. As she was leaving the building at about half past 9 in the evening, and proceeding along an inclined wooden walk extending from a platform in front of the theater, which walk was the means of entering and leaving said theater, she slipped and fell on said walk. It is alleged that said walk was improperly and negligently constructed and maintained by said defendants, in that certain slats nailed on said walk were loose and broken and not properly affixed to said walk, and that, as a result thereof, said plaintiff was not able to maintain her footing and fell to the ground.

[1] Appellants complain of no errors in the proceedings before the trial court, but assert that the verdict is not warranted by the evidence. The point is without merit. There is a conflict in the evidence, it is true, but the testimony of Rachel Siegman, together with that of Francis Campbell, a ticket taker at the theater, was such as to warrant the jury in believing that there was a broken slat on the runway, leaving the edges of the slat where the break occurred rough and uneven, that such condition was known to the defendants, and that plaintiff's fall was due to this defective condition of the runway.

[2] As to the contributory negligence of the plaintiff Rachel Siegman, the jury was also the judge. She testified that she was watching where she was going; that her sight was good; that she did not examine each separate slat before treading upon it. We think she was not required to do this. She was required only to exercise ordinary care, and the duty of the defendants was to keep the approach to their place of business reasonably safe for those having occasion to use it. Long v. Breuner Co., 36 Cal. App. 630, 172 Pac. 1132.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

---

59 Cal. App. 154

## SEVERINI v. SUTTER-BUTTE CANAL CO.
(Civ. 2465.)

(District Court of Appeal, Third District, California. Sept. 22, 1922.)

**Damages ⟸62(4)—Owner, who refused to pay for water for irrigation before date on which he claimed it was due, limited to interest thereon during intervening time, and could not recover damages for failure to furnish water.**

Where landowner, who was required by his contract to pay water company $58 September 1st, refused to comply with water company's demand made pursuant to order of Railroad Commission that one-half of such amount be paid February 1st and the other half July 1st, and thereby caused the company to withhold water necessary for the irrigation of his land, he could not recover for the damages sustained because of company's refusal to furnish water, since by making payment at the times demanded he could have limited his loss to the $1.53 interest.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Simone Severini against the Sutter-Butte Canal Company. Judgment of nonsuit, and plaintiff appeals. Affirmed.

W. E. Davies, of Marysville, for appellant.

W. H. Carlin, of Marysville, and Henry Ingram, of Gridley, for respondent.

BURNETT, J. Plaintiff sued the defendant for damages in the sum of $7,000 claimed to have been caused by the failure and refusal of the defendant to furnish water to plaintiff for irrigating his lands during the season of 1919. The trial court granted a motion for nonsuit, and the appeal is from the judgment entered thereupon in favor of defendant. Plaintiff purchased the land from the Sutter Irrigated Farms Company. Prior to said sale the company had entered into a contract with the Sutter County Canal Company, predecessor of defendant, for a supply of water at the price of $2 per acre, payable on the 1st day of September of each year. This contract for the supply of water was recorded, and it expressly provided that the water was to be appurtenant to the land. Plaintiff's purchase was of 29 acres, and in 1910, 1912, 1915, and 1916 he planted it to fruit of different kinds. During each year from 1910 to 1918, inclusive, he received from defendant and paid for water at said agreed price. In the year 1919 he made a request of defendant for water pursuant to his contract, but the latter refused to furnish it unless plaintiff would pay $1 per acre on February 1. This plaintiff refused to do unless he was guaranteed water. Defendant declined to furnish guaranty, so the water was not supplied. It appears that defendant's demand was due to the fact that in 1918 the Railroad Commission of this state changed the rates of service of water by respondent to its consumers, including appellant, so as to provide that, instead of paying $2 per acre on the 1st of September, $1 should be paid on the 1st of February and the other $1 on the 1st of July. It appears that about January 15, 1919, respondent mailed to, and which was received by appellant, this notice:

"Notice. Under rules prescribed by the Railroad Commission of the state of California for the undersigned, water rates for the ensuing season are payable as follows: One-half thereof, February 1, 1919. One-half thereof July 1, 1919. If not so paid interest will be charged at the rate of eight per cent. per annum. Service will be refused until rates are paid. Consumers in arrears must also settle their accounts before receiving service."

Thereafter appellant called at the office of respondent at Gridley and was informed by the agent in charge that the company would require the payments to be made in accordance with the rule adopted by said Railroad Commission. Plaintiff was asked on cross-examination this question: "You refused to pay it?" and he replied: "Yes; sure I did. I say that I pay on September 1st."

We may pass by the question of damage to the crops and the contention of appellant that "the water right of the plaintiff is an easement attached to the land and to raise the rate without the consent of the landowner would impair the obligation of the contract," and come directly to the practical question whether by reason of his pertinacious and imprudent refusal to make such trifling concession he should be heard to complain. The situation was as follows: Assuming that appellant would have been required to pay on his total acreage of 29 acres at $2 per acre under the old arrangement, it would have amounted to $58 on September 1st. Under the demand of respondent he would be required to pay $29 on February 1st and $29 on July 1st. At 7 per cent. interest the first would amount to $30.19 on September 1st and the second to $29.34. Hence it appears that appellant refused to pay $1.53 more than he thought he should pay, but chose rather to run the risk of losing his crops. Indeed, according to the allegations of his complaint, he actually lost $7,000. When there is such inconsequential difference between the parties the law expects the one who has great interests at stake to yield in order to save excessive damages and costs. The case is governed by the decision of the Supreme Court in Henrici v. South Feather Land, etc., Co., 177 Cal. 442, 170 Pac. 1135, from which we quote as follows:

"By paying the excessive price without conceding its correctness, he could have saved his trees, vines, and crops, and reduced his damage to a comparatively trifling sum. This it was plainly his duty to do. 'The law imposes upon a party injured by another's breach of contract or tort the active duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible. If by his negligence or willfulness he allows the damages to be unnecessarily enhanced, the increased loss, that which was avoidable by the performance of his duty, falls upon him.' 1 Sutherland on Damages (4th Ed.) § 88; Ash v. Soo Sing Lung, ante, p. 356, 170 Pac. 843; Cullerton v. Miller, 26 Ont. 36, 45; Dillon v. Anderson, 43 N. Y. 231, 237. The principle has been applied by this court in a case similar to the one at bar. Mabb v. Stewart, 147 Cal. 413. * * * So, in this case, the plaintiff could not hold the defendant responsible for the ruin caused by his own act in allowing his trees and vines to go without water for four years, when, as he well knew, he might, at slight cost, have secured the water and reduced his damage to almost nominal proportions."

The plaintiff may pride himself upon his firmness in insisting upon what he conceived to be his rights, and he is entitled to whatever satisfaction that may bring, but the law does not permit such pride to prevent the payment, although not due, of less than $2 in order to save the loss of possibly thousands of dollars. Of course, he could have paid it under protest and thereafter have had his action for the recovery of the excess, if it was not due.

In reference to the contention of appellant that if the rule in the Henrici Case, supra, applies it is a matter of mitigation, and

should have been pleaded (Bader v. Mills & Baker Co. [Wyo.] 201 Pac. 1012), it is sufficient to say that the defense does appear in the answer, and since the facts were developed by the testimony of plaintiff, no proof of it was required on the part of defendant.

If it should be thought that plaintiff was entitled to a judgment for the said sum of $1.53, it is sufficient to say that the rule of de minimis applies.

Respondent also claims that, under the authority of Southern Pacific Co. v. Spring Valley Water Co., 173 Cal. 291, 159 Pac. 865, L. R. A. 1917E, 680, the modification made by the Railroad Commission was a valid exercise of jurisdiction, although applying to a prior existing contract, and therefore the right existed to insist upon the increased rate, but in any event the other point is decisive of the case.

The judgment is affirmed.

We concur: FINCH, P. J.; ANDERSON, Justice pro tem.

---

59 Cal. App. 150

## ZURICH GENERAL ACCIDENT & LIABILITY INS. CO., Limited, v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 4310.)

(District Court of Appeal, First District, Division 2, California. Sept. 22, 1922.)

**1. Master and servant ⟸405(4)—Evidence held to show ranch hand was within scope of employment.**

Evidence in a compensation case *held* to show that the employment of a ranch hand originally employed to do grading had been enlarged to cover breaking of horses and that he was acting in that branch of his work when injured.

**2. Master and servant ⟸375(1)—Injury to ranch hand watering horse while laid off held compensable as injury "arising in course of employment."**

A ranch hand, who did not receive pay when laid off, but received his board and lodging and always cared for his team and other stock when necessary on Sundays and days when he was laid off, *held* entitled to compensation for injury received while watering an unbroken horse, such injury being one occurring in the course of his employment within the Workmen's Compensation Act, though he was laid off for the day.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

Application for certiorari by Zurich General Accident & Liability Insurance Company, Limited, to review an order of the Industrial Accident Commission awarding compensation for injuries to James Shannahan. Award affirmed.

J. Hampton Hoge, of San Francisco, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

LANGDON, P. J. This matter comes before us upon a writ of certiorari to review the award of the respondent Industrial Accident Commission, by which respondent James Shannahan was allowed the sum of $107.34 as damages suffered by him by reason of an injury sustained, according to the findings of the said commission, in the course of and arising out of his employment with the Cloman Land & Sheep Company, of which company the petitioner was the insurer. Petitioner asserts that Shannahan was not entitled to compensation or to any of the benefits of the Workmen's Compensation, Insurance and Safety Act, because at the time of his injury he was not employed by Cloman Land & Sheep Company and was not performing services growing out of and incidental to his employment.

On February 8, 1921, Shannahan was employed by the Cloman Land & Sheep Company to work on a ranch owned by said company and situated at Grimes, Cal. He testified that he was to be paid $3 a day for his services for six days a week, together with board and lodging for seven days. He testified that when he started his work on the ranch he "broke" three horses; that he was employed generally to do "scraping"; that he watered and fed the horses on the ranch; that he would come in with his own team and water it and then go down and water the extra stock whenever Mr. Adams, the superintendent was not around to do it; that Mr. Adams had not instructed him to water the other horses, but he watered them as he watered his own team and Mr. Adams was aware of this and did not object thereto; that he worked eight or nine hours a day on the ranch; that he did not have any regular hours, but worked until "things were done"; that he would be engaged in watering the stock sometimes until half past 7 o'clock. On the evening of the accident between 6 and 7 o'clock, he took one of the horses out for water. Here is his account of what then occurred:

"I watered him, and to get him gentle, the saddle was on and the bridle, and I put my foot on the saddle so the weight on the stirrup would get him gentle. Q. How old was that horse? A. A young horse, maybe 6. Q. Had it been broken? A. Yes; we had hooked it up on the wagon a couple of times. Q. What had you to do with the breaking of that horse? A. Well, we broke it on the wagon. Q. Had you driven it? A. Yes, I was the first one to draw a line on her. Q. Who put the saddle on it? A. I did. Q. Did you ride him over to water? A. No; I walked her. Q. Why did you put the saddle on? A. To get her used to it. Q. Had you done that before? A. A couple of

times, and I was on her once. Q. Had you ever put the saddle on before with Mr. Adams' knowledge? A. I don't know; sometimes I did it when he was not there—any time I saw her standing there. Q. I want to know if you were doing anything that was not within your duties or within his knowledge; did he ever object to your watering this horse or putting the saddle on him? A. Never said a word. Q. Had he seen you with this horse before? A. Oh, yes. Q. When you put your foot on the stirrup, what happened? A. She threw back and went up. I had her by the halter, and didn't want it to get away. Q. He stood on his hind legs? A. Just reared up, and I said, 'Oh, Larry! Oh, Larry!' and he said 'All right, Jim.' Q. Who is Larry? A. Mr. Adams. Q. Where was he? A. Fixing the caterpillar. Q. Was he in sight? A. No; he was behind the fence, and he came, and the milker heard it, and he ran out, and that is the time I was tromped. Q. What happened? A. I got kicked and tore in here. * * *

Petitioner argues that, as Shannahan was employed to do grading on the ranch, his duties did not include any work with the horse which injured him; that while he did assist the superintendent on two occasions, in driving this horse in a wagon, this was done merely as an accommodation to the superintendent. It is urged, as a material fact, that, had Shannahan not watered the unbroken horse or assisted in training him, this work would have been done by the superintendent, or by some one else on the ranch, and Shannahan would not have been discharged because of neglect of duty. That may be true, but the trend of the argument is that a man working on a ranch must confine himself strictly to the minimum amount of work expected of him in order to keep his job, and must have his duties very definitely defined; otherwise, he will lose his right to compensation for injuries sustained while serving his employer's interests with the knowledge, consent, and encouragement of the employer. In the present case Adams was the superintendent on the ranch, with authority to direct the men about their work. He stated that Shannahan was employed to drive a Fresno. He was asked:

"In addition to that, what did he have to do, or what did he do, in regard to the horses? A. He assisted me in breaking three colts; that is, we broke the colts together. * * * I told him, before he came down, we would have to break the horses for the Fresno. * * * Q. You knew he was a man experienced in handling horses? A. Yes; I heard he was. Q. You did use him, then, in helping do that work? A. Yes. Q. You found him a capable man with horses? A. Yes."

[1] We think a recital of the above testimony is a sufficient answer to petitioner's contention, and that it clearly shows that, even though Shannahan had been employed originally to do grading, his employment had been enlarged by the superintendent to cover the breaking of horses on the ranch, and that he was acting within that branch of his work at the time he was injured.

[2] Another objection is made to the award based upon the fact that on the day of the accident, July 15, 1921, Shannahan's team of horses being tired, it was thought best to rest it, and, accordingly, he "laid off" for the day. On Sundays and other days upon which he did not work he did not receive his wages of $3 a day, but he did receive his board and lodging, and he always watered and cared for his team and for the other horses on the ranch, when necessary, upon Sundays and holidays and days when he was "laid off." It is contended that, because he was not to receive wages for the day in which he was injured, he was not in the employ of the Cloman Land & Sheep Company on that day. We think the point is without merit. He cared for the horses and received his board and lodging on that day, which, assuredly, was a part of his compensation for his labor. The situation here is different than would be the situation of a factory worker on a holiday. Here the place of employment was open and accessible to the employee on this day, when he was not actually working at the grading. He was at least encouraged, if not expected, to care for his teams and the other stock around the ranch. He was given some compensation for such labor—i. e., his board and lodging—and while engaged in this work he was injured. This work grew directly out of his employment, and would never have been performed by him but for his employment on the ranch.

We think Shannahan was in the employ of Cloman Land & Sheep Company at the time of his injury; that said injury occurred in the course of his employment and was proximately caused thereby, all within the meaning of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831); that the findings of the Industrial Accident Commission are sustained by the evidence.

The award is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

59 Cal. App. 102

## ROSENBLOOM v. SOUTHERN PAC. CO. et al. (Civ. 4232, L. A. 7149.)

(District Court of Appeal, First District, Division 2, California. Sept. 12, 1922. Hearing Denied by Supreme Court In Bank Nov. 10, 1922.)

**1. Parties ⟸76(6)—Objection that mother's complaint in action for death does not show that father is dead waived when not taken by demurrer or answer; "widow."**

Under Code Civ. Proc. § 376, giving a right of action for death of a minor child to the father, or, in case of his death or desertion of his family, to the mother, the objection in an action by the mother that there is no allegation that her husband is dead, or has deserted her, is only an objection to her legal capacity to sue, which, under Code Civ. Proc. §§ 430, 433, must be taken by demurrer or answer, and, under section 434, is waived if not so taken, especially where there is no objection to plaintiff's testimony that she is a "widow," which means a woman whose husband is dead, and who has not married again.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Widow.]

**2. Parties ⟸76(7)—Objection to capacity to sue does not go to court's jurisdiction.**

The objection that plaintiff has not legal capacity to sue does not go to the jurisdiction of the court.

**3. Death ⟸99(3)—$5,000 for death of child not excessive.**

A verdict of $5,000 in favor of a mother for the death of her child two years old *held* not so excessive as to suggest passion, prejudice, or corruption.

**4. Negligence ⟸90—One employing married woman does not make her husband her agent, so as to impute his negligence to her.**

The mother of a child employing a married woman to board and care for the child, and paying her for such service, did not merely because of his community interest in her earnings, make the woman's husband her agent, so as to impute to the mother his negligence in the operation of an automobile in which the child was killed.

**5. Husband and wife ⟸270(8)—One asserting married person contracted as agent of community has burden of showing agency.**

The question whether, in a given transaction, a married person contracts as an individual or as agent for the community is a matter of proof, and one who sets up the community agency has the burden of establishing the fact of agency.

**6. Negligence ⟸90—Automobile driver's negligence not imputed to mother of child riding.**

Where the husband of a woman employed to care for a child was not the agent or servant of the child's mother, his negligence in the operation of an automobile in which the child was riding could not be imputed to the mother.

**7. Railroads ⟸350(16)—Contributory negligence of driver of automobile crossing spur track held a question for jury.**

Where the driver of an automobile crossed the main tracks of a railroad with care, and it did not appear that he knew of the existence of a spur track further on, where the automobile was struck by a backing train which had no light or flagman on the rear end, as provided by an ordinance, whether the driver was negligent *held* a question for the jury.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Louyre Rosenbloom against the Southern Pacific Company and Mary E. Clairemont, as administratrix of Louis E. Stout, deceased. From a judgment for plaintiff, the first-named defendant appeals. Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

R. A. Morton, of Los Angeles, for respondent.

Stutsman & Stutsman, of Los Angeles, for defendant.

LANGDON, P. J. This is an appeal by the defendant Southern Pacific Company from a judgment against it for $5,000 in an action by plaintiff to recover damages because of the death of her minor child, alleged to have been caused by the negligence of said defendant. A motion for nonsuit was granted as to the other defendant in the action, evidently upon the principle that the cause of action did not survive the death of Louis Stout.

[1, 2] The appellant urges, first, that the complaint does not state facts sufficient to constitute a cause of action, in that there is no allegation that the plaintiff's husband is dead, or that he has deserted her, to conform to the requirements of section 376 of the Code of Civil Procedure. This objection goes to the legal capacity of the plaintiff to maintain the action. The defendant and appellant failed to present this objection by demurrer or answer in the trial court. Legal incapacity of the plaintiff to sue is an objection to be presented by demurrer if the fact appears on the face of the complaint, and by answer if it does not so appear (sections 430 and 433, Code Civ. Proc.); and, if such an objection is not taken either by demurrer or answer, it must be deemed to have been waived. (Section 434, Code Civ. Proc.; Wedel v. Herman, 59 Cal. 507, 516). The objection that the plaintiff has not legal capacity to sue does not go to the jurisdiction of the court. Crittenden v. Superior Court, 166 Cal. 340, 136 Pac. 287; Work v. Campbell, 164 Cal. 343, 128 Pac. 943, 43 L. R. A. (N. S.) 581. Furthermore, defendant and appellant failed to object to testimony of respondent as to her status, which testimony

established her right to bring the action. She testified that she was a "widow."

"A widow is a woman whose husband is dead and who has not married again." Black's Law Dictionary.

A widow is defined to be an unmarried woman whose husband is dead; one who has lost her husband by death and has not taken another. Bouvier's Law Dictionary; In re Ray's Estate, 13 Misc. Rep. 480, 35 N. Y. Supp. 481, 484.

[3] Appellant also urges that the verdict is excessive and was the result of passion and prejudice. While we do not think that this judgment is such as to suggest at first blush passion, prejudice, or corruption on the part of the jury (Bond v. United Railroads, 159 Cal. 270, 286, 113 Pac. 366, 48 L. R. A. [N. S.] 687, Ann. Cas. 1912C, 50), we are also of the opinion that this point, to be available to appellant on appeal, should have been presented to the trial court upon the motion for a new trial. (Clarke v. Fitch, 41 Cal. 472; Hale v. San Bernardino Valley Traction Co., 156 Cal. 713, 106 Pac. 83)[1]. Section 657 of the Code of Civil Procedure specifies "excessive damages appearing to have been given under the influence of passion or prejudice" as a separate and distinct ground for a new trial; but the record discloses that appellant made its motion for a new trial upon other grounds, and did not present the question of excessive damages to the trial court. Under such circumstances there is no order of the lower court upon this point which is subject to our review. The relative duties of the trial and appellate courts on the general question of the measure of damages are discussed at length in the case of Bond v. U. R. R., supra.

Appellant contends that the court erred in overruling appellant's motion for a nonsuit and its motion for a new trial. These objections involve the sufficiency of the evidence to support the verdict, and may be discussed together.

[4] In support of its position on these motions, appellant argues several matters, for a proper consideration of which a brief preliminary discussion of the facts is necessary. The plaintiff, a widow, was employed as a telegraph operator. At the time of the accident which resulted in the death of her child, she had placed the child with Mrs. Dolly Stout, who was to care for him and furnish him board and lodging for the sum of $5 a week. The child was a little over two years of age. On October 13, 1920, some time between 6 and 7 o'clock in the evening, Mrs. Stout, her husband, Louis E. Stout, and plaintiff's child were riding in a Ford laundry delivery wagon, driven by Louis E. Stout. A collision occurred between the Ford delivery wagon and a train of the Southern Pacific Company. Mr. and Mrs. Stout were killed instantly, and the child died the following day as a result of his injuries. Upon these facts alone it is contended that the negligence, if any, of Louis E. Stout in the management and control of his automobile is to be imputed to plaintiff. This is upon the theory that Mr. and Mrs. Stout were plaintiff's agents in charge of her child.

Plaintiff testified that she made arrangements with Mrs. Stout to care for her child, and paid her for such service. But it is contended that Louis E. Stout, the driver, was also the agent of plaintiff in the matter of the care of her child, merely from the fact that he was the husband of Dolly Stout, the woman to whom she had intrusted her child. Appellant takes this position because the amount paid for the board of the child became the community property of the Stouts. We agree with the respondent that it would be unprecedented to hold that an employer of a married woman enters into a relationship of principal and agent with her husband by virtue of his community interest in her earnings.

[5] The question of whether or not, in a given transaction, a married person contracts as an individual or as agent for the community is a matter of proof, and one who sets up the community agency has the burden of establishing the fact of agency. In the case of Schwarze v. Mahoney, 97 Cal. 131, 31 Pac. 908, it was said:

"The right of a married woman to enter into any transaction with any other person which she might, if unmarried (Civ. Code, § 158), gives to her a correlative right to enforce * * * any obligation which she may have received from such other person as the consideration for such transaction, and whenever, in a transaction with a married woman, another person has received from her any property or advantage for which he has given his obligation, the burden is upon him to show that the transaction was entered into by her as the agent of the community, and not for herself. * * *"

[6] In the case of Wagoner v. Silva, 139 Cal. 563, 73 Pac. 433, it was held that the husband cannot be presumed to have been the agent of his wife from the mere fact of the marriage relation. In the present case, the jury has found, under the instructions given by the court, that Louis Stout was not the agent or servant of the plaintiff in caring for her child. Plaintiff, therefore, cannot be charged with the negligence, if any, of Louis Stout on the ground that he was her agent in charge of her child.

There is no proof in the record whatever as to any negligence on the part of Mrs. Stout. The only facts relating to her which appear in the record are that plaintiff engaged her to care for the child, and that her body was removed from the wreckage. If the action had been brought to recover dam-

[1] See opinion of Supreme Court denying hearing, post, p. 57.

ages for the death of Mrs. Stout, the doctrine contended for by appellant might have been applicable, for in such a case there would enter the rule that a wife in the care and control of her husband has imputed to her his negligence. Basler v. Sacramento Gas & Elec. Co., 158 Cal. 514, 518, 111 Pac. 530, Ann. Cas. 1912A, 642. But in the present case the facts make such a rule inapplicable, for the plaintiff herein bears no relationship whatsoever to Louis Stout and any amount recovered by her would enrich in no way the estate of Louis Stout, and thus violate the maxim that one may not profit by his own wrong. There is no reason, therefore, why the negligence, if any, of Louis Stout should be imputed to the plaintiff because of the fact that his wife was plaintiff's agent.

[7] But, despite what has been said, the decisive question must be met: Was the negligence of Louis Stout the proximate cause of the death of plaintiff's child? For, of course, regardless of agency between Louis Stout and plaintiff, if the negligence of Louis Stout was the proximate cause of the accident, plaintiff cannot recover from the defendant Southern Pacific Company.[2]

On this question the jury was properly instructed, but appellant's position is that the evidence demonstrates conclusively the negligence of Louis Stout as the proximate cause of the injury, and that it should have been so declared as a matter of law, and a verdict directed for the defendant.

With every intendment in the plaintiff's favor, let us examine the evidence. Between 6 and 7 o'clock in the evening Louis Stout, his wife, and plaintiff's child were traveling in a Ford automobile. They were driving south on Workman street, near its intersection with Alhambra avenue, in the city of Los Angeles. Workman street runs north and south. It is crossed at right angles by Alhambra avenue. There are two main line tracks on Alhambra avenue. There is a spur track about 46 feet south of the main line tracks, which leads to the Southern Pacific shops. The spur track branches from the main line one block east of Workman street, and crosses Workman street about 20 feet south of the sidewalk. The track enters and leaves the crossing over a private right of way. There was a wigwag signal north of the main line tracks, and about 120 feet north of the shop or spur track. There was no warning signal at or near the shop track. There is an arc light at about the center of the main line crossing. A network of wires passes under the arc light. At the southeast corner of the intersection there is a board fence about 4 feet high that parallels the shop track east of Workman street. Several trees stand between the board fence and a cottage on that corner. Between the curb and the shop track a line of telephone poles extends from Workman street to Sichel street. The shop track extends between the line of poles and the fence and trees. At the southwest corner, between the Alhambra avenue curb and the shop track, and extending from the Workman street curb 2 or 3 feet into Workman street, there is a culvert or excavation about 2 feet below the street level.

The story of the accident may be related in the language of the witness, George C. Miller, produced on behalf of the plaintiff. He testified that he resided not far from the intersection crossing; that he had gone to the crossing with his infant daughter to watch the trains, and at the time of the collision, and for some time prior thereto, he was standing close to the electric signal on the north side of the main line tracks. He saw the train that later collided with Stout's automobile move east on the east-bound main track with an engine at the far end, then back down on the shop track and stop about 50 feet east of the east line of Workman street. At this time another train was operating on the shop track about 300 feet west of Workman street. When the collision train stopped just east of Workman street Miller saw a brakeman with a lantern leave the end box car and walk west across Workman street to a point in the roadway about 170 feet west of the west line of Workman street. The brakeman had not returned to Workman street when the collision train backed across the intersection. When the train backed across Workman street it carried no light on the rear end, nor was any brakeman or flagman at or near the crossing. The approaching train was difficult to see because the arc light was shielded by a network of wires crossing the street just under it. The automobile passed Miller just as the train started to move. The automobile was proceeding slowly at about a fast walk, and did not increase its speed, but continued at an even speed down the right side of Workman street until within about 6 feet of the shop track, when a woman screamed, and the automobile turned suddenly to the right and went down into the culvert, out of which it bounced at an angle onto the first rail of the shop track, where it was struck by the train and dragged down the track.

The witness testified, further, that he ran to the wreckage about 50 feet west of Workman street, and there met a brakeman with a lantern running toward the wreckage from the west. This testimony was corroborated in its essential details by other witnesses for the plaintiff.

There was received in evidence an ordinance of the city of Los Angeles, section 1 providing that from one hour after sunset to one hour before sunrise a train crossing a public highway shall have a light on the approaching end, or a flagman with

[2] See opinion of Supreme Court denying hearing, post, p. 57.

a light shall precede the train, unless such crossing or track is protected by an interlocking device or apparatus. It was stipulated that on the day of the accident the sun set at 5:30 o'clock, and it was also stipulated that the shop track and crossing were not protected by an interlocking device or apparatus.

It is contended by appellant that it was the duty of Stout to stop, look, and listen for the approaching train because the record contains testimony that the approaching train could have been seen for a distance of over 100 feet. But the testimony is that the train started to back across Workman street at about the time Stout reached or crossed the main line tracks, only a short distance away from the spur track, and the testimony regarding the physical features of the landscape make the conclusion that it was somewhat difficult to see this train at that hour a reasonable one. Of course, if Stout knew of the existence of the spur track at that point, it was his duty to look and listen, but there is no evidence that he knew of the existence of the spur track. The evidence is that he proceeded slowly across the street and crossed the main tracks in safety. Conceding that the electric wigwag signal north of the main line tracks was ringing, the testimony is that Stout proceeded cautiously to cross the main line tracks in response to such warning. After that there was nothing to warn him of the existence of the spur track. It was only as he crossed the main tracks, or after he crossed them, that the train on the spur track started to move slowly backward, with no light and no signal. He had then but a short distance to travel to the point where he suddenly swerved his car to the right. The evidence is consistent with the view that he was alert in crossing the main tracks, and after passing them naturally relaxed his vigilance because there was nothing to warn him of further danger, and that, when the box car loomed before him, moving directly across his path, without light or signal, he swung his car suddenly to the right to avoid a collision, but, being unfamiliar with the physical features of the road, he drove into the culvert, from whence his car bounced to the track directly in front of the train.

In view of this evidence, and the possible deductions to be made from it, the matter of Stout's negligence was properly left to the jury.

"It is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn by the jury from the evidence, that the court can say, as a matter of law, that contributory negligence is established. Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury." Zibbell v. Southern Pacific Co., 160 Cal. at page 241, 116 Pac. at page 515.

In the present case, as in the case last cited, there was nothing to call attention to the existence of a spur track, and the two cases have other features in common.

In the case of Alloggi v. Southern Pacific Co., 37 Cal. App. 72, 173 Pac. 1117, a train of cars was backed along a spur track over a highway crossing, at night. No brakeman was present at the crossing or on the train, and there was a conflict of evidence as to the visibility of the approaching train. The court said:

"The evidence was, therefore, susceptible of the construction, as the jury evidently found, that the defendants were guilty of negligence in shunting cars over a crossing used by the public, at night, without lights and attendants upon them, and without warning. * * * And if, as there is some evidence to show, the cars were standing still and disconnected, assuming that there was sufficient light to have seen them, it does not follow that the plaintiff should be required to conjecture or surmise that the cars might suddenly be shunted backward without notice. * * * The court did not err in refusing to instruct the jury that it was the duty of plaintiff to stop, look, and listen at the most advantageous place. He was not required to look at the most advantageous place, for this would be putting upon him the burden of not only knowing the most advantageous point, but also of exercising the highest degree of care, while all that was required of him was ordinary care."

The case of Wing v. Western Pacific R. Co., 41 Cal. App. 251, 182 Pac. 969, is also in point here. In that case the plaintiff had crossed the two main tracks of a highway crossing, and was struck by a train backing along a spur track that branched from the main track and ran up over a sidewalk near the point of the accident. Plaintiff had a clear view of the spur track in both directions for some distance. There was no light on the approaching car. It was pointed out that, had the accident occurred on either of the main line tracks, the motion for nonsuit would have been properly granted, but the condition and position of the spur track, and the fact that the car that struck plaintiff was being backed upon the track without lights or warning, were elements which might cause reasonable minds to differ as to plaintiff's negligence.

The case of Lawrence v. Southern Pacific, 208 Pac. 966, is the latest expression of our Supreme Court upon this question and is in point here. That court said:

"In the presence of such evidence this court is unable to say as a matter of fact that the decedent knew or should in reason have known of the existence of this crossing or of the approach of this train so as to have been bound to stop and look and listen before essaying this crossing, and hence we cannot say that as a matter of law the decedent was guilty of contributory negligence in failing so to do. Under such conditions the question of contributory negligence would be one to be sub-

mitted to the jury under proper instructions of the court."

In the present case we think the question of the negligence of defendant was properly submitted to the jury, and its verdict thereon is conclusive upon this court.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for a rehearing in the above-entitled cause in this court is denied.

We desire to withdraw from the opinion that part thereof which holds that the objection that the verdict was excessive was the result of passion and prejudice is not available on appeal unless it has been presented to the court below on a motion for new trial. The verdict in this case was not subject to that objection, and it is sufficiently disposed of by the statement in the opinion that it is not such as to suggest, at first blush, passion, prejudice, or corruption on the part of the jury.

The passage in the opinion which states that, "if the negligence of Louis Stout was the proximate cause of the accident, plaintiff cannot recover from the defendant Southern Pacific Company," was not necessary to the opinion.

SHAW, C. J., WILBUR, LENNON, LAWLOR, and WASTE, JJ., and RICHARDS, Justice pro tem., concur.

---

(59 Cal. App. 133)

## BIRCH et al. v. ORANGE COUNTY.

(Civ. 3962.)

(District Court of Appeal, Second District, Division 1, California. Sept. 20, 1922. Hearing Denied by Supreme Court Nov. 16, 1922.)

**1. Taxation ⊂⊃459—Grossly inequitable and palpably excessive assessment may be considered fraudulent.**

An assessment, grossly inequitable and palpably excessive, may be considered fraudulent.

**2. Taxation ⊂⊃494(1)—Judgment of assessor and board of equalization not subject to control by courts.**

The assessor and the board of equalization exercise judicial functions and their judgment within the limits of a reasonable discretion cannot be controlled by the courts.

**3. Taxation ⊂⊃494(1)—When conclusion of assessing officers as to value of property is conclusive.**

The conclusion of assessing officers as to the value of property for purposes of taxation, when honestly arrived at and when not made in pursuance of some fixed rule or general system, the result of which is necessarily discriminatory and inequitable, is conclusive on the courts, however erroneous the conclusion may be.

**4. Taxation ⊂⊃542—Assessment of assessor, affirmed by board of equalization, conclusive in action to recover taxes paid under protest, in absence of a showing of fraud.**

Assessment made by assessor, who did not adopt a method of valuation so out of relation with the factors that should enter into a fair consideration of the matter of value as to cause assessment to be discriminatory and not just when compared with assessments of other similar property affirmed by the board of equalization, *held* conclusive, in an action to recover taxes paid under protest in the absence of a showing of actual or constructive fraud, even though a better method of arriving at the value of the property might have been followed.

Appeal from Superior Court, Orange County; Rex B. Goodcell, Judge.

Action by A. Otis Birch and others, copartners, doing business under the firm name and style of the Birch Oil Company, against the County of Orange. Judgment of nonsuit, and plaintiffs appeal. Affirmed.

See, also, 195 Pac. 931.

Woodruff & Shoemaker, of Los Angeles, for appellants.

L. A. West and Alex P. Nelson, both of Santa Ana, for respondent.

JAMES, J. Plaintiffs brought this action to recover the sum of $11,173.86, which amount they alleged had been paid to the tax collector of the county of Orange under protest. Incidental to that recovery the court was asked to set aside an assessment valuation entered by the county assessor against the plaintiffs' property for the year 1918 as to all amounts in excess of $150,000. A judgment of nonsuit was granted, from which plaintiffs have appealed.

Plaintiffs as copartners owned 20.16 acres of land in the county of Orange, upon which there were, during the year 1917–1918, 9 or 10 wells producing crude petroleum. As a by-product of the wells gas was also marketed, which increased the income. Surrounding this property were various other oil-producing lands, notably those owned by five corporations. Some of these latter were, in 1918, producing more, but the majority less, oil than were the wells of plaintiffs. The plaintiffs alleged in their complaint that the assessment levied against them for the year mentioned as for their real property, totaling a valuation of $569,615, was disproportionate and not uniform with the valuation placed upon other oil-producing property of similar kind and similarly situated; in other words,

that their constitutional right to have equal protection of the laws had been invaded. The examples used for comparison were properties of the several oil corporations referred to hereinbefore. The method adopted by the assessor in arriving at his total figures is characterized as being arbitrary and as not being one from which fair valuation results may be deduced. The plaintiffs admit that the actual value of their property was in excess of the total valuation given to it by the assessor. However, as the assessor used but 40 per cent. of his valuation total in making up the tax roll, it appears that his base figures exceeded by $674,037 the amount claimed by plaintiffs to represent the value of their property. They presented an application for a reduction of the assessment to the county board of equalization in July, 1918. This application, it is conceded, conformed to the requirements of section 3674, Political Code. It set forth as the particular grounds that the "assessed value of said property is unfair, unjust, and excessive as compared with other property of substantially the same character and value and similarly situated in said county, and imposes an unequal burden upon the applicant," and that the assessment was "arbitrary, discriminatory, oppressive, erroneous and illegal." After a full hearing, at which considerable evidence was heard, the application was denied. The claims made at the hearing before the county board of equalization were the same as those here urged, and comparison of values was called for in the assessment figures touching plaintiffs' property and that of the neighboring oil companies hereinbefore referred to.

These same plaintiffs were in court heretofore, making substantially the same claims with respect to the assessment of the same property for the year 1917. Birch et al. v. Orange County, 186 Cal. 736, 200 Pac. 647. In that case neither the method used by the assessor nor the resulting assessment figures were the same or similar to those exhibited in this record. It was shown in that case that plaintiffs' assessment was greater than the combined assessment of the four (adjoining) oil companies, when the latter were producing monthly 215,608 barrels of oil, and the plaintiffs only 44,686 barrels per month. The court held that the disparity was so great as to substantiate the claim of constructive fraud, and reversed a judgment against the plaintiffs.

[1-3] The law as it regulates the making of assessments and the securing of relief to a taxpayer is quite fully expounded in that decision and in the decision found in Los Angeles Gas & Electric Co. v. Los Angeles County, 162 Cal. at page 164, 121 Pac. 384, 9 A. L. R. 1277, referred to in the following: It is clear by the decisions that an assessment "grossly inequitable and palpably excessive" may be considered fraudulent. At the same time, it is recognized that both the assessor and the board of equalization exercise judicial functions, and that within the limits of a reasonable discretion their judgment cannot be controlled by the courts. Judson on Taxation, §§ 464, 472, 473; Cooley on Taxation (3d Ed.) vol. 2, p. 1467.

"It is not disputed that the conclusion of assessing officers as to the value of property for purposes of taxation, when honestly arrived at and when not made in pursuance of some fixed rule or general system the result of which is necessarily discriminatory and inequitable, is conclusive on the courts, however erroneous the conclusion of those officers may be. The law necessarily leaves the determination of the question of fact of value to certain officers, and when it appoints tribunals for that purpose, as in this state primarily the assessor, and, for purpose of review, the board of supervisors acting as a county board of equalization, the conclusion of those tribunals on such a question of fact constitutes a judgment. * * *" L. A. Gas & Elec. Co. v. County of Los Angeles, 162 Cal. 164, 121 Pac. 384, 9 A. L. R. 1277.

Attention has been called to the fact that plaintiffs were accorded a hearing before the county board of equalization. They were accorded a full hearing and allowed to introduce all evidence that they wished to offer. This included the testimony of the assessor, and evidence as to the amounts of the assessments made against adjoining oil properties. It was shown by that evidence that the assessor for the year in question used precisely the same method in arriving at his total valuations against the several companies. There was some small difference in the allowances made as for production cost and value of the wells, but the assessor gave his reasons for making the difference, and those reasons were sufficient to support his judgment in the matter.

In arriving at the total amount of his assessment, the assessor first ascertained the number of barrels of oil produced by the plaintiffs during the preceding year, which was found to be 342,570. He estimated a sale value of $1 per barrel (that amount was admitted by plaintiffs to be reasonable), allowed 65 cents per barrel as cost of production, leaving a remainder of 35 cents which he classed as net income. This he multiplied by the number of barrels produced, which gave him his total net income for oil. He then ascertained the quantity and value of gas commercially produced during the year, allowed 25 per cent. off for cost of production, added the remainder to the oil total. Having then a total net income amount he "capitalized" the mineral and gas value by assuming that a net 10 per cent. return was being made to the operators. Multiplying his net income by ten and taking 40 per cent. thereof as the basis for taxation, he secured a total of $529,643. He added a nominal $100 for surface value of ground, and added $39,900 as

the value of the wells, approximating $3,000 for each well. The latter amount he estimated to be the fair value of the well casing in a producing hole. The amount resulting from this computation was $569,615. Respondent has tabulated the production figures for the year preceding March, 1918, and the assessment total assigned in each case. As a result it is found that plaintiffs' and the properties of the neighboring oil companies, under the method used by the assessor, were valued as follows:

| | | |
|---|---|---|
| Birch Oil Company..... | 342,510 bbls. | $529,715.00 |
| Fullerton Oil Company..... | 350,700 bbls. | 431,240.00 |
| General Petroleum Company | 242,269 bbls. | 276,270.00 |
| Brea Canyon Oil Company.. | 288,229 bbls. | 413,700.00 |
| Columbia Producing Company ..... | 277,565 bbls. | 462,965.00 |
| Union Oil Company of California ..... | 730,969 bbls. | 1,300,520.00 |

Answering the argument that the capitalization method as used by the assessor is not designed to produce reasonably accurate results, as compared with the market value of the property assessed, it sufficiently appears from the evidence presented that the ascertainment of the value of the producing oil properties is one of great difficulty, so many and various are the elements which enter into that value. Actual experience may prove that a producing oil property may increase or diminish in value; production quantity may become lessened or the price of the product may be reduced accordingly as the market for petroleum fluctuates with variations in demand and supply. No one can ever foretell when such variations may occur, how great they may be, or how long they may continue. Value then becomes a matter of opinion to a large extent, and may be based upon estimate of the reasonable production probabilities of the property under consideration. It has long been the accepted practice of assessing officers to use an income amount mathematically ascertained as a basis for estimating the value of the property which produces the income. We find the method extensively used in the appraisement of corporate stocks. The Circuit Court of the United States in Chicago Union T. Co. v. State Board of Equalization (C. C.) 112 Fed. 607, approved the method as being legitimate and fair. Such a method, the court said, was a reasonable one to employ in arriving at the value of "the beneficial ownership of everything that enters into the property of the corporation." In the case cited the income was estimated to produce a rate of 6 per cent. on capital. Mathematically considered, the higher the rate the less the estimated capital value. The assessor here took one-tenth or 10 per cent. as his income multiplier. It is not demonstrated in this case that the percentage adopted resulted in the property being assessed at an amount disproportionate to its value or the assessed value of other property of like kind and similarly situated. The physical merchandise constituting the "well" necessarily had to be separately listed (Pol. Code, § 3617) as personal property. The value of the casing in the "hole" depended in part upon its condition and the possibilities of its being salvaged in event that the well was abandoned. The assessor necessarily had to approximate that value, having little to guide him except the current cost of casing and the length of time the particular casing had been in use. He testified that whenever old casing stood in an abandoned well he treated it as valueless; where the casing was in a producing "hole" and doing duty, he assessed it as indicated. There was no evidence offered to show that the casing itself, if removed from the wells, might not have been worth in the market all that the assessor valued it at. Some of the "wells" of the adjacent oil operators were assessed for $2,500, others for $3,000, some at more and some at less, but, as has been mentioned, the assessor gave substantial reasons for making the difference. Having determined that the assessor did not adopt an unauthorized method in arriving at the value of plaintiffs' property for assessment purposes, it at once is apparent that the court committed no error in sustaining objection to questions asked of a witness by whom it was proposed to show the various factors that should be considered in estimating the value of oil-producing property.

[4] The entire cause of complaint of the plaintiffs is answered with the statement that the assessor did not adopt a method of valuation so out of relation with the factors that should enter into a fair consideration of the matter of value as to cause plaintiffs' assessment to be discriminatory and not just when compared with assessments entered against other property of similar kind. Conceding that a better method might have been used, the result is still the same. The assessor exercised a permitted discretion in making up his assessment figures. He treated all similar properties as he did that of plaintiffs. The board of equalization heard and fully considered plaintiffs' application for adjustment, and, with the testimony offered and the evidence of the tax roll before it, affirmed the assessment. The courts are not empowered to make a more extensive review than to ascertain that the acts of the assessor and board of equalization are not open to the charge of fraud, actual or constructive.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

59 Cal. App. 116

## PEOPLE v. WREN. (Cr. 1049.)

(District Court of Appeal, First District, Division 2, California. Sept. 20, 1922.)

**1. Criminal law ⟹1134(9)—Proceeding to recover property wrongfully seized is independent of criminal prosecution, and not reviewable on appeal from conviction.**

A proceeding to recover property wrongfully seized and sought to be used as evidence against accused is independent of the criminal prosecution involved, and a denial of a motion for an order directing the return of such goods is not reviewable on an appeal from the conviction.

**2. Criminal law ⟹395—Articles, though unlawfully seized, are admissible in evidence in prosecution for their possession.**

The unlawful seizure of prohibited drugs on the person of the defendant arrested on suspicion will not prevent their use as evidence against him in a prosecution for their possession in violation of the State Poison Act, since the courts will not inquire into or investigate the source of competent testimony produced on trial.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

Thomas Wren was convicted of possessing morphine in violation of the State Poison Act, and he appeals. Affirmed.

A. D. Duncan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

NOURSE, J. [1] The defendant appeals from a judgment of conviction of the crime of having in his possession a quantity of morphine in violation of the State Poison Act (St. 1907, p. 124). Though the offense is a misdemeanor in the first instance, the defendant was informed against and convicted in this case of a felony because of a prior conviction of the same offense. In his application on appeal numerous assignments of error are made, but all of these have been abandoned except the point that the court erred in denying his motion for a return of property which had been taken from his possession and used in evidence against him at the trial, and the point that the trial court erred in admitting in evidence the property so taken from the person of the defendant. The motion for the return of the property was made at 9:45 a. m. of the day of the trial, and prior to the calling of the case for trial. Assuming that the motion was made at a reasonable time, the point is not to be considered on this appeal as the motion for the return of the property is an entirely separate proceeding, and no part of the cause from which the appeal is taken. People v. Mayen (Cal. Sup.) 205 Pac. 435.

[2] As to the second point, appellant concedes that, if the issue raised on this appeal comes within the ruling of People v. Mayen (Cal. Sup.) 205 Pac. 435, there is no merit in the appeal. The only material difference between the issue raised on this appeal and that considered in the Mayen Case is that in the present case the property was taken from the defendant's person by the arresting officer, and while in custody following an arrest upon suspicion, while in the Mayen Case the property was taken from the premises of the defendant under a void search warrant.

The facts of this case are that the defendant was arrested on the public streets of San Francisco by a member of the police department on suspicion that he (the defendant) was a drug addict, the arresting officer having had him under observation for several days prior to the arrest. He was immediately taken to the southern police station, and without a search warrant, and without any charge being placed against him, but while still in the custody of the police officer, his clothing was searched and five packages of narcotics were found in the lapel of his coat. He was immediately charged and booked for a violation of the State Poison Act, was subsequently arraigned, and pleaded guilty, and thereafter, upon request of his counsel changed his plea to "not guilty" and raised the defense that his arrest was illegal, and that the subsequent search and seizure were contrary to his constitutional rights.

[2] Whatever may be said as to the arrest of defendant without a warrant, it is sufficient for the purposes of this case that, when the search was made at the police station, and the prohibited drugs found in his possession, the crime with which he was charged was complete. Thereafter the arrest upon the charge on which defendant was tried and convicted was free from any legal objection. The search and seizure of which defendant complains was made before this charge was laid, and is therefore outside of the realm of this appeal. The fact that the property was taken from the person of the defendant rather than from his premises can have no bearing upon its competency as evidence to be produced on the trial. As said in People v. Mayen, supra (Cal. Sup.) 205 Pac. 437:

"There is no rule better established or more universally recognized by the courts than that where competent evidence is produced on a trial the courts will not stop to inquire or investigate the source from whence it comes or the means by which it was obtained."

And, again, in the same case ([Cal. Sup.] 205 Pac. 440):

"But no authority, so far as we have been able to discover, has suggested that the subse-

quent use of articles so taken as evidence is in itself any part of the unlawful invasion of such constitutional guaranty. The search and seizure are complete when the goods are taken and removed from the premises. Whether the trespasser converts them to his own use, destroys them, or uses them as evidence, or voluntarily returns them to the possession of the owner, he has already completed the offense against the Constitution when he makes the search and seizure, and it is this invasion of the rights of privacy and the sacredness of a man's domicile with which the Constitution is concerned."

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

---

59 Cal. App. 121

## PEOPLE v. MARTINEZ. (Cr. 876.)

(District Court of Appeal, Second District, Division 1, California. Sept. 20, 1922.)

**1. Criminal law ⟸977(3)—Judgment after application for probation 16 days after conviction within period prescribed by Code.**

Where defendant was convicted December 17, and after application, probation was denied, and judgment pronounced January 3, it was within Pen. Code, § 1191, which provides that, upon conviction, the court must appoint a time for pronouncing judgment which must be not more than five days thereafter, unless on application for probation the court extend the time for a period not exceeding 20 days.

**2. Rape ⟸54(1)—Uncorroborated testimony of victim sufficient in statutory rape.**

The uncorroborated testimony of the victim of a statutory rape is sufficient, considered alone, to sustain a conviction.

**3. Criminal law ⟸564(1)—Evidence held to show that rape was committed in county of prosecution.**

In a prosecution for rape, evidence and defendant's admission *held* sufficient to warrant conclusion that the crime was committed in the county of prosecution.

**4. Criminal law ⟸369(8)—Admitting evidence of other acts of sexual intercourse shortly after act charged not error.**

In a statutory rape prosecution, where venue was laid in T. county, permitting evidence of other acts of sexual intercourse shortly afterwards in V. county, offered to show disposition of defendant and the probability of his committing the act charged, was not error.

**5. Criminal law ⟸783(1)—Instruction limiting effect of evidence as to previous intercourse with another than defendant not error.**

Where, in a statutory rape prosecution, a physician stated that after examination of prosecutrix he found the hymen had been ruptured, and thereupon defendant elicited from prosecutrix that prior to her intercourse with defendant she had like intercourse with another, the court's statement in ruling that the jury should consider such testimony to show that the rupture might have been caused by another than defendant, but, if they found defendant guilty of the act as charged, such fact of intercourse with another would be no defense, was not error.

**6. Rape ⟸49(1)—Not material that victim of statutory rape made no outcry.**

In a prosecution for statutory rape, it is not material that the victim made no outcry.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Lino Martinez was convicted of statutory rape, and he appeals. Affirmed.

J. C. C. Russell, of Hanford, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

SHAW, J. On December 13, 1921, the defendant was convicted upon an information charging him with the crime of statutory rape committed in Tulare county in June of that year. Four days after his conviction, to wit, on December 17th, the court convened for the purpose of pronouncing judgment against him, at which time he applied to the court to be admitted to probation. The hearing of this application was postponed to January 3, 1922, at which time his application was denied and judgment pronounced, all in accordance with the provisions of section 1191 of the Penal Code. From this judgment he has appealed.

[1] First. Defendant's first contention is that the court failed to pronounce judgment within the time prescribed by law. While section 1191 of the Penal Code provides that, upon the conviction of a defendant, the court must appoint a time for pronouncing judgment, which must not be more than five days thereafter, it further provides that, where an application for probation is to be considered, the court may extend such time for a period not exceeding 20 days. As appears from the record herein, there was an application made by defendant for probation, and the time for hearing of the same was continued from December 17th to January 3d, a period well within the 20 days provided by the section, and within which time judgment was pronounced.

[2] Second. It is claimed that the evidence was insufficient to sustain the verdict of conviction. This contention is likewise without merit. While the testimony of the prosecuting witness clearly tended to prove the commission of the act of sexual intercourse between herself and the defendant, he insists that such testimony was not corroborated. The law that the uncorroborated testimony of the victim of a statutory rape is sufficient, considered alone, to sustain a conviction, is

too well settled to require comment. There was ample testimony, as to the truth of which the jury was convinced, tending to show that the prosecuting witness, at the time of the commission of the crime, was under the age of 16 years.

[3] Third. Another contention is that the evidence was insufficient to show the alleged offense was committed in Tulare county. The testimony of the prosecuting witness, while to the effect that she did not know whether the act occurred in Tulare county, was that while living at or near Selma, which is in Fresno county, defendant took her with him in an automobile, traveling southerly through Goshen, which is in Tulare county, to Santa Paula, in Ventura county; that before reaching Goshen, in Tulare county, but near that place, they left the automobile, crossing a ditch near some shrubbery, wherein the act of sexual intercourse as charged was committed. The location of the points named, the direction of travel from Selma southerly towards Goshen, and the commission of the act near but before reaching Goshen, constituted evidence from which a fair inference might be drawn that the crime was committed in Tulare county, and which, taken in connection with the fact that the defendant, in the absence of any threats, intimidation, or inducements offered him so to do, voluntarily stated to a witness for the prosecution that he committed the act of sexual intercourse with the prosecutrix in Tulare county, was sufficient to warrant the jury in concluding that the crime was committed therein.

[4] Fourth. It is next claimed that the court erred in permitting testimony tending to prove that, upon arriving at Santa Paula, in Ventura county, defendant was guilty of acts of sexual intercourse committed with the prosecutrix. The conviction, however, was not based upon such acts, and the evidence as to the commission thereof was offered, as stated in the court's instructions, merely for the purpose of showing the disposition of defendant and the probability of his committing the act with which he was charged. There was no error of the court in admitting such evidence.

[5] Fifth. Counsel for defendant devotes much of his brief to alleged misconduct of the district attorney, and also to misconduct of the court. That of the former is predicated solely upon the fact that, in the course of the trial, he asked some questions to which objections were interposed, and by the court sustained, upon the ground that they were immaterial, irrelevant, and not proper cross-examination. Such acts constitute no ground for the claim of misconduct, and, since the objections were overruled, upon no possible stretch of the imagination could it be said that defendant was prejudiced thereby. As to the misconduct of the court, it appears that a physician was called, who testified that upon an examination of the prosecutrix he found that the hymen had been ruptured. Thereupon defendant elicited from the prosecutrix the fact that prior to the act of sexual intercourse with defendant she had like intercourse with another person. In ruling upon the objection to this testimony, the court stated that the jury should consider such testimony only as tending to show that the rupture to which the physician testified might have been caused by an act of sexual intercourse had by the prosecutrix with another than the defendant, but, if they found that defendant was guilty of the act as charged, such fact of intercourse with another would constitute no defense to the act with which he was charged. We perceive no error in this statement; on the contrary, it was rather favorable than otherwise to the defendant, since it tended to controvert the inference that the hymen was ruptured by the act committed by defendant.

[6] Finally, it is claimed the court erred not only in the instructions given to the jury, but likewise in refusing instructions tendered by the defendant. We have carefully read the instructions, which, as a whole, were full, fair, and explicit, and well calculated to state the law which the jury should apply to the facts as found by them. No purpose could be subserved by a discussion of the several assignments of error based thereon. Suffice it to say that appellant's contentions in this regard appear to be based upon an erroneous construction of the law applicable to the facts, wherein he contends that the testimony of the prosecutrix should have been corroborated, and that the jury were entitled to consider the fact that she made no outcry, and did not immediately complain to others of the unlawful act committed upon her. As we have stated, the fact of defendant's guilt did not depend upon corroboration of her testimony, and the fact that she, a female under 16 years of age, made no outcry, but concealed from others knowledge of the act, was not material to the inquiry provided the jury upon sufficient evidence was satisfied that he was guilty of the act as charged.

That defendant is clearly guilty of the crime of which he is convicted admits of no doubt, and a careful reading and consideration of the record discloses no error in the rulings of the court nor in the instructions given or refused.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(189 Cal. 759)

**In re RUSSELL'S ESTATE. (S. F. 9883.)**

(Supreme Court of California. Oct. 26, 1922.)

**1. Wills ⟸300—Jury warranted in believing contestant's evidence and disbelieving proponents'.**

The jury in a will contest was warranted in believing as true all evidence in support of contestant's claim not so inherently improbable as to be unworthy of belief, and in disregarding as untrue all of the evidence on behalf of proponents which was in any way contradictory or otherwise impeached.

**2. Wills ⟸386—Evidence to be interpreted to support verdict so far as reasonably possible.**

It is the duty of the appellate court in reviewing the facts in a will contest to interpret the evidence so as to support the verdict to the extent that it is reasonably susceptible thereto in the light of the rule as to the jury's right to believe or disbelieve evidence.

**3. Wills ⟸300—Jury entitled to disbelieve testimony of interested witness.**

In a will contest, the jurors had a right if they saw fit to disbelieve the testimony of the sole beneficiary under the will, especially where they might conclude that she had been successfully impeached by evidence of conflicting declarations.

**4. Evidence ⟸318(2)—Statements in letters written by witnesses held hearsay and admissible only to impeach them.**

In a will contest statements contained in letters written by the testator's son and sister-in-law were pure hearsay as against the proponents, and incompetent on the question of testamentary capacity, and admissible only to impeach such persons as witnesses.

**5. Trial ⟸105(2) — Hearsay statements in letters rendered competent when writers testified they were true, and letters admitted without objection.**

In a will contest hearsay statements in letters written by the testator's son and sister-in-law were rendered competent when the writers, in answer to questions, declared the statements therein were true, and the letters were then offered and received in evidence without objection.

**6. Evidence ⟸215(3) — Admissions by sole beneficiary under will competent on behalf of contestant.**

In a will contest any admissions of fact contained in letters written by the sole beneficiary under the will were competent evidence in behalf of the contestant.

**7. Appeal and error ⟸206(2)—Error cannot be predicated on method of examining, when not objected to and letters about which examined subsequently introduced without objection.**

Error cannot be predicated on the fact that counsel in examining a witness read in the presence of the jury all or portions of letters written by him, and then questioned him regarding the truth of the statements therein, though such statements were incompetent for any purpose other than impeachment, where this method of examination was indulged in without objection and the letters were afterwards introduced in evidence without objection.

**8. Evidence ⟸568(2)—Opinion of lay witness as to sanity of no value except as facts and reasons stated give it value.**

The opinion of a lay witness upon mental sanity is of no value other than such as is afforded to it by the facts stated and the reasons furnished by the witness in support thereof.

**9. Wills ⟸55(1)—Evidence of change of temperament and character held to tend to show mental derangement.**

When a mild, quiet, amiable, and modest man suddenly becomes irritable, harsh, suspicious, obscene, and profane, evidence of such revolution of temperament and character tends to show mental derangement.

**10. Appeal and error ⟸994(1)—Bias and unfairness of witnesses go only to credibility, and cannot be considered by Supreme Court.**

The alleged apparent bias and unfairness of witnesses is a matter which goes only to the weight and credibility of their testimony, and cannot be considered in the Supreme Court so long as their testimony is not inherently incredible.

**11. Wills ⟸31—Nature of mental unsoundness which will invalidate will specified.**

Mere mental derangement or insanity in a medical sense is not sufficient to invalidate a will, and there must be either such a complete mental derangement as denotes utter incapacity to know and understand those things which the law prescribes as essential, or a specific insane delusion which affected the making of the will.

**12. Wills ⟸55(9)—Evidence held insufficient to overcome presumption of sanity.**

Evidence in a will contest *held* insufficient to show that testator did not understand the nature of the business in which he was engaged, and did not have a recollection of the property he meant to dispose of and of the persons to whom he desired to bequeath it and of the manner in which he desired to distribute it; and hence insufficient to overcome the presumption of sanity in these respects.

**13. Evidence ⟸317(18) — Testator's statement competent to show his belief, but not to show truth of facts stated.**

Evidence that a testator in his later years told several persons that he found a man in bed with his wife was competent to prove that he then believed such to be the fact, but was pure hearsay and wholly valueless for the purpose of proving that the incident in fact occurred.

**14. Wills ⟸55(1) — Presumption of honesty and chastity held to rebut conclusions that testator's claim of wife's infidelity was either true or plain falsehood; "delusion"; "insane delusion."**

The presumptions of honesty and chastity, which are but applications of the presumptions of innocence, in the absence of evidence, rebut the conclusions that testator's story that he found a man in bed with his wife was either true or a plain falsehood, and leave open only the conclusion that it was either a delusion or an insane delusion; a "delusion" being a fixed belief that a thing is true which is not true or not true in the manner in which it is believed, and an "insane delusion" being such a belief entertained without any basis in reason or evidence, and adhered to against reason and evidence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Delusion; Insane Delusion.]

**15. Wills ⟸38(3)—Testator's belief, arising long after daughter's birth, that she was not his child, held to show a diseased mind.**

Where for over 40 years a testator entertained no belief or suspicion that the contestant was not his daughter, such belief, thereafter first appearing without any fact, circumstance, or evidence then transpiring to justify it, can only be ascribed to a diseased mind, especially where there are other circumstances indicating mental derangement.

**16. Wills ⟸52(5)—Contestant bound to show absence of evidence or information sufficient to form basis for claimed delusion.**

A daughter, contesting a will on the ground that the testator had an insane delusion that she was not his daughter, first arising years after her birth, had the burden of proving that the testator had not received some evidence or information sufficient in law to provide a basis in reason for his belief.

**17. Wills ⟸55(3)—Contestant held to make prima facie case against existence of basis for claimed delusion.**

Where a daughter contesting a will, whose relation to the testator was admitted, proved that for 42 years he never questioned the fact, and that his attitude was uniformly that of an affectionate father, and called all the apparently available witnesses who would be likely to know of the existence of any fact, circumstance, or evidence affording reason for the testator's belief that she was not his daughter, and elicited from all of them that they knew of no such fact, circumstance, or evidence, she made a sufficient prima facie case to shift the burden of evidence, though not the burden of proof, to the proponents, and to make it incumbent upon them to show the existence of some such evidence or information.

**18. Evidence ⟸317(3), 553(3)—Statement of physician held hearsay, and should not be assumed in hypothetical question.**

In a will contest, what a doctor told testator about his having a clot of blood on the brain was hearsay, and should not have been assumed in hypothetical question respecting the testator's soundness of mind.

**19. Wills ⟸54(1) — Testator's statements about disinclination to dictate letters held competent on question of capacity.**

In a will contest involving the question of testamentary capacity, what the testator told his stenographer about being disinclined to dictate letters *held* competent evidence of his state of mind.

**20. Appeal and error ⟸1048(3)—Evidence ⟸553(3) — Fact assumed in hypothetical question held improper, but not prejudicial.**

In a will contest on the grounds that testator was incompetent and under an insane delusion, the inclusion in the facts assumed by a hypothetical question of the fact that the writing of a letter by the testator to the contestant was a great shock to the members of his family *held* improper, but not prejudicial.

**21. Evidence ⟸506 — Hypothetical question not objectionable as invading the province of the jury.**

A hypothetical question, asked an expert alienist, as to whether if the assumed facts were true the testator was able to understand and carry in his mind the nature and situation of his property and his relations to his relatives and those around him, with clear remembrance as to those in whom and those things in which he had been most interested and capable of understanding the act which he was doing and the relation in which he stood to the objects of his bounty, free from any delusion, etc., *held* not objectionable, as calling upon the witness to determine the ultimate question in issue, as the jury still had to determine the credibility of the witness, whether the assumed facts had been proved, and whether they were fair and sufficient.

**22. Limitation of actions ⟸127(10)—Amendment in will contest to allege an insane delusion held not to set up new cause of action.**

Assuming that in a will contest it is necessary to specifically allege the existence of an insane delusion, the gist of the cause of action thus pleaded is the same as that pleaded by general allegations of the testator's incompetency to make a will, and hence such allegation may be made by amendment, though a new cause of action would be barred by limitations.

**23. Wills ⟸384—Instruction requiring testator to be able to remember extent of property not prejudicial.**

In a will contest an instruction, which in defining mental competency, required ability on the part of the testator to remember the character "and extent" of his property, was not prejudicial, where the testator's entire estate consisted of a sum of money which he had recently received from the sale of a business.

**24. Wills ⟸330(2)—Instruction against will if testator had insane delusion, etc., though capable of attending to ordinary business, not erroneous.**

In a will contest instructions that, if the testator was suffering from an insane delusion and the will was a product thereof, or if he lacked general testamentary capacity, the jury should find against the will, though he had sufficient capacity to attend to ordinary business, were not erroneous.

**25. Trial ⟸260(5)—Refusal of instructions covered by others given not error.**

In a will contest, the refusal of an instruction was not error, where all the essential matters contained therein were embodied and correctly stated in other instructions given by the court.

**26. Wills ⟸300, 386—Reviewing court will scrutinize evidence on which jury found against will; sufficiency of evidence to be measured by same standard as in other cases.**

Though because of proneness of juries to set aside wills if the provisions thereof do not accord with their own conceptions of justice and fairness it is the duty of the reviewing court to scrutinize with great care the evidence upon which a verdict invalidating a will has been predicated, the sufficiency of the evidence in such a case is to be measured by the same standard and tested by the same rules applicable to all other cases.

Lawlor, J., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Proceeding to revoke the probate of the will of James R. Russell, deceased. From an order revoking the probate, the proponents appeal. Affirmed.

Tum Suden & tum Suden, of San Francisco, for appellants.

A. J. Woolsey, of Oakland, Harry G. McKannay, of San Francisco, and McKannay, Hunt & Woolsey, for respondent.

MYERS, Justice pro tem. This is an appeal from an order revoking the probate of a will on a contest instituted after probate. The grounds of contest were insufficient execution, undue influence, and mental incompetency. A nonsuit was granted as to the first two grounds, and the issue submitted to the jury on the third, resulting in a verdict for the contestant. Proponents appeal on the grounds of insufficiency of the evidence and errors of law. Contestant is a daughter of the testator, and the will under contest bequeathed the entire estate to Ella F. Russell, the second wife, and named her and Elbridge Russell, a son by the second marriage, as executors thereof. The unsoundness of mind is alleged to consist in both general mental incompetency and a specific insane delusion that the contestant was not the daughter of the testator.

[1, 2] In considering the question of the sufficiency of the evidence to support the verdict, it is well to bear in mind that the jury was warranted in believing as true all of the evidence in support of contestant's claims (unless it was inherently so improbable as to be entirely unworthy of belief), and in disregarding as untrue all of the evidence in behalf of proponents which was in any way contradicted, or otherwise impeached. It is likewise the duty of the appellate court in reviewing the facts to interpret the evidence so as to support the verdict, to the extent that it is reasonably susceptible thereto, in the light of the foregoing rule. Applying this rule of interpretation to the evidence herein, the facts appear therefrom substantially as follows:

The will was executed July 9, 1919, by the testator, who was then confined to his bed in his last illness, and who died therefrom four days later. The cause of death was "general spinal paralysis," and the disease had first manifested itself in the form of an apoplectic stroke, suffered by the testator September 16, 1916, resulting immediately in paralysis of the left portion of his body and limbs, from which he had never fully recovered.

[3] The testator was born in Massachusetts in 1851, was married there in 1873, and his daughter, Lillian, the contestant, was born three or four months thereafter. Contestant testifies that her father said to her in 1908, "I wronged your mother and had to marry her. I want now to ask your forgiveness." Of course, this is not competent evidence to prove such fact, but it is competent to prove that the testator then believed such to be the fact. On the other hand, counsel for proponents testified that sometime after October, 1916, testator had told him that "when he was a young fellow he was made the goat." Testator lived with his wife and child nearly 4 years, then suddenly abandoned them, and never thereafter communicated with them during the life of the wife. As to the existence of any fact affording a reason for this action, the record is entirely void of any competent evidence. It is in evidence that testator told the contestant, in 1908, that he came home one day and found his wife in company with a woman with whom he had forbidden her to associate, and that he thereupon left; that he had been a skunk all his life, and that he was sorry to have to make the confession. On the other hand, witnesses for proponents testified that he had told them that he came home one day and found a man in bed with his wife, and that was the reason he left. It does not appear, however, that he even told this story to any one prior

to 1915, 39 years after the supposed occurrence. The proponent, Ella F. Russell, testified that he told her the story at the time of their marriage in 1892, and that, referring to his first wife, "he cursed the very ground she walked on." But it must be remembered that the jurors had a right, if they saw fit, to disbelieve the testimony of this witness, because of her interest as the sole beneficiary under the will, and because they might conclude that she had been successfully impeached by the evidence of conflicting declarations made by her at other times.

The testator's first wife died in March, 1888, and almost immediately thereafter he instituted inquiries to locate his daughter, which resulted in a correspondence between them lasting until the latter part of 1889. Four letters written by the testator during this period are in evidence, and it is not clear whether or not there were any more. In these letters he repeatedly refers to contestant as "my child" and "my dear child," always refers to himself as "your father," and the letters contain numerous expressions, apparently sincere, indicating love, affection and parental solicitude for the daughter's welfare. In his last letter of this period, dated October 7, 1889, he encloses $10, promises to write her a long letter soon and urges her to write soon and send him her picture. Then he appears to have dropped from sight again, so far as the daughter was concerned. He had removed from Santa Ana, and contestant sent letters to him addressed to Santa Ana, to Oakland, to Alameda and San Francisco, which were returned to her by the post office as "unclaimed." Contestant heard nothing from him thereafter, until 1907, when she learned of his business address in San Francisco, wrote him there, and then followed an affectionate correspondence between them, which continued with more or less regularity up to January, 1917. Some dozens of letters written by the testator during this period are in evidence, and contestant testified that there were many more, which she had not brought with her to California because she had not realized that they would be material. It appears that the letters prior to 1913 were long and "chatty," and abounded in expressions of parental love, affection, and solicitude; that those subsequent to that year were usually brief. Contestant explains this change by saying that testator said to her, in 1913, that her brother Elbridge, was now old enough to write her all the news, that he, her father, was very busy, and that she must not expect long letters from him thereafter, but must rely upon Elbridge to write her all the news.

The testator, in planning and building a new house in 1907, added thereto a room which was expressly planned to be the room of this daughter, the contestant. In 1908, upon invitation of the testator, seconded by the other members of the family, she came West on a visit, and remained six months as a member of the family. During this time she was introduced to the friends and neighbors by the testator as his daughter, and uniformly so treated by the testator, his wife and son. Thereafter she returned to her home in Massachusetts. In 1911, while on an eastern trip, the testator arranged for the daughter to meet him in Chicago, and they proceeded thence together upon a combined business and pleasure trip to this coast, by way of New Orleans and various southern cities. Finally arriving at testator's home, contestant again remained there as a member of his family three or four months. On the occasions of both these visits the testator urged the contestant to remain here permanently as a member of his household, which she declined. The testimony is without conflict that throughout both these visits the relations between the contestant on the one hand and the testator and the other members of his family on the other were uniformly cordial, affectionate, and harmonious, with the single exception that the testator was disappointed and perhaps displeased at her refusal to remain permanently as a member of his household. In 1913 the testator visited contestant at her Massachusetts home, and throughout this visit their relations were equally affectionate and harmonious. On the occasion of this visit the testator repeated the assurances which he had several times previously given to contestant—that he would always see to it that she should be provided for financially. He had made at least one other visit to her during this period.

When their correspondence had been resumed in 1907 he had made her an allowance of $10 per month, which was increased to $25 a month during her visit in 1908, and was paid regularly thereafter until some time in 1915, when it was cut down to $15, which he continued to pay until 1917. In January, 1917, he wrote her, "cannot send you more remittances for present, as I have all the expense can stand here." At that time he was confined to his house from the paralytic stroke, and his salary, which was his sole income had been discontinued by his partner. Notwithstanding testator's action at this time, his wife continued to send contestant the monthly allowance out of her own funds.

Testator did not thereafter communicate directly with contestant (although she continued writing to him, and the son, Elbridge, continued writing to her), until December, 1917, when testator sent her the following letter:

"San Francisco, Dec. 1, 1917.

"Miss Russell as you call yourself. Enclosed find Ck. for $15.00 which is the last I will send to you reasons I am getting well along in years and have a family to support without

assistance from anyone which is no joke in times like these I don't doubt but you need money who don't but you cannot get it from me. would suggest you hunt up some of your mothers gentlemen friends who accomodated then and encourage them to contribute to your birth—there never was a young man stung more than I so if you interview them they may held you Minnie and Jim Hagan know some if not I will tell you. I curse her every day of my life and her offspring I hate the sight off and it makes me puke to think off

"Please do not write me again I never want to hear from you I offered you a home once in Calif you would not accept but never again.

"J."

In November, 1914, testator had made an olographic will in which he left his entire estate to his wife, "knowing that she will do justice to all interested," and in which he did not mention either of his children, except by naming his son as one of the executors thereof. In October, 1916, he made a will in which he provided for each of the children, the provision for contestant being an annuity of $35 per month for life, and the creation of a trust fund of $12,000 to carry out the purposes thereof. On July 7, 1919 (six days before his death), he republished and reaffirmed this last will by executing a codicil thereto, whereby he changed the executors thereof, but made no other change except such as was necessitated by the fact that he had in the meantime sold out his business. Two days later he executed the will here in contest, leaving his entire estate to his wife and expressly excluding his son, Elbridge, and his daughter, Lillian, from participation therein.

Counsel for the respondent claim that the evidence proves that the testator, in connection with his stroke suffered in 1916, underwent a mental degeneration evidenced by a complete change of personality. Their claims as to what the evidence proves in this behalf are well summarized in the following language in their brief:

"Here we find a man who, prior to his stroke, was a loving father, affectionate, regular in his habits, apparently in control of his emotions, and friendly and lovable in all relationships, both business and personal, suddenly transformed into an individual capable of writing the document hereinabove referred to to the unfortunate child whom he deserted in her infancy, suddenly claiming that she is not his child; in his business relationship unexpectedly turning upon his partner of 20 years, quarreling with him daily, using the most profane and violent language, threatening to strike him with a cane, challenging him to fight a duel, and in every other manner acting in a most unbecoming manner many times daily before the office employees at the tannery. Before his stroke, he was normal, vigorous, quick-thinking, keen, active, pleasant and aggressive, in business, and after his stroke he could not walk with vigor, his speech was thick, his left foot dragged, his mouth drooled, and his left hand and arm were practically useless. Where before his sickness he assumed full control and management of all of the affairs of the office of a large tanning concern, after his sickness he did nothing. He would go to the office and stare into space, tell the stenographer to answer the letters, told her it worried him to answer them, he could not keep his mind on the subject; that he tired quickly. The general trend of his physical and mental condition was steadily down hill. He lost his temper very quickly; grew irritable and angry; would shout and stamp his cane on the floor. He became vulgar and profane, suspicious of his partner and of all his business associates, aswell as his attorney."

Without attempting to review in detail the mass of evidence on this subject, it will suffice to say that there was evidence which, if believed, was legally sufficient to support substantially all of the foregoing claims. There was also an abundance of evidence to the contrary thereof. This but presents the common situation of a conflict of evidence, which was to be resolved by the jury.

[4-6] Appellants contend that the major portion of the evidence relied upon to support contestant's claims in this behalf is incompetent for that purpose, being statements contained in letters which had been written by Elbridge Russell and by Miss Arnold, a sister-in-law of the testator. The statements contained in those letters were, of course, pure hearsay as against the appellants; were incompetent to prove any fact at issue herein, and were admissible in evidence only for the purpose of impeaching those witnesses. But those statements, for the most part, were rendered competent evidence herein by virtue of their adoption by those witnesses as part of their testimony at the trial. For example, the witness would be shown a statement in one of the letters and asked, in effect, if that statement was true, and the witness would reply, in effect, that the statement was and is true, and that the fact was and is as there stated. After a letter of the witness had been gone through in this fashion, and its statements adopted as the present testimony of the witness, it would then be offered and received in evidence, without objection from appellants. In this connection it may be noted that any admissions of fact contained in letters written by Ella F. Russell were competent evidence in behalf of the contestant because she was the sole beneficiary under the will. Estate of Ricks, 160 Cal. 467, 485.

[7] Appellants now complain of the practice, indulged in by counsel for contestant in the examination of Elbridge Russell, of reading to him in the presence of the jury all or a portion of a letter written by him, and then questioning him in regard to the statements therein contained. Of course, those statements were incompetent for any purpose other than the impeachment of the witness, and it is urged that this procedure was improper, unfair, and highly prejudicial. This

method of examining a witness cannot meet with our approval, but the record shows that it was here indulged in without objection, and with at least the tacit acquiescence of counsel for appellants. It further appears that all of the letters which had been so read in the presence of the jury were thereafter introduced in evidence without any objection whatever. For these reasons no error can be claimed in this connection.

[8-10] But two witnesses testified directly in behalf of the contestant that the testator was of unsound mind. Appellants contend that when the facts stated and the reasons given by these witnesses for their opinion are considered it becomes apparent that the opinion is of no value, and is not entitled to be accorded any weight whatever. It is true that the opinion of a lay witness upon a question of mental sanity is of no value other than such as is afforded to it by the facts stated and the reasons furnished by the witness in support thereof. But we cannot say that the facts stated by these two witnesses do not afford a reasonable and sufficient basis for the conclusions expressed by them. The substance of their testimony is summarized in the foregoing quotation from respondent's brief. As was said in 3 Elliott on Evidence, 774:

"If a mild, quiet, amiable, and modest man should suddenly become irritable, harsh, suspicious, obscene and profane, evidence of such a revolution of temperament and character would be admissible as tending to show mental derangement."

Much is said in appellants' briefs as to the apparent bias and unfairness of these two witnesses. But that is a matter which goes only to the weight and credibility of their testimony, and cannot be considered here, so long as their testimony was not inherently incredible.

[11] But mere proof of mental derangement or of insanity, in a medical sense, is not sufficient to invalidate a will. The contestant is required to go further and prove either such a complete mental degeneration as denotes utter incapacity to know and understand those things which the law prescribes as essential to the making of a valid will, or the existence of a specific insane delusion which affected the making of the will in question. Counsel for respondent claim that she has submitted an abundance of proof upon both of these issues.

[12] Upon the question of general testamentary incapacity we are inclined to hold, after an examination of the entire record, that there is nothing therein which is irreconcilable with the following conclusions: That the testator at the time of making the will understood the nature of the business in which he was engaged; that he had a recollection of the property he meant to dispose of, and of the persons to whom he desired to bequeath it, and of the manner in which he desired to distribute it. This being so, it follows that the evidence was insufficient to overcome the presumption of sanity in these respects. There remains to consider under this issue only the question of the ability of the testator to know or understand his relation to his relatives, the natural objects of his bounty. This question, in the instant case, is substantially identical with that presented by the allegation of an insane delusion; the claimed delusion being the belief that the contestant was not the daughter of the testator.

In considering the question of an insane delusion we start with the admitted fact that the contestant was the daughter of the testator. We come next to the proven fact that, so far as the evidence discloses, the testator never voiced a question or doubt or suspicion concerning her paternity until 42 years had elapsed after her birth. Nothing is shown to have occurred at this time (1915), or at any time after contestant was born, which affords any ground, reasonable or unreasonable, for this belief. Counsel for appellants argue that the fact that when contestant was 3½ years old testator found a man in bed with her mother furnished an abundantly sufficient reason to take the belief out of the category of insane delusions. It may be doubted whether, if this were a fact, it alone would afford a basis in reason for a belief which was first formed more than 40 years thereafter; but there is not a scintilla of competent evidence in this case that such an incident ever occurred.

[13, 14] Evidence that the testator, in his later years, told this story to several persons was competent for the purpose of proving that he then believed such to be the fact, but it is pure hearsay and wholly valueless for the purpose of proving that such an incident had in fact occurred. This story as told by the testator may have been either a delusion or an insane delusion, or it may have been true, or it may have been a plain falsehood. The conclusion that it was a falsehood is rebutted by the presumption of honesty, which is but an application of the presumption "that a person is innocent of crime or wrong." The conclusion that it was true is rebutted by the presumption of chastity, which is but another application of the same basic presumption of innocence. This leaves open only the conclusion that it was either a delusion, that is to say, a fixed belief that a thing is true which is not true, or which is not true in the manner in which it is believed, or an insane delusion, that is to say, such a belief entertained without any basis in reason or evidence and adhered to against reason and evidence. At any rate there is no basis at all in the evidence for a conclusion that any such incident as related by the testator ever occurred.

[15] The evidence discloses only this single fact or circumstance to which this belief of the testator can in any way be ascribed:

That the contestant was born three or four months after the marriage, and must, therefore have been conceived out of wedlock. If the testator had entertained this belief, or even a suspicion concerning her paternity from the time of her birth, it might be fairly said that this circumstance affords that slight basis in reason for the belief, which is all that the law requires to take a delusion out of the category of insane delusions. But when it is shown that the testator entertained no such belief or suspicion for a period of more than 40 years, such belief thereafter first appearing can be ascribed in reason only to some fact or circumstance or evidence which thereafter transpired. There being no such fact or circumstance or evidence disclosed, it remains only to ascribe the belief to the spontaneous generation of a diseased mind. This conclusion is rendered more probable by the proof of the many facts and circumstances above referred to, which, as Elliott says, may be regarded as indicia of mental derangement.

[16, 17] Appellants argue that the burden of proof was upon the contestant to prove the insane delusion, and that she has failed to meet the requirement of the law, in that she has failed to prove that the testator did not at some later time receive some evidence or information sufficient in law to provide a basis in reason for his belief. The rule of law is beyond question that the burden of so proving rested upon the contestant, but we are not prepared to agree that the effect thereof goes to the extent claimed for it by counsel. The contestant, starting with the admitted fact of her paternity, proved (by evidence sufficient to go to the jury) that for 42 years the testator never questioned this fact but that, on the contrary, his attitude during this period was uniformly, so far as disclosed, that of an affectionate father. Then, after showing the formation of this belief in the testator's mind, and its apparent effect upon the will, contestant called to the stand apparently all the available witnesses who would be likely to know of the existence of any fact or circumstance or evidence which would afford a reason for this belief, and elicited from all of them that they knew of no such fact or circumstance or evidence. We are of the opinion that in so doing contestant sufficiently made a prima facie case. To hold, as appellants contend that contestant is required to go further and to negative every possibility that testator might at some time in his life have received some information which afforded some basis for his belief, would be to require of her the performance of an obvious impossibility. We are satisfied that in making the proofs above mentioned contestant made a sufficient prima facie case to shift the burden (not the burden of proof, but the burden of evidence), to the proponents, and to make it incumbent upon them to show the existence of some such evidence or information.

Contestant called as witness a physician who, after qualifying as an expert alienist was asked an hypothetical question which assumed the facts claimed by contestant to have been proved. The question ended as follows:

"Assuming these facts to be true, was the subject of this question able to understand and carry in his mind the nature and situation of his property and his relations to his relatives and those around him, with clear remembrance as to those in whom and those things in which he had been mostly interested, capable of understanding the act he was doing and the relation in which he stood to the objects of his bounty, free from any delusion, the effect of disease, which might lead him to dispose of his property otherwise than he would if he knew and understood what he was doing, on July 9, 1919, the date of his will?"

The question was objected to "as confiding the determination of this entire issue to the expert, and invading the province of the jury," and "as not based on the facts brought out in the testimony."

[18-20] Appellants specify in their briefs numerous assumed facts which are claimed to be without support in the evidence. Without reviewing them all in detail, it may be said that the great majority of the assumptions so attacked do find some support, direct or inferential, in the evidence; that the few which do not and which should therefore have been excluded doubtless would have been excluded if they had been called to the attention of court and counsel at the trial. For example, the question assumed that—

"The doctor informed the subject that he had a clot of blood on the right side of the brain which would have to dissolve before he would be able to recover."

What "the doctor informed the subject" was, of course, hearsay, but the jury might have inferred the presence of a clot of blood on the right side of the brain from the proven fact that the patient's entire left side was paralyzed. "What the subject told his stenographer about being disinclined to dictate letters" was competent evidence of his state of mind. The question assumed that "the writing of this letter (hereinabove quoted) was a great shock to the members of his family." This, of course, was a false quantity, and should have been excluded, but we cannot see that proponent was prejudiced by its inclusion.

It is worthy of note that to this question as first framed appellants objected only generally on the ground that it assumed facts not in evidence. It was only after repeated requests from the trial judge that counsel consented to specify the particulars thereof. When he did so the question was then reframed by contestant to meet every objection so specified. Again appellants contented themselves with the general objection, in the

face of repeated requests that they specify the particulars, saying they "would rather stand on the objection." It might well be urged in view of these circumstances that appellants are estopped to now claim error in this behalf; but it is sufficient to say that we find no prejudicial error in any event.

[21] There is no merit in the contention that the objection should have been sustained because the question invaded the province of the jury by calling upon the witness to determine the ultimate question in issue. This question when answered by the witness still left for the determination of the jury at least all of the following questions: (1) The credibility of the witness, (a) as to his skill and learning, (b) as to his honesty, impartiality, and fairness; (2) as to whether or not each of the assumed facts had been proven; (3) as to whether or not the facts assumed had been fairly selected from among the facts proven; (4) as to whether or not material facts omitted from the question had been proven. The cases cited by appellants are not in point here. Some of them had to do with a question which called for a mixed conclusion of law and fact; the others with a question which called for the opinion of the witness upon a question not "of science, art, or trade," and which was not a proper subject of expert testimony.

[22] This contest, as originally filed within a year after probate, alleged generally that "the said deceased was not of sound and disposing mind, or of sound or disposing mind, and was not competent to make his last will" on the date in question. Thereafter, more than a year after the probate, contestant, by leave of court, filed an amendment thereto, specially pleading the existence of the alleged insane delusion. Appellants contend, on the authority of Estate of Ruffino, 116 Cal. 304, 317, 48 Pac. 127, that the issue of an insane delusion was not raised by the general allegation of testamentary incompetency; that it was presented only by the specific allegations contained in the amendment; that the amendment was filed too late, and therefore the latter issue is barred. The Ruffino Case does not so hold. What was there decided was that an allegation that the testator was deceived by false representations which were made to him, and a finding responsive thereto, constituted neither allegation nor finding of an *insane* delusion. The allegations and findings there involved were relevant to an issue of fraud, rather than insanity. Assuming that it is necessary to specifically allege the existence of an insane delusion in order to tender that issue (which we do not hold), still the gist of the cause of action thus pleaded would be the same as that pleaded by the general allegations, to wit, testamentary incapacity. Even under that view of the law the amendment could not be held to state a new and distinct cause of action, so as to be barred by the statute.

Neither is there any merit in the claim that the issue of general incompetency was abandoned at the trial. The court fully instructed the jury upon both issues, at the request of both parties.

Numerous other rulings of the trial court in the admission of evidence are specified as error. We find that some of them were erroneous, but we are unable to conclude that the appellants could have suffered any substantial prejudice therefrom.

[23] Many attacks are made upon the instructions given, predicated for the most part upon a very close and critical, not to say hairsplitting analysis of the words used therein. Perhaps the most substantial error thus pointed out is that wherein the jury was told, in the definition of general mental competency, that the testator must be able to remember the character *and extent* of his property. Conceding that in the case of a testator whose estate was very large and diversified this instruction might be prejudicial, it is clear that it could not have so operated here, where the testator's entire estate consisted of the sum of $135,000, which was the net purchase price received by him from the sale of his business the preceding month.

[24] The court did not err in instructing the jury, in effect, that if they found that the testator was suffering from an insane delusion as defined in the instructions, and that the will was the product thereof, they were to find against the will, notwithstanding they might also find that he had sufficient capacity to attend to his ordinary business. Neither was it error to give the similar instruction predicated upon their finding a lack of general testamentary capacity.

[25] All of the essential matters contained in proponents' instruction 9, which was refused, were embodied and correctly stated in other instructions which were given by the court. The two instructions given by the court of its own motion are not fairly susceptible to the construction claimed for them by appellants. Fairly construed and read together, the instructions given present a full, impartial, and substantially correct exposition of the rules of law applicable to the questions of fact submitted to the jury.

[26] It has frequently been remarked that juries are often prone to set aside a will because the provisions thereof do not happen to accord with the jurors' concepts of justice and fairness. It may also be said to be the duty of the reviewing court to scrutinize with great care the evidence upon which a verdict invalidating a will has been predicated, where the sufficiency thereof is questioned. But that is the most that can be properly claimed in this behalf. The sufficiency of the evidence in such a case is to be measured by the same standard and tested by the same rules which are applicable to all other cases. So measured and tested, we conclude that

the evidence herein was legally sufficient to sustain the verdict, and that no prejudicial error was committed at the trial.

The judgment is affirmed.

We concur: SHAW, C. J.; LENNON, J.; WASTE, J.; RICHARDS, Justice pro tem.

LAWLOR, J. I dissent. I adhere to the view expressed in the first opinion rendered in this case (64 Cal. Dec. 37), that the evidence was insufficient to show a want of testamentary capacity, and it will not be necessary again to review it.

It is conceded by the majority opinion that the evidence of decedent's having told the story of the circumstances under which he left his first wife was competent to prove his state of mind. The issue raised by the pleadings was whether he was seized with an insane delusion after the stroke in September, 1916, notwithstanding the evidence that he had such a state of mind from the time he left her in 1876 until his death. In any event, the issue of the sufficiency of the evidence was so closely contested it cannot be said the verdict was unaffected by any errors that may have been committed.

The main opinion concedes the hypothetical question contained inadmissible hearsay statements. This error and the inclusion of the erroneous element that decedent became enraged at his partner "apparently without any cause or provocation" in my opinion rendered the question lacking in a fair and substantial statement of the evidence. The admission of the opinion of the expert witness, the only one called, was calculated to influence the verdict, and should have been excluded. Further, the course followed by respondent's counsel in getting before the jury the contents of letters, written by relatives of the decedent, giving accounts of his physical and mental condition, was clearly improper, and such a practice is condemned in Estate of Packer, 164 Cal. 525, 129 Pac. 778. A large part of the evidence in support of respondent's case was contained in such letters, and their admission under the circumstances could not have failed to be prejudicial. I do not think from the record it can be said that counsel for appellants did not object to the reading of such letters to the jury. They did not object every time such evidence was offered, but that was not necessary, since it appears that the whole course pursued was objected to.

"Where a party has once formally taken exception to a certain line or character of evidence, he is not required to renew the objection at each recurrence thereafter of the objectionable matter arising in the examination of other witnesses; and his silence will not debar him from having the exception reviewed." Green v. Southern Pacific Co., 122 Cal. 563, 565, 55 Pac. 577.

189 Cal. 743

## CARSE v. MARSH, Superior Court Judge.
## (L. A. 7086.)

(Supreme Court of California. Oct. 24, 1922.)

**Intoxicating liquors ⊂⊃269—State court has jurisdiction of action for maintaining nuisance under Volstead Act.**

Under Const. U. S. Amend. 18, providing that Congress and the several states shall have concurrent jurisdiction to enforce this article by appropriate legislation, and the Volstead Act, providing that an action to enjoin a nuisance under the act may be brought in the name of the United States in any court having equity jurisdiction, and the state Constitution, giving the superior court jurisdiction of actions to prevent or abate a nuisance, the superior court of San Diego county had jurisdiction to try a case brought by the district attorney in the name of the United States to enjoin a nuisance, as defined by the Volstead Act.

In Bank.

Application for a writ of prohibition by W. C. Carse, to be directed to Spencer M. Marsh, Judge of the Superior Court of San Diego County. Writ denied.

A. J. Morganstern, of San Diego, for petitioner.

H. S. Utley, Dist. Atty., and J. D. Malcolm, Deputy Dist. Atty., both of San Diego, for respondent.

SHAW, C. J. This is an application for a writ of prohibition to restrain the superior court of the county of San Diego from proceeding to punish the applicant herein for contempt, said contempt consisting in his alleged violation of the terms of an injunction issued in a cause then pending in said court.

The action wherein the order was issued, which the applicant is charged with having violated, was entitled United States, Plaintiff, v. W. C. Carse, Defendant, and was brought under the provisions of the act of Congress commonly known as the Volstead Act (41 Stat. 305). The object of the action was to have it declared that said applicant was maintaining a "public and common nuisance," and of having such nuisance abated, and of procuring an injunction preventing said applicant from further maintaining the same. That act declares that a place where intoxicating liquor is manufactured, sold, kept, or bartered is a "common nuisance," and provides that—

"An action to enjoin any nuisance defined in this title may be brought in the name of the United States by the Attorney General of the United States or by any United States attorney or any prosecuting attorney of any state or any subdivision thereof. * * * Such action shall be brought and tried as an action in equity and may be brought in any court

having jurisdiction to hear and determine equity cases."

The section also provides for the issuance of restraining orders in actions commenced pursuant to its terms. The sole contention of the applicant is that the superior court of the county of San Diego has no jurisdiction to entertain said action, and hence no jurisdiction to make or enforce said order.

The Eighteenth Amendment, adopted by the people of the United States in the year 1919, provides that—

"The manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes is hereby prohibited."

The second section of that amendment provides that—

"The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

We think there is no doubt of the jurisdiction of the court to entertain the action. The Constitution of this state gives the superior court jurisdiction of actions to prevent or abate a nuisance. The statutes of the United States enacted for the purpose of enforcing said amendment to the Constitution of the United States declares that a place wherein intoxicating liquor is manufactured, sold, kept, or bartered is a common nuisance, and that an action to abate the same may be begun by any prosecutor of any state or subdivision thereof in any court having jurisdiction in equity. The superior court of this state by the Constitution of this state is given jurisdiction in equity, and hence it has jurisdiction by that provision. Such being the case, it cannot be disputed that the superior court of the county of San Diego had jurisdiction within the county to abate any nuisance existing within that county, whether it is declared to be a nuisance by an act of Congress or by the state Legislature, or whether it is of such a character as would be a nuisance by common law. It matters not what power declares the thing to be a nuisance, providing it is done by somebody having authority to act. Undoubtedly Congress has power under the Eighteenth Amendment to declare any place wherein intoxicating liquor is manufactured, kept, sold, or bartered to be common nuisance. The court has such jurisdiction to abate it, regardless of the authority which declares it to be a common nuisance. In the case of Missouri v. Illinois, 180 U. S. 244, 21 Sup. Ct. 345, 45 L. Ed. 497, in replying to the claim that resort to a court of equity was unnecessary, the court said:

"The defendant contends that the law furnishes a plain, adequate and complete remedy for this nuisance by an indictment or by proceedings under the statutes for the abatement of a nuisance by the board of health. Neither of these remedies can be invoked until a part of the mischief is done, and they could not, in the nature of things, restore the pond, the land and the underground currents to the same condition in which they now are. In other words, they could not remedy the whole mischief. The preventive force of a decree in equity, restraining the illegal acts before any mischief is done, gives clearly a more efficacious and complete remedy."

In Stead v. Fortner, 255 Ill. 468, 99 N. E. 680, the court said on this subject:

"There are a number of states where jurisdiction is expressly conferred upon courts of equity, but a statute is not necessary to enable such courts to exercise a jurisdiction of ancient origin and which has always existed without any statute. * * * If there is a statute of that kind it is no more than a legislative declaration of an existing jurisdiction. It would require a statute to destroy such a jurisdiction."

An action in all respects similar to this was involved in the Employers' Liability Cases, 223 U. S. 1, 56, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. In that case the right of a state court having general jurisdiction to entertain an action for the recovery of damages for personal injuries under the federal disability law relating to interstate commerce was directly involved. It was held that civil rights established by federal legislation in the exercise of its jurisdiction, directed to a case wherein interstate commerce was involved, and upon which the states had no power to legislate, were cognizable in the state courts, provided they had the jurisdiction of such cases by local law. The court held that the provision in the statute giving the states authority to enforce that law was unnecessary, as they had the right and authority regardless of the act of Congress especially giving it to them.

The right of the district attorney to proceed in the name of the United States is given by the Volstead Act. There can be no doubt of the right of the United States to avail itself of the law officers of the state for the purpose of enforcing the act of Congress; consequently the case is properly brought in the name of the United States.

Our conclusion is that the court had jurisdiction in the case, and that it could proceed to judgment, declaring the place maintained by the applicant to be a common nuisance, and proceed to abate the same either by the means provided in the act, or by any other means which it sees fit in the exercise of its jurisdiction in equity to adopt for that purpose.

The writ of prohibition is denied.

We concur: WILBUR, J; WASTE, J.; SHURTLEFF, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.

(189 Cal. 778)

## MATOVICH v. MARSH, Superior Court Judge. (L. A. 7085.)

(Supreme Court of California. Oct. 24, 1922.)

In Bank.

Application for a writ of prohibition by Tony Matovich, to be directed to Spencer M. Marsh, Judge of the Superior Court of San Diego County. Writ denied.

A. J. Morganstern, of San Diego, for petitioner.

H. S. Utley, Dist. Atty., and J. D. Malcolm, Deputy Dist. Atty., both of San Diego, for respondent.

PER CURIAM. Upon the authority of the case of W. C. Carse v. Spencer M. Marsh, 210 Pac. 257, this day decided, and for the reasons stated therein, it is ordered that the application for a writ of prohibition herein is denied.

SHAW, C. J., and WILBUR, LENNON, LAWLOR, WASTE, SHURTLEFF, and SLOANE, JJ., concur.

(189 Cal. 746)

## YOUNG et al. v. SOUTHERN PAC. CO. et al. (Sac. 3169.)

(Supreme Court of California. Oct. 25, 1922.)

**1. Appeal and error ⟸1099(8)—Law on first appeal becomes law on second appeal as to matters decided.**

Decision on former appeal that question of contributory negligence should not have been submitted to the jury is the law of the case on subsequent appeal, where the evidence is practically the same.

**2. Railroads ⟸338—Last clear chance doctrine held inapplicable to motorcyclist on adjoining track.**

Where a motorcyclist going about 6 miles an hour was first seen by the trainmen when he was crossing a passing track about 14 feet from the main track on which he was struck by a caboose, the failure to apply the emergency brakes at the very instant he was seen did not render the railroad company liable under the last clear chance doctrine, as the doctrine did come into play before he was in a position of peril from which he could not have extricated himself by the exercise of ordinary care.

**3. Negligence ⟸122(1)—Person presumed to see and hear within range of senses.**

The law presumes that a person possessing normal faculties of sight and hearing must have seen and heard that which was within the range of his sight and hearing.

**4. Railroads ⟸327(1)—Absent-mindedness or forgetfulness not an excuse for failing to look and listen.**

Absent-mindedness or forgetfulness will not excuse a person about to cross a railroad track from looking and listening, and a person who attempts, regardless of warnings, to cross in front of a moving train, is guilty of contributory negligence, though he be apparently in a condition of mental abstraction, and consequently indifferent to the peril of his situation.

**5. Negligence ⟸83—Avoidable injury to negligent person actionable.**

A person who fails to exercise reasonable and ordinary care to avoid injuring another who is known to be in a situation of peril, from which he cannot extricate himself by the exercise of ordinary care, is liable for resulting injury, despite the previous negligence of the person injured.

**6. Negligence ⟸83—Last clear chance doctrine inapplicable to contemporaneous mutual carelessness.**

The last clear chance doctrine does not apply where, by mutual carelessness, an injury ensues to one of two parties, both of whom are contemporaneously and actively in fault down to the very moment of the injury.

**7. Negligence ⟸83—Avoidable injury to person in position of inescapable peril actionable.**

Liability is placed upon the party inflicting an injury only where, immediately before the actual infliction of the injury, the injured party was in a position of peril from which he could not extricate himself by the exercise of reasonable and ordinary care, and where vigilance on his part would not have averted the injury.

**8. Railroads ⟸346(5)—Burden of issue last clear chance on plaintiffs.**

In an action for death of a motorcyclist, sighted by the trainmen when he was on a passing track about 14 feet from the main track on which he was struck, plaintiffs relying on the last clear chance doctrine had the burden of showing that deceased could not have avoided the collision by altering the direction, accelerating or retarding the speed of his vehicle after the trainmen first saw him.

**9. Railroads ⟸350(33)—Evidence on issue of last clear chance held insufficient for jury.**

In an action for the death of motorcyclist, sighted by trainmen when he was on a passing track about 14 feet from the main line track on which he was struck, evidence on the issue of last clear chance *held* insufficient to go to the jury in that it failed to show that deceased could not have avoided the collision by altering the direction, stopping, accelerating, or retarding the speed of his motorcycle after the trainmen saw him.

Lawlor, J., dissenting.

In Bank.

Appeal from Superior Court, Yolo County; K. S. Mahon, Judge.

Action by Roy J. Young, special administrator of the estate of Jacob Bluhm, deceased, and Charlotte Bluhm, against the Southern Pacific Company and others. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

George Clark, of Los Angeles, and Black & Clark, of San Francisco, for appellants.

Devlin & Devlin, of Sacramento, and Hudson Grant, of Woodland, for respondents.

LENNON, J. This is an appeal by the plaintiffs from a judgment of nonsuit, entered against them in favor of defendants in an action to recover damages for the death of one Frederick Bluhm, son of one of the plaintiffs.

Upon the first trial of the case, in which both the issue of contributory negligence on the part of the deceased and the doctrine of last clear chance were presented to the jury, the plaintiffs recovered. Upon appeal from the first judgment, entered upon the verdict of the jury in favor of the plaintiffs and against all of the defendants, this court held that the undisputed evidence showed that the deceased was, as a matter of law, guilty of contributory negligence, and that therefore the issue of contributory negligence should not have been submitted to the jury. And inasmuch as some of the defendants manifestly could not in any view of the evidence be held liable for the death of the deceased, under the doctrine of last clear chance, the judgment was reversed because it was impossible to ascertain whether the verdict of the jury, against all of the defendants, was had in response to the charge of the trial court upon the issue of contributory negligence, or was predicated upon the applicability to all of the defendants of certain instructions, incidentally held to be erroneous, enunciating the doctrine of last clear chance. Young v. Southern Pacific Co., 182 Cal. 369, 190 Pac. 36.

Upon a retrial of the case, the court below, upon the conclusion of plaintiffs' case, granted a motion for a nonsuit upon the grounds, in substance: (1) That the undisputed evidence conclusively showed, as a matter of law, that the deceased was guilty of contributory negligence; (2) that the doctrine of last clear chance could not be availed of to send the case to the jury because it was not shown in evidence that the deceased, when first observed by the train crew, had placed himself in a position of actual peril from which he could not extricate himself by the exercise of ordinary care. From the judgment entered upon the order of nonsuit, the plaintiffs appeal.

[1] In support of the present appeal the point is again presented, rather by suggestion than positive contention, that the evidence was sufficient to warrant the sending of the case to the jury upon the issue of contributory negligence. The evidence upon the second trial, bearing upon the issue of contributory negligence, is practically the same as that presented upon the same issue at the first trial. This being so, the ruling of this court upon the first appeal "that the question of contributory negligence should not have been submitted to the jury" became the law of the case, and, therefore, binding upon the trial court and conclusive of the question upon appeal.

It is earnestly contended, however, that the trial court was in error in withholding the case from the jury upon the theory that the plaintiffs had failed to sustain the burden of affirmatively showing in evidence facts sufficient to warrant the invocation and application of the doctrine of last clear chance.

The plaintiffs' case, as presented upon the second trial, was rested upon facts and circumstances which, in so far as they are pertinent to the point of the applicability of the last clear chance doctrine are as shown by the record, now before us, substantially as follows:

The deceased, Fred C. Bluhm, while riding a motorcycle at right angles across the railroad tracks of the Southern Pacific Company at "Main Street railroad crossing," in the city of Woodland, was killed by coming into collision with a caboose which was being switched by the employees of the defendant railroad company. Main street runs east and west through the city of Woodland, and is crossed by three railroad tracks of the Southern Pacific Company; the most easterly being the passing track, the middle being the main line track and the third being the switch track. The main line track of the Southern Pacific, upon which the caboose, at the time of the collision, was being shoved in a northerly direction, runs straight north and south. The other two tracks converge slightly to the main line track in their course northerly across the street. The distance from the west rail of the passing track, at which point Bluhm was first seen by the trainmen, to the point of collision on the main line track was shown by actual measurement to be 13.8 feet. The width between the rails of the tracks was 5.1 feet. At the time of the accident the view of a person approaching from the east would be obscured by several box cars left by the defendant railroad company on the passing track, which projected into the street far enough to conceal from sight the switching of the caboose.

While the switching was in progress the deceased approached the crossing from the east on his motorcycle without making any effort to ascertain if there was danger at the crossing from moving trains. He approached the crossing at a speed of about six or eight miles an hour, and while so doing a stationary electric bell was ringing, as was the bell on the engine. The engineer had just previously given two sharp whistle blasts. A friend of the deceased, following in a horse-drawn vehicle about 40 or 50 feet behind the deceased, and who had heard the warning bells and observed the smoke from

the engine, shouted to the deceased: "Look out Fred, you are liable to get killed." As the deceased continued to approach the crossing two other persons standing near the main line track were wildly gesticulating at him. The actions of these men attracted the attention of one of the brakemen, who was standing on the right-hand steps of the caboose. Sensing the fact that something was wrong, but not knowing why the men were waiving their arms, the brakeman looked both ways and then for the first time saw the deceased. At the time when he was first seen by the brakeman the deceased was on the passing track, shown to be 13.8 feet distant from the main line track, moving in a direction which, if continued in, would carry him onto the main line track and across the path of the oncoming train. There was evidence to the effect that the northerly end of the caboose, at that time, was only 10 feet from the point of the subsequent collision and moving at a rate of speed approximating 10 miles an hour. Upon seeing the deceased on the passing track the brakeman waved and shouted a warning at the deceased, and then gave the signal for the emergency brakes, which were instantly applied, not because of the signal, but because the engineer, simultaneously with the brakeman, saw the approach of the deceased. The deceased, despite the warning of shouts and bell, continued on his course onto the main line track immediately in front of the train. At that point the brakeman first observed that the deceased seemed confused and "looked as if he wanted to try and save himself." The deceased was then on the easterly rail of the main line track and about two feet in front of the oncoming train. At this point the deceased, so the engineer and brakeman testified, threw up his hands and either jumped or fell backward from his motorcycle. It is an undisputed fact in the case that the motorcycle, after the deceased left it, continued upright and uninjured on its course across the main line track for a short distance and finally fell for lack of balance and momentum, with its motor still running, about two or three feet from the west rail of the main line track. However, upon this particular phase of the case there is direct evidence that the deceased was knocked from his motorcycle by the impact of the train, and this evidence must, for the purpose of testing the correctness of the ruling granting the motion for a nonsuit, be taken as true.

There is evidence tending to show that it would have been impossible to have stopped the train, traveling at the speed of 10 miles per hour, within a distance of 10 feet. It is insisted, however, that there is other evidence in the plaintiffs' case to the effect that the train was traveling at the rate of from four to eight miles per hour when deceased was first seen on the passing track, and that deceased was then 20 or 25 feet from the main line track, and that the end of the caboose at that time was 30 or 40 feet from the point of subsequent collision. This latter view of the evidence is found upon the testimony of the engineer and brakeman, given at the former trial and embodied in their depositions taken after the accident. The testimony of these witnesses came into the case on the second trial primarily for the purpose of refreshing the memory of the witnesses, and their depositions were offered and received in evidence upon the second trial as original evidence. It was explained, however, by the engineer and brakeman upon the second trial, that the differences in their testimony relative to the speed of the train, the distance at which they first saw the deceased, and the distance at that time of the caboose from the actual point of collision resulted from the fact that their previous testimony was based only upon estimates which must give way in the face of the fact established by actual measurement that the distance from the passing track to the main line track was but 13.8 feet.

It is contended in support of the appeal that the physical facts of the case showing the distance of the train from the deceased at the time the deceased was first sighted at the passing track, the speed of the train, and the speed of the motorcycle would have warranted the inference and would have supported a finding by the jury that the engineer did not immediately nor at all apply the emergency brakes upon first sighting the deceased on the passing track; that respondents were under a duty to so apply the brakes; and that a failure to do so when the deceased was first seen on the passing track made the defendant liable, notwithstanding the contributory negligence of the deceased and that therefore the case should have gone to the jury upon the question of fact as to whether the defendants failed to make immediate and effective application of the emergency brakes, and thereby lost the last clear chance to avoid the accident.

Assuming without deciding that the testimony of the engineer and brakeman, relative to distances and speed as given at the first trial and as embodied in their depositions, was substantive evidence which tended to create a conflict in the evidence of the plaintiffs' case as to whether or not the emergency brakes were applied immediately upon the deceased being sighted by the brakeman and engineer, and taking such conflict in the evidence in the light most favorable to the plaintiffs' case, still we must hold with the trial court that, as a matter of law, the doctrine of last clear chance had no application to the facts of the plaintiffs' case.

The primary negligence of the defendants

having been offset, as a matter of law, by the undisputed showing of the contributory negligence of the deceased, the burden was then upon the plaintiff, in order to avoid the nonsuit, to show that, by the exercise of ordinary care, the defendants, notwithstanding the contributory negligence of the deceased, could have avoided the accident.

[2] Assuming, as we have hereinbefore indicated, for the purpose of discussion and decision, that there was sufficient affirmative evidence in support of plaintiffs' case to the effect that the emergency brakes were not applied in time or at all, the question to be decided is whether or not it was the imperative legal duty of the defendants to apply the brakes immediately upon seeing the deceased on the passing track. The only evidence appearing in support of this phase of plaintiffs' case upon which the claim can be made and based that the deceased was in a position of peril when first sighted upon the passing track, is the testimony of the brakeman to the effect that, upon first seeing the deceased, he gave the signal for the emergency brakes which "means immediate danger." It is argued in effect from this that the trainmen were aware that the deceased was in danger of collision even before he came upon the main line track and that therefore it was the duty of defendants at the very instant that they became aware of the danger of collision to apply the emergency brakes. This contention cannot be maintained. To do so we would be compelled to hold that the doctrine of last clear chance came into play before the deceased was in a position of peril from which he could not have extricated himself by the exercise of ordinary care.

[3, 4] The law presumes that a person possessing normal faculties of sight and hearing must have seen and heard that which was within the range of his sight and hearing. Absent-mindedness or forgetfulness will not suffice as an excuse for the neglect of a person about to cross a railroad track to look and listen for a possible approaching train. And a person who attempts, regardless of warnings, to cross in front of a moving train, even though he be apparently in a condition of mental abstraction and consequently indifferent to the peril of his situation, is nevertheless negligent. Chicago, etc., R. R. Co. v. Hedges, 118 Ind. 5, 20 N. E. 530; Lake Shore, etc., R. R. Co. v. Pinchin, 112 Ind. 592, 13 N. E. 677; Cones v. Cincinnati, etc., R. R. Co., 114 Ind. 328, 16 N. E. 638; Lake Shore, etc., R. R. Co. v. Miller, 25 Mich. 274; Baltimore, etc., R. R. Co. v. Whitacre, 35 Ohio St. 627; Bruker v. Covington, 69 Ind. 33, 35 Am. Rep. 202; Rogstad v. St. Paul, etc., R. R. Co., 31 Minn. 208, 17 N. W. 287; Woodard v. New York, etc., R. R. Co., 106 N. Y. 369, 13 N. E. 424.

So, therefore, the plaintiffs' case cannot prevail unless it can be said that viewing the established facts in the light most favorable to plaintiffs, the case falls within the exception to the general rule which permits the defense of contributory negligence to be interposed to an action for damages resulting from the primary negligence of the defendant. This exception to the general rule is enunciated in the doctrine of last clear chance which, as crystallized into a settled rule of law, has for its basic principle the humane proposition that even though a person by his own negligence has placed himself in a position of peril, nevertheless, an injury to him inflicted in that situation by a person knowing such peril will, strictly speaking, be considered as willfully and wantonly inflicted if it can be shown that the injury could have been thereafter avoided by the exercise of reasonable and ordinary care on the part of the party inflicting the injury, and if it could not have been avoided by the exercise of ordinary care on the part of the injured party.

[5, 6] More shortly stated, it is the exception to the general rule, relating to the defense of contributory negligence, that a showing of a failure to fulfill the duty of exercising reasonable and ordinary care to avoid injuring a person who is known to be in a situation of peril from which he cannot extricate himself by the exercise of ordinary care will render a defendant liable in damages for the resulting injury despite the previous negligence of the person injured. This exception to the general rule, however, has no application to a situation where, by their mutual carelessness, an injury ensues to one of two parties, both of whom are contemporaneously and actively in fault down to the very moment of injury. Rowe v. Southern California Ry. Co., 4 Cal. App. 1, 87 Pac. 220; Denver City Tramway Co. v. Cobb, 164 Fed. 41, 90 C. C. A. 459; Holmes v. S. P. Coast Co., 97 Cal. 161, 31 Pac. 834. In other words, the doctrine of last clear chance excludes from the operation of its underlying principle every case wherein it may be said that the negligence of the injured party was contemporaneous, concurrent, continuing, and contributory with the negligence of the party inflicting the injury. Gilbert v. Erie R. Co., 97 Fed. 747, 752, 38 C. C. A. 408; Louisville, etc., R. R. Co. v. Young, 153 Ala. 232, 45 South. 238, 16 L. R. A. (N. S.) 301; Green v. Los Angeles Terminal Ry. Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68; Tobin v. Omnibus Cable Co., 4 Cal. Unrep. 214, 34 Pac. 124.

[7] Obviously, if both parties to an accident could, by the exercise of ordinary care, have avoided it, neither can be said to have had the last clear chance. It is only when a defendant charged with the negligent infliction of the injury, knowing plaintiff's peril, could and the injured plaintiff could not have avoided the injury that the defendant is liable. The liability is placed upon the

party inflicting the injury only if immediately before the actual infliction of the injury the injured person was in such a situation as to be unable, by the exercise on his part of reasonable and ordinary care, to extricate himself, and vigilance on his part would not have averted the injury. French v. Grand Trunk Ry., 76 Vt. 441, 58 Atl. 722; Young v. Southern Pacific, supra.

[8, 9] No evidence was offered in this behalf by plaintiffs, and the burden was upon them to show that deceased had reached a point from which he could not escape by the exercise of ordinary care, either by stopping his motorcycle or by retarding or accelerating its speed. Young v. Southern Pacific, supra. Indeed, the evidence leads to the conclusion that deceased, had he exercised ordinary care, could, when first sighted, have avoided the accident as easily as could the defendants. Deceased, when first sighted, was approaching the main line track upon a motorcycle the speed of which, nothing to the contrary appearing, could have been readily retarded, accelerated, or altogether stopped. It is a fair inference, and indeed the only inference from the evidence, that the slightest acceleration of speed of the motorcycle would have carried the deceased across the main line track free from the impact of the approaching train. True, a retardation of the speed of the train, at the time the deceased was first sighted, might also have permitted the deceased to have passed safely in front of the train. It is certain, however, that an acceleration or retardation by the deceased of the speed of the motorcycle would have avoided the collision. This conclusion is warranted and fortified by the fact that the motorcycle, after the deceased left it, proceeded upright under its own power, free and clear of the impact of the train. And it must be conceded that an endeavor by the deceased to accelerate or retard the speed of the motorcycle would have been less difficult and more certain of success than an endeavor by the trainmen to retard or stop the speed of the train. And this is so, whether the point at which the deceased was first sighted be 13.8 feet or 25 feet from the main line track. Indeed, if the latter point be the true one, as contended by the plaintiffs, then there is even less room for the application of the doctrine, since the greater distance afforded the deceased increased opportunity to stop his motorcycle short of the point of collision.

The testimony of the brakeman to the effect that he signaled for the emergency brakes when he first saw deceased on the passing track and the giving of the signal for the emergency brakes meant "immediate danger" will not of itself suffice to show that the deceased at that time had placed himself in a position of danger from which he could not have extricated himself. That is to say, while the testimony last referred to may have shown that the deceased, when first sighted, was approaching a position of danger, still it does not show that at that time he was in a position of inescapable danger. And until he was in a position of inescapable danger the trainmen were not obligated to apply the emergency brakes, and therefore their application would have been the exercise of greater care than that called for by the law, for under the law they were required to exercise only ordinary care. With the warning bells ringing and men gesticulating at him, it was a fair inference that the deceased was aware or would become aware of the danger in time to save himself, and therefore the trainmen were justified in believing that the deceased would slow down, stop, or turn aside in time to avoid the collision. Young v. Southern Pacific, supra; Basham v. Southern Pacific, 176 Cal. 320, 168 Pac. 359; Green v. Los Angeles Terminal Ry., 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68; Wallis v. Southern Pacific Co., 184 Cal. 662, 195 Pac. 408, 15 A. L. R. 117. Of course, every person approaching a crossing at a speed which would bring him in collision with a moving train at the crossing is in danger and certain to be injured unless he accelerates his speed, slows down, or stops, or the engine does so. Therefore, in order to establish the fact that the deceased, when first sighted on the passing track, was in a position of inescapable danger, it was necessary, as a part of plaintiffs' case, to show that the deceased could not have avoided the collision by altering the direction of his motorcycle, accelerating or retarding its speed, or that he could not have saved himself by jumping from it at some point before reaching the main line track.

There is nothing inconsistent with this view in the case of Basham v. Southern Pacific Co., 176 Cal. 320, 168 Pac. 359. A careful consideration of that case will show that it is very similar to the instant case in its statement of facts and the principle of law enunciated therein. The effect of a decision may not be extended by a reference to a single phrase but must be determined by a consideration in its entirety of the opinion in the case. When read and considered in its entirety, the case last above referred to did no more than reiterate the rule in vogue in this state that the doctrine of last clear chance cannot be invoked and applied where both parties are continuously, contemporaneously, and actively in fault. The phrase "or was immediately about to enter the danger zone" found at page 327 of the opinion in that case was employed in a general discussion of the doctrine of last clear chance and must be taken as having reference to a position of danger where the person approaching is already in such close proximity to the danger point as to warrant the belief that he could not by any efforts of his own have avoided the impending danger.

The only point at which, in any view of the evidence, it can be said that deceased was in a position where he could not have avoided the accident, save by accelerating the speed of his motorcycle, is to be found within that space comprising the distance between the rails of the main line track plus the distance in which the motorcycle, considering the speed at which it was traveling, could not be stopped. And the deceased having arrived at that point without any prior endeavor on his part to avoid the train, it was then obviously too late for the defendants, save by the exercise of the most extraordinary efforts, to have prevented the accident.

The plaintiffs, having failed to show in evidence that the deceased could not have altered the direction, stopped, retarded, or accelerated the speed of his motorcycle after the train crew first saw him on the passing track, and thereby, of his own endeavor, have avoided the accident, it must be held that the negligence of the deceased was contemporaneous, concurrent, and continuing down to the very moment of the collision. This being so, the plaintiffs failed to support the burden of proof put upon them by the law to show, as part of their case in chief, that the defendant had the last clear chance to avoid the accident. This, in effect, was the ruling of this court upon the first appeal of the instant case, upon practically the same facts presented upon the present appeal, and therefore the ruling in the first instance constitutes the controlling law of the case. The trial court, therefore, was justified, as a matter of law, in granting the motion of nonsuit.

The judgment appealed from is affirmed.

We concur: SHAW, C. J.; WILBUR, J.; WASTE, J.; SLOANE, J.; RICHARDS, Justice pro tem.

LAWLOR, J. I dissent. Upon the former appeal I joined in the dissent on the ground that while the instructions on contributory negligence were erroneous, under the evidence the verdict might well have been based upon the doctrine of the last clear chance. To this conclusion I still adhere. I have not been able to convince myself that the former decision is susceptible of the interpretation put upon it by the majority opinion that it held, so as to become the law of the case, that the evidence was insufficient as matter of law to justify a verdict for the plaintiff under the doctrine of the last clear chance, although the law which would govern that issue on a retrial was declared. As I have this view, and as the evidence on the retrial is of the same general import as that on the first trial, I think it was sufficient to have gone to the jury.

190 Cal. 13

## McCULLAGH et al. v. RAILROAD COMMISSION OF CALIFORNIA et al.

(S. F. 10117.)

(Supreme Court of California. Oct. 26, 1922.)

**1. Waters and water courses ⟸257(1)—Water company held not "public utility" within rate-fixing jurisdiction of Railroad Commission.**

Where owner of large tract of land acquired the right to use the water of certain river, and thereafter conveyed such right to newly organized corporation, all the stock of which was owned by the landowner, and where the land was sold in smaller tracts to purchasers to whom the water company agreed, in connection with the sale of the land, to furnish certain amounts of water, which water rights were to be appurtenant to the land, and for which the purchaser agreed to pay annual rate, the water company was not a public utility, within the rate-fixing jurisdiction of the Railroad Commission.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Public Utility.]

**2. Corporations ⟸3—Corporation not a public utility merely because articles empowered it to exercise power of eminent domain.**

The mere fact that the articles of incorporation empowered the corporation to exercise the power of eminent domain did not make the corporation a public utility, where the power so reserved was never exercised.

**3. Public service commissions ⟸19(1)—Determination of Railroad Commission as to character of utility not conclusive as to persons not parties.**

Determination of the Railroad Commission, holding that a water company was a public utility, was not res judicata on question of whether the company was a public utility, in subsequent proceeding to review order subsequently made by the commission by persons who were not parties to the prior proceeding, and were not affected by the determination made therein.

In Bank.

Application by A. McCullagh and others against the Railroad Commission of the State of California and the Coneland Water Company to review an order of the Commission declaring the Water Company to be a public utility and fixing rates. Order annulled.

Fred C. Pugh, of Red Bluff, and F. S. Brittain, of San Francisco, for petitioners.

Hugh Gordon, Wm. W. Clary, Richard C. Harrison, and Devlin & Brookman, all of San Francisco, for respondents.

RICHARDS, Justice pro tem. This is a petition for a writ of review, wherein A. McCullagh and some 77 other persons are applicants for the writ, to be directed against the Railroad Commission of California and Coneland Water Company, a corporation, the respondents herein, and by which it is sought

to have a certain order and decision of the Railroad Commission declaring the said Coneland Water Company to have been and to be a public utility, and directing a certain increase in water rates, affecting injuriously the rights of the applicants herein, reviewed and annulled. As to the main facts of this case there is no material dispute, and these may be briefly summarized as follows:

The Los Molinos river rises in the Sierra Nevada Mountains and flows in a westerly and southwesterly direction through Tehama county to the Sacramento river. During a portion of its course it passes for several miles through the Rancho Rio de Los Molinos, a Mexican grant dating from the year 1844. A large part of this rancho came into the ownership of one J. S. Cone, who also acquired a considerable portion of another and adjoining Mexican grant known as the Rancho Rio de Los Berrendos, which properties were at the time of his death, which occurred prior to the year 1905, distributed to certain of his heirs. In the year 1905 one of these heirs, Mrs. Sherwood, conveyed certain portions of the land which she had thus acquired to a corporation known as the Los Molinos Land Company, which had been incorporated in that year for the purpose of receiving the title to said lands and of subdividing and selling the same. In the following year Mrs. Anna R. Cone, the widow of the decedent, J. S. Cone, also conveyed a portion of the lands of these two ranchos, which she had received from the estate of her deceased husband, to the Los Molinos Land Company; said corporation also acquiring additional lands from other sources, making a total acreage of 10,560.19 acres under its ownership during the latter year. In May, 1905, one Smith Crowder, then the vice president and manager of the Los Molinos Land Company, posted along the Los Molinos river notices of his intention to appropriate water from that stream to the extent of 10 inches thereof, measured under a 4-inch pressure, in which notices he stated the purposes for which he claimed said water to be for distribution for irrigation and domestic uses upon the lands owned or to be thereafter acquired by the Los Molinos Land Company lying south and west of the point of diversion. It seems evident that the posting of these notices, while done by and in the name of said Smith Crowder personally, were intended by him to be done for the benefit of and on behalf of the Los Molinos Land Company, since subsequently he transferred all of the rights which he had acquired by virtue of the posting of said notices to the latter corporation, which, during the year 1905 commenced installation of diversion works at the points indicated by said notices, and proceeded with the construction of irrigation canals and laterals during that and the succeeding year, for the distribution of the water thus appropriated over portions of the land it had undertaken to subdivide and sell, including the lands acquired from Mrs. Cone.

In the early part of the year 1907 the Los Molinos Land Company conveyed to a corporation known as the Sunset Syndicate 72 inches of said water in payment for rights of way for its canal. A little later in the year 1907 the Coneland Water Company, one of the respondents here, was incorporated. All of the water rights thus acquired and of the distributing system thus in course of construction were transferred by the Los Molinos Land Company to the Coneland Water Company. All of the original capital stock of the latter, amounting to $100,000 in par value, was subscribed for and issued to the Los Molinos Land Company, and said original capital stock has ever since been and now is owned by said latter corporation. The two corporations occupied the same offices and had practically the same officers; the land company paying the bills. Commencing in the year 1905, the Los Molinos Land Company had entered upon the subdivision and selling of its said lands in smaller tracts to individual purchasers, and continued such sales down to about the year 1912, when practically all of its said lands had been sold. It seems to be conceded that said lands without irrigation were worth from $10 to $30 an acre, according to location, but in connection with each of said sales the Los Molinos Land Company, prior to the formation of the Coneland Water Company, agreed with each of said purchasers that it would furnish each of their respective tracts of land with water for irrigation purposes to the extent of one-fifth of a miner's inch per acre, which said water rights were to be appurtenant to the land in each case, and for which the purchaser agreed to annually pay the sum of $2 per acre. After the formation of the Coneland Water Company the agreements of the Los Molinos Land Company with each of its said purchasers were changed, so as to provide that the Coneland Water Company would agree to furnish each of said tracts of land with water in the same amount and for the same terms. The agreement which the Coneland Water Company was thus to provide was to be executed by it of even date with the deed conveying each of said tracts to its purchaser. Said agreement was to be termed a water right agreement and it was to be therein stipulated that the water right thus created should become appurtenant to the land, and that such water right should only be transferable with and should run with said land. Each of said water right agreements were also to contain, and in each case did contain, a clause reciting that the water company had sold and transferred certain other and similar water rights to prior purchasers of said lands from the land company, and that it was understood and agreed

that the water right transferred by the instant agreement should be subsequent and subject to the existing vested rights created by such prior agreements. It also provided that the water company should have the right to sell to other persons under similar contracts amounts of water totaling 10,000 miners' inches, and that in the event the agreed quantity of water in the canals of the said water company, after supplying said prior contracts and rights to the use of said water, should fall short of 10,000 cubic inches under miners' measurement, then and in that event the water rights thereby transferred should entitle the holder thereof to a proportionate equal part of the available water.

The sales of land by the Los Molinos Land Company, with the accompanying water right agreement of the Coneland Water Company, continued thereafter and up to about the year 1912, when the Los Molinos Land Company had thus disposed of 10,145 acres of the entire tract theretofore owned by it and thus subdivided and sold. With the exception of two instances, neither the Los Molinos Land Company nor the Coneland Water Company ever undertook or agreed to sell, rent, supply, or deliver any of said water to other persons than the said individual purchasers of said lands. The first of said exceptions was the transfer of 72 inches of said water by the Los Molinos Land Company in the year 1907 to the Sunset Syndicate for certain rights of way for its canal. The second of said exceptions occurred in the year 1912, when the Coneland Water Company agreed to supply the Sunset Syndicate with 500 inches of water for use upon certain lands owned by said Syndicate and described in said agreement. The consideration for this latter agreement was the compromise and settlement of certain controversies and litigation which had arisen between the Sunset Syndicate, on the one hand, and the Los Molinos Land Company and the Coneland Water Company, on the other, involving certain rights of way for the canals and water ditches of the latter company over the lands which had been acquired by said Syndicate. The waters thus transferred were to be used upon said lands of the Sunset Syndicate for such purposes as it might desire, and entirely beyond the control of either the Los Molinos Land Company or the Coneland Water Company after its diversion to said lands. As a portion of the consideration for such water the Sunset Syndicate agreed to pay the Coneland Water Company the sum of $12,500.

In the year 1912, when the Railroad Commission had become invested with jurisdiction to regulate water corporations under and by virtue of the terms of the Public Utilities Act (St. Ex. Sess. 1911, p. 18), which went into effect on March 23d of that year, the Coneland Water Company began making reports to the Railroad Commission in compliance with the rules and regulations of the latter as to its method of transacting business, and later in the same year the said water company applied to the commission for authority to issue additional capital stock, which application was granted. It also regularly thereafter filed with the commission its annual report. In the year 1914 two corporations, known as the Los Molinos Citrus Farms Company and the Lyon Cattle Company, alleging themselves to be successors in interest of the Sunset Syndicate in said lands affected by the two agreements above referred to, transferring to the latter corporation 72 and 500 inches of water, filed a complaint before the Railroad Commission alleging that the Coneland Water Company was a public utility, the water rates and charges of which were within the control of the commission, and charging the said Coneland Water Company with unjust discrimination in the matter of its said rates, the contention of the complainants being that their predecessor, the Sunset Syndicate, had been charged the sum of $12,500 for the amount of water to be delivered to it under the terms of said two agreements, while the said water company was only charging its other customers their annual rate of $2 per acre, which was far less than the sum required to be paid by the terms of said agreement for the amount of water to be received by the Sunset Syndicate and its successors in interest.

The Coneland Water Company appeared in said proceeding with the contention that it was not a public utility, and hence was not subject to the jurisdiction of the Railroad Commission. It appeared that the sum of $12,500, which it was to receive from the Sunset Syndicate, was not in the nature of a water rate, but was a payment made or to be made by the latter to it in compliance and settlement of certain controversies over property rights, and that whatever rights the complainants had to receive water from its system of canals was derived solely from said contracts, and was not based upon any duty which the respondent as a public utility owed to the complainants. Upon the hearing the commission went quite fully into the history of the transactions of the Los Molinos Land Company and the Coneland Water Company in regard to sales of land and water rights, and as a conclusion therefrom held that the Coneland Water Company was a public utility, and that its water system was and is a public utility water system, and as such subject to the jurisdiction of the Railroad Commission. The Coneland Water Company apparently acquiesced in this decision and thereafter continued its operations in conformity with the rules and regulations of the commission applicable to public utili-

ties. It is to be observed, however, that none of the petitioners herein were parties to said proceeding before the Railroad Commission, nor as to their water rights or rates thereon affected thereby, nor were they or any of them parties to or concerned in the subsequent acts and conduct of the Coneland Water Company in conforming to the rulings of the Railroad Commission in said proceeding, nor in the subsequent acts and conduct of said water company in conducting its business in conformity with the rules and regulations of the commission, up to the time at least when, in March, 1921, the proceedings were instituted by the Coneland Water Company before the Railroad Commission out of which the present controversy arose.

On March 21, 1921, the Coneland Water Company filed with the Railroad Commission its application for an order of said commission fixing just, reasonable, and nondiscriminatory rates for water, in which it set forth that it was a public utility corporation, and as such was the owner of a certain system of canals and ditches in Tehama county, California, and was and is engaged as a public utility in the sale, distribution, and delivery of water through said system for purposes of irrigation to owners of certain lands therein described, describing the lands owned in severalty by the petitioners herein, and naming these petitioners as their customers in the sale, distribution and use of said water. It then set forth the annual rate of $2 per acre of their respective holdings paid by each of its said customers and proceeded to allege that said rates were unduly low and unjustly discriminatory, and were unreasonable and noncompensatory. It therefore prayed that the commission fix the rates to be charged by it for its water thus supplied to its customers at such rate as the commission should deem reasonable. The petitioners herein, having been served with process in said proceeding, appeared therein and set forth fully and in detail the history of their and each of their relations with the Los Molinos Land Company and the Coneland Water Company, and alleged that their and each of their rights to the use of the water of the Coneland Water Company upon their said lands had been created and secured to them by contracts which created vested rights in each of the holders of said contracts to the use of the stipulated amount of water annually upon their said land at the rates provided therein, and that said petitioner Coneland Water Company was not, and never had been, as to said respondents, a public utility corporation. Wherefore the respondents prayed that the Railroad Commission find as a fact that the said waters and water rights and irrigation system of the Coneland Water Company had never been dedicated to a public use, and that said corporation is and always has been a private water company, engaged in the sale and distribution of water and water rights to the lands of the respondents sold by the Los Molinos Land Company with such appurtenant water rights for private gain. Wherefore the respondents prayed for the dismissal of said petition.

Upon the hearing of the issues thus tendered before the commission, the facts hereinbefore recited were brought forth fully and in detail. On November 24, 1921, the commission rendered its decision, holding that the question of the jurisdiction of the Railroad Commission over the Coneland Water Company had been determined in the prior proceeding above referred to, wherein the said corporation had been held to be a public utility and that the commission had jurisdiction to fix or regulate its water rates to its said customers. The commission accordingly determined that the rates theretofore charged for water supplies to its customers by said water company were unjust and unreasonable, and proceeded to establish water rates to be charged its said customers, the petitioners herein, at $3.50 per year, payable in semiannual installments, making such rates effective on November 4, 1921. The petitioners herein filed an application for a rehearing in said proceeding, reiterating their former contention, which application for rehearing was by the commission denied on December 10, 1921. They thereupon united in instituting the present proceeding seeking an annulment of the above decision and order of the Railroad Commission, and setting forth in their said application herein the practically undisputed facts above recited.

[1] We are unable to perceive any material distinction between the facts of this case, as to the principles involved, and the question presented in the case of Allen v. Railroad Commission et al., 179 Cal. 68, 175 Pac. 466, 8 A. L. R. 249. In that case, as in this, the owner of a large tract of arid land had acquired similar rights to the use of the water of a nearby river, which it was proposed to bring, by means of canals, ditches, and laterals, to its said lands and to distribute the same thereon for purposes of irrigation in domestic uses. The lands, thus greatly increased in value by the proposed use of the said water thereon, were to be subdivided and sold in smaller tracts to individual purchasers under agreements, by the terms of which each purchaser was to receive, as a part and portion of his agreement to purchase the land, a perpetual water right to receive annually a specified amount of water upon his said land, for which he was to pay a definite annual sum per acre thereof. The form and method by which these transfers of the ownership of the land and its appurtenant water right were to be consummated were in practical effect identi-

cal in each case, since there was in each case a land company owning, subdividing, and selling the land, and a water company ostensibly owning, diverting, and distributing the water, and issuing the water rights agreement and certificates to the purchaser of each several tract of land in pursuance of the land company's contract with such purchaser that he should be entitled to receive the same; the land company and the water company in each case being organized, owned, controlled, and operated by the same individuals. In each of said cases the water right agreed to be conveyed to each purchaser of a portion of said land was expressly made appurtenant to the tract of land so purchased and ran with said land. In each case, after the land company had disposed of a large portion of its said lands, the individual purchasers and holders of these appurtenant water rights, the water company, finding its agreement to supply water to and upon the several portions of said larger tract held in these several ownerships, undertook to go before the Railroad Commission and have it declared that the said water company was a public utility, and as such subject to the jurisdiction of said commission for the purpose of having its water rates as fixed by its aforesaid agreements regulated and increased by the orders of said commission.

In certain of its aspects the instant case furnishes a stronger justification for the interference of this court with the orders of the Railroad Commission in the premises than was presented in the Allen Case, since in that case said acts and things had been done by the land company and the water company which may be said to have furnished some basis for the claim of the latter that it was from its inception a public utility; as, for example, the record in the Allen Case disclosed that upon the original survey and plat of the lands of the Hemet Land Company there was delineated and laid out a townsite, which was to be supplied as to the lots therein to be sold to later purchasers with water for public and domestic uses and which was supplied as the townsite developed into the town or city of Hemet. As to such portion of the water of the Lake Hemet Water Company as were devoted to such purposes, this court held that there had been a dedication thereof to public uses, and that as to such town or city said water company was a public utility. No such complication is presented in the instant case. The Coneland Water Company never, with the exception of the instances above noted, devoted its water to any other uses than the supply of its holders of contractual water rights; the exceptions being its two special agreements with the Sunset Syndicate for the supply of a definite quantity of water for the independent use of that corporation and its successors. Such an exceptional transaction cannot be taken to evidence the devotion of the whole or any portion of the water of the Coneland Water Company to general public uses.

[2] The respondents, however, contend that in certain of its aspects this case presents stronger reasons for upholding the orders of the Railroad Commission than were presented in the Allen Case. One of these consists in the fact that in the articles of incorporation of the Coneland Water Company it was provided that the corporation should have power to "acquire water and water rights by appropriation, purchase, condemnation, eminent domain, and all other lawful ways and means." It is argued that the power to acquire water by condemnation and eminent domain are essentially the powers of a quasi public corporation, and hence of a public utility, and that the assertion of this power in its articles of incorporation indicated the intent of said corporation from its inception to be a public utility. This court, however, has held in the case of Del Mar Water, Light & Power Co. v. Eshleman, 167 Cal. 666, 140 Pac. 591, 948, that "the mere chartered authority does not * * * mark the nature of the operating corporation." Mr. Justice Shaw, in his concurring opinion in that case, puts it aptly:

> "The fact that the articles of incorporation empower the company to engage in public service does not, of itself, constitute proof that it is engaged in such public service, or that it has dedicated such property as it may own to such public service. * * * The only effect of the adoption of such articles by a corporation is to give it the capacity to engage in such public service if it so desires. After having become incorporated in this manner, it has the power to engage in such service in the same sense that an individual has power to engage in such service. It may or may not do so, and until it does, it cannot be said to be subject to the jurisdiction of the Railroad Commission."

In the instant case there was no showing before the Railroad Commission that the Coneland Water Company had ever attempted to exercise the powers of eminent domain or had ever acquired any property whatever by condemnation. No significance is therefore to be given to its reservation in its articles of incorporation of powers which it has never in fact exercised.

[3] The respondents make the final contention that the Coneland Water Company has taken on the status of a public utility by virtue of the decision of the Railroad Commission holding it to be such in the proceedings instituted before the commission by the Los Molinos Citrus Farms Co. and others against the Coneland Water Company to have it so declared, which proceedings were reported in volume 8, Opinions and Orders of the Railroad Commission, at page 24, wherein the commission decided that the

said Coneland Water Company was a public utility. It is to be noted, however, that the petitioners herein were not parties to that proceeding, and were not in any way concerned in the issues there presented, nor in the conclusions arrived at by the commission in so far as the establishment of any water rates affecting the rights or rates of these petitioners are concerned. Such decision was therefore in no wise binding upon them; nor could the fact that the Coneland Water Company acquiesced in said decision and thereafter submitted itself to the rules, regulations, and jurisdiction of the Railroad Commission have any binding effect upon these petitioners or any of them. The first time that the contractual water rights of these petitioners and their annual water rates thereunder were called in question was in the proceeding before the commission to which they were made parties, and which are sought to be reviewed upon this writ. They then appeared therein and asserted, as for the first time they were required to do, the existence of contractual and vested rights to the amount of water and at the annual rate provided for in the several agreements which they had each received from the Los Molinos Land Company and the Coneland Water Company at the time of acquiring their several tracts of land. The Railroad Commission having upon the hearing in that proceeding ruled against these petitioners' contention and decided that said Coneland Water Company was a public utility and that as such the commission had jurisdiction to regulate and advance its water rates over those fixed as to these petitioners by said agreements, the petitioners have instituted these proceedings to review the decision of the commission in that regard.

We are entirely satisfied that this case comes fully within the principles declared in the case of Allen v. Railroad Commission, supra, and later affirmed and upheld in the case of Stratton v. Railroad Commission, 186 Cal. 119, 198 Pac. 1051. The cases of Traber v. Railroad Commission, 183 Cal. 304, 191 Pac. 366, and Butte County Water Users' Ass'n v. Railroad Commission, 185 Cal. 218, 196 Pac. 265, cited by the respondents herein, contain nothing out of harmony with the views expressed herein, since in each of those cases a state of facts was presented before the commission showing that as to the parties before it the water companies therein concerned had taken on the quality of public utilities through the dedication of their water systems and service to public uses. No such showing having been made before the commission in the instant case, the conclusion reached in the decision of that tribunal, in the absence of the requisite facts to sustain it, is the proper subject of review in the present proceedings.

The order of the Railroad Commission is annulled.

We concur: SHAW, C. J.; WASTE, J.; LENNON, J.; WILBUR, J.; LAWLOR, J.

---

190 Cal. 1

## MAR SHEE v. MARYLAND ASSUR. CORPORATION, BALTIMORE.

(S. F. 9778.)

(Supreme Court of California. Oct. 26, 1922. Rehearing Denied Nov. 25, 1922.)

**1. Coroners ⟹10—Purpose of inquest stated.**

Under Pen. Code, §§ 1510, 1520, and Pol. Code, §§ 4143, 4148, the primary purpose of a coroner's inquest is to provide a means for the prompt securing of information for the use of those charged with the detection and prosecution of crime.

**2. Coroners ⟹22—Verdict on coroner's inquest not admissible.**

While a coroner's inquest may partake somewhat of a judicial character, it does not do so to an extent which confers upon the verdict any inherent evidentiary value so as to render it admissible in evidence as against either party to an adversary civil action.

**3. Evidence ⟹219(1)—Claimant by furnishing copy of coroner's verdict, as required by policy, does not adopt its recitals or declarations.**

Where a life insurance policy requires the furnishing of a copy of the coroner's verdict with the proofs of death, the claimant by mere compliance with such requirement does not adopt as his own the recitals or declarations contained in the verdict so as to render it evidence against him.

**4. Evidence ⟹89—When fact proved so as to deprive presumption of evidentiary force.**

Under the rule that as against a proved or admitted fact a disputable presumption has no weight, and under Code Civ. Proc. §§ 1957, 1963, and 2061, subd. 2, that a fact is proved as against a party when established by the uncontradicted testimony of the party himself or his witnesses under circumstances which afford no indication that the testimony is the product of mistake or inadvertence, when a fact so proved is wholly irreconcilable with the presumption sought to be invoked, the presumption is dispelled and disappears from the case.

**5. Insurance ⟹646(6) — Presumption that shooting of insured was not criminal or wrongful held overcome by circumstances.**

In action on life insurance policy which excluded liability for death resulting from murder, the presumption under Code Civ. Proc. § 1963, subd. 1, that the shooting of insured was not criminal or wrongful, and hence must have been accidental, was overcome, and would not support a verdict, where it appeared from plaintiff's own evidence that insured was shot twice in the back, and that no person was in sight when witnesses arrived at the scene of the killing; it being inconceivable how he could have

been so shot unless the person doing the shooting was aiming at him.

**6. Homicide ⇐22(1)—Shooting with intent to kill deceased or person for whom he was mistaken held murder in the first degree.**

If the person shooting another intended to shoot such person or some other person for whom he mistook his victim, the killing constituted murder in the first degree.

Lawlor, J., dissenting.
Shaw, C. J., dissenting in part.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Mar Shee, sometimes called Mah See, against the Maryland Assurance Corporation, Baltimore. From a judgment for plaintiff, defendant appeals. Reversed.

Rehearing denied; LAWLOR and SLOANE, JJ., dissenting. WASTE, J., absent.

John Ralph Wilson, C. B. Morris, and Fred L. Berry, all of San Francisco, for appellant.

Harding & Monroe and Robert H. Borland, all of San Francisco, for respondent.

MYERS, Justice pro tem. Plaintiff brought this action as the beneficiary under an accident insurance policy issued to Fong Wing, which insured him against "loss resulting from bodily injuries, including death resulting therefrom, effected independently and exclusive of all other causes directly through accidental means." Upon this policy was indorsed a rider or proviso as follows:

"Nor shall the company be liable for any injury, fatal or otherwise, resulting directing or indirectly from murder, highbinder acts, or tong wars, anything else in the policy to the contrary notwithstanding."

The defendant denied that the death resulted through accidental means, and alleged affirmatively that the death of the insured resulted from "murder, highbinder acts, and tong wars." Plaintiff had judgment below, and the defendant appeals on the ground of insufficiency of the evidence to sustain the findings and of errors of law occurring at the trial.

The facts so far as established by the evidence are substantially as follows: On December 21, 1918, at about 8 o'clock in the evening, the insured, Fong Wing, left his store on Waverly place in the city of San Francisco, presumably for the purpose of going to a drug store on the corner of Clay street and Grant avenue. About 15 minutes thereafter four or five or six shots were heard in rapid succession; there being an appreciable interval between the first two and those which followed. A witness who was in front of his store on Waverly place, diagonally across from Fong Wing's store, ran out to the street immediately upon hearing the shots, and found Fong Wing lying upon the sidewalk mortally wounded. No other person was in sight upon the street at that time, nor was anyone heard running or walking away from that vicinity, nor was any smoke from the shots visible. It was after dark, and the street lights were burning, but it was "not very light" at that point. Fong Wing had been shot twice in the back with bullets of 38 caliber or larger, one of which entered between the shoulders, slightly to the left of the spine, and the other of which entered the posterior portion of his left side, just above the hip bone. Both bullets had ranged somewhat downward in their course through his body, and either one was sufficient to cause death. He died about three hours thereafter.

It also appeared in evidence that the insured was a director of the China Mail Steamship Company, a corporation which had about 9,000 Chinese stockholders; that this corporation had expended more than $3,000,000 in a manner which met with intense dissatisfaction on the part of some of its stockholders, and that various threats had been made against its officers, both orally and by means of anonymous letters. The precise nature of the threats does not appear. Some of them could be construed as threats of personal violence towards some officials of the steamship company, and others of them appear to have been merely attempts to extort bribes or hush money upon the threat to hold up a pending bond issue of the corporation by means of legal proceedings. It does not, however, appear that any threat of any character was directed at Fong Wing personally. It further appears that about six months prior to the shooting a number of officers and stockholders of the corporation, among whom was Fong Wing, had applied to the chief of police, telling him of threats which had been made against them, and asking for police protection.

In support of its contention that the evidence is insufficient to support the findings, the defendant makes two points: The first is that under the circumstances of this case the plaintiff is precluded from recovery by the verdict of the coroner's jury, a certified copy of which was received in evidence. The terms of the policy required the claimant thereunder to attach to and include with her proofs of death a certified copy of the verdict of the coroner's jury, which was done. This verdict found "that said deceased was murdered by parties unknown to the jury." Defendant contends that the verdict of a coroner's jury is competent evidence because found and rendered in the course of an official procceding of a judicial character, and relies upon People v. Devine, 44 Cal. 452,

458, as so holding. The sole question there before this court was as to the admissibility of the deposition of a witness at the coroner's inquest for the purpose of impeaching that witness by showing that her testimony given at the trial was contradicted by her testimony given at the inquest. The conclusion there reached as to the judicial character of the proceedings was based upon the uniform holdings of the English courts to that effect, under the common law and the statute of 4 Edward I, but in so concluding this court overlooked a fundamental difference between coroners' inquests under the English law and the proceedings called by the same name under the law of this state. Under the English law, one important purpose of the coroner's inquest was to ascertain and determine whether or not the circumstances were such as would result in an escheat to the crown of the real property of the deceased, and to make an official record of such determination. 1 Jones' Blackstone, § 478.

[1, 2] In this state substantially all the rules of law governing the conduct of inquests are to be found in the Penal Code (sections 1510, 1520), the provisions in the Political Code (sections 4143, 4148) having to do mainly with the subject of fees and expenses and the preservation of vital statistics. It appears from a consideration of all of these provisions that the primary purpose of such inquest under our laws is to provide a means for the prompt securing of information for the use of those who are charged with the detection and prosecution of crime. We conclude therefore that, while in England a coroner's inquest may be fairly said to be in the nature of a judicial proceeding in rem, no such dignity or weight attaches to such an inquest in this state; that while such proceedings in this state may partake somewhat of a judicial character, they do not do so to an extent which confers upon the verdict of such a jury any inherent evidentiary value so as to render it admissible in evidence as against either party to an adversary civil action.

[3] It is urged by counsel for appellant that if the coroner's verdict was not *inherently* competent it was rendered competent as against the plaintiff by the fact that she delivered a certified copy of it to the defendant as a part of her proofs of death; that by so doing she must be held to have adopted it as her own declaration; and it is accordingly admissible in evidence as against her, as her own admission against interest. This, notwithstanding the fact that she was *required* by the terms of the policy to furnish a copy of the coroner's verdict as a part of the proofs of death. In support thereof they cite the decision of this court in Walther v. Mutual Life Ins. Co. of New York, 65 Cal. 417, 4 Pac. 413, which appears to fully support their contention. That was an action upon an insurance policy which excluded "self-destruction in any form" as a ground of liability. The defense was suicide. Upon the trial the plaintiff offered, for the sole purpose of proving compliance with the terms of the policy, the proofs of death, which included a copy of the coroner's verdict finding that the deceased committed suicide. This court held that when the papers were in evidence they were in for all purposes; that they were prima facie evidence of suicide, placing upon the plaintiff the burden of overcoming the presumption thus raised; and that, inasmuch as she had offered no other evidence of the cause of death, she could not recover. It was asserted in the briefs, but not stated by the court, that plaintiff was required by the terms of the policy to furnish the copy of the verdict with her proofs of death. No reason was stated in the opinion for the conclusion thus reached, other than the citation of the case of Insurance Co. v. Newton, 22 Wall. (89 U. S.) 32, 22 L. Ed. 793.

An examination of that case discloses that it falls far short of supporting the rule here contended for and apparently adopted in the Walther Case. That also was an action upon a policy defended on the ground of suicide. The proofs of death in that case included a number of affidavits together with a copy of the coroner's verdict; and the *affidavits*, as well as the verdict all showed death by suicide. The defendant offered them in evidence, and their exclusion by the trial court was held to be prejudicial error. The Supreme Court held that they "were admissible as representations on the part of" the plaintiff, saying:

> "They were intended for the action of the company, and upon their truth the company had a right to rely. Unless corrected for mistake, the insured was bound by them. Good faith and fair dealing required that she should be held to *representations deliberately made.*" (Italics ours.)

It is apparent that the court in using this language had in mind the *affidavits*, the procurement of which by the plaintiff rested largely in her discretion, and the submission of which to the company was, in large measure at least, her *voluntary act.* The quoted language is entirely inapt to describe the coroner's verdict, in the framing of which the plaintiff could have no voice and in the submission of which to the company she could have no choice. We are confirmed in this conclusion by the following language of the Supreme Court of Massachusetts, quoted with approval in the opinion in the Newton Case:

> "The effect of such disclosure [of purported facts in the proofs of death] to defeat the action must depend upon the *degree to which the plaintiff is bound by the statement. If not*

*sworn to by the plaintiff, nor treated by him in such manner that he is concluded by his conduct,* the whole question will be open to explanation and proof." (Italics ours.)

We conclude therefore that where, as here, the policy requires the furnishing of a copy of the coroner's verdict with the proofs of death, the claimant is not to be held, by the mere compliance with such requirement, to have adopted as his own the recitals or declarations contained in such verdict. If the Walther Case, supra, is to be construed as in conflict with this conclusion, it is to that extent disapproved and overruled. We do not intend to intimate that there may not be circumstances under which the claimant under such a policy should be held to have adopted as his own the declarations or recitals in such a verdict and to have thus rendered them competent evidence against him. But no such circumstances have here been made to appear.

There was direct evidence to the effect that Fong Wing was not at any time connected with any highbinder tong, and that there was no tong war at that time which affected the tong or family of which he was a member, so that appellant's claim in this connection narrows down to the contention that the evidence shows without conflict that he was murdered. Appellant concedes that under the circumstances here shown the plaintiff was entitled, in the first instance, to the benefit of the presumption of law that the shooting was accidental, rather than criminal. But it claims that where, as here, *the facts are proved to the contrary,* the presumption is dispelled, the conflict vanishes, and nothing remains to support the finding of the court.

[4] There seems to be some confusion in the decisions of this state with respect to the extent to which under various circumstances presumptions of law are to be regarded as evidence of facts. The Code expressly declares them to be evidence (Code Civ. Proc. §§ 1957, 1963), and admonishes the trial judge to instruct the jury on all proper occasions "that they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a * * * presumption." Code Civ. Proc. § 2061, subd. 2.

Among the decisions of this court recognizing and applying the foregoing rule may be mentioned the following: Sarraille v. Calmon, 142 Cal. 651, 76 Pac. 497; Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712; Moore v. Gould, 151 Cal. 723, 91 Pac. 616; People v. Siemsen, 153 Cal. 387, 390, 95 Pac. 863; Freese v. Hibernia Sav., etc., Soc., 139 Cal. 392, 73 Pac. 172; Gilmour v. North Pasadena Land, etc., Co., 178 Cal. 6, 171 Pac. 1066.

On the other hand is the line of cases illustrated by the case of Savings & Loan Socy. v. Burnett, 106 Cal. 514, 529, 39 Pac. 922, 925, relied on by appellant, wherein it is said:

"Disputable inferences or presumptions, while evidence, are evidence the weakest and least satisfactory. They are allowed to stand, not against the facts they represent, but in lieu of proof of them. The fact being proven contrary to the presumption, no conflict arises; the presumption is simply overcome and dispelled."

Among the cases which appear to follow and apply this rule are the following: Savings & Loan Socy. v. Burnett, 106 Cal. 514, 529, 39 Pac. 922; Larrabee v. Western Pac. Ry. Co., 173 Cal. 743, 747, 161 Pac. 750; Williams v. Hasshagen, 166 Cal. 386, 390, 137 Pac. 9; Freese v. Hibernia Sav., etc., Socy., 139 Cal. 392, 73 Pac. 172; King v. Hercules Powder Co., 39 Cal. App. 223, 178 Pac. 531; Brown v. Chevrolet Motor Co., 39 Cal. App. 738, 179 Pac. 697; Maupin v. Solomon, 41 Cal. App. 323, 183 Pac. 198.

There is a third group of cases which recognize the rule that, "as against a proved fact, or a fact admitted, a disputable presumption has no weight," but hold also that—

"Where * * * an endeavor is made to establish a fact contrary to the presumption, the fact in dispute still remains to be determined upon a consideration of all of the evidence including the presumption." Pabst v. Shearer, 172 Cal. 239, 242, 156 Pac. 466; Pacific Portland C. Co. v. Reinecke, 30 Cal. App. 501–507, 158 Pac. 1041; People v. Milner, 122 Cal. 171, 179, 54 Pac. 833.

In order then to resolve this apparent conflict it becomes important to determine what is "a proved fact," within the meaning of the rule. Looking to the nature of the evidence by which the fact was "proved," contrary to the presumption in the several cases so holding, we find that in both the Burnett Case and the Larrabee Case, supra, the fact was proved by the testimony of both the witnesses for the plaintiff and the witnesses for the defendant, without substantial conflict, and that the fact so proved was irreconcilable with the presumption. In the Williams and Freese Cases, supra, none of the testimony in support of the facts contrary to the presumption was given by witnesses of the party who relied upon the presumption, and the court in those cases, while recognizing the rule that as against a proved fact a presumption disappears, refused to apply it to that situation.

In the cases above cited from the District Court of Appeal, that court in each instance recognized and undertook to apply the rule, but did not in fact do so, as it was there dealing in each instance, not with a presumption of law, but with an inference of fact. That distinction was pointed out by this court in its order denying a hearing in the Maupin Case, supra.

In the case of Albert v. McKay & Co., 174 Cal. 451, 457, 163 Pac. 666, this court held, in effect, but without discussion, that a presumption cannot be deemed to give rise to a conflict of evidence, unless the presumption on the one hand is irreconcilable with the evidence on the other hand.

From the foregoing we deduce that a fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that, when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case.

[5,6] Considering the evidence herein in the light of this rule, it is apparent that the evidence which is claimed by appellant to prove that the insured was murdered in the carrying out of a conspiracy to blackmail the steamship company is of such a vague and insubstantial character that it goes no further than to arouse a suspicion or afford ground for conjecture or speculation. Furthermore, it was in no way binding upon the plaintiff. But the proof of the facts and circumstances immediately surrounding the shooting was furnished by plaintiff's own witnesses, was uncontradicted, and its truth is not questioned by either party. Are the facts thus proved irreconcilable with the presumption relied on by plaintiff? In this connection it should be noted that, strictly speaking, there is no presumption of law that the shooting was accidental. The presumption here involved is "that a person is innocent of crime or wrong." Code Civ. Proc. § 1963, subd. 1. As applied to the present situation, the presumption is that the shooting was not criminal or wrongful, from which the conclusion would follow that it must have been accidental. But we are unable to conceive of any set of circumstances under which the insured could have been shot *twice*, in the manner here shown, unless the person who did the shooting was aiming at him. We are thus led inevitably to the conclusion that the person who did the shooting intended to shoot either Fong Wing or some other person for whom he mistook Fong Wing. But the killing, in either of these events, constituted murder in the first degree. People v. Suesser, 142 Cal. 354, 366, 75 Pac. 1093.

The facts thus proved being wholly irreconcilable with the presumption of innocence, it is dispelled thereby, and no evidence remains to support the finding that the insured was not murdered. As the judgment must be reversed for this reason, it is unnecessary to here consider the claimed errors of law.

The judgment is reversed.

We concur: WASTE, J.; LENNON, J.; RICHARDS, Justice pro tem.

SHAW, C. J. I concur, but I do not agree that the fact of murder must be proved by "uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence." Such circumstances must be weighed by the court or jury, and the testimony need not be uncontradicted.

LAWLOR, J. I dissent. The majority opinion concedes the legal presumption that the killing was not criminal applies, but holds that the evidence offered on behalf of respondent that the decedent was twice shot in the back constituted a proved fact, within the meaning of the rule there laid down, which rebutted that presumption. It may be assumed on appeal that a fact is proved and such a presumption dispelled within the meaning of the rule when, for instance, a witness for the party claiming the presumption testified directly to the contrary, or when the uncontradicted testimony offered by such a party is irreconcilably opposed to the presumption. But such an assumption is not to be indulged if in determining whether a fact has been proved it is necessary to consider the probative force of the evidence. In every case the presumption and the other evidence must be considered together. In either of the above instances only one inference could be drawn from the evidence, and that would be in favor of the other party. Of course, where opposing inferences may be drawn, the one found by the trial court will not be disturbed on appeal.

The main opinion proceeds on the theory that, as matter of law, only one inference is deducible from the evidence offered by respondent, and that therefore the presumption has been overcome. In my opinion the evidence is susceptible of two inferences—either that the killing was not intentional or that it was murder.

The circumstances are these: Suddenly several shots were heard, and two bullets were found in different portions of decedent's back. Wong Ming Yin went immediately to the scene. He saw no other person in the vicinity. No smoke was visible, no weapons were found, and no one was heard running away. The only statement made by the wounded man was to give his name. It may be remarked that if we were considering whether the foregoing evidence established the corpus delicti it could hardly be claimed we would not be bound to uphold a finding either that the death was or was not caused by criminal means.

In appellant's third amended answer it is alleged that Fong Wing's death was direct-

ly caused by highbinder acts or by other unlawful acts and personal disputes and tong wars which resulted in his murder. The finding is a negation of this defense. Concerning the evidence admitted under the above allegations of the answer as tending to establish a motive for the killing, it may be pointed out that several settlements had been made by the officers of the steamship company, of whom the deceased was one, with the dissatisfied stockholders; that six months intervened between the request for police protection and the shooting; that deceased was not a member of a fighting tong. One Fong Fat testified as follows:

"Q. When you first heard the first shot, that is when the sound came to your ear, did you look out? A. I looked out as much as I could, but I don't care to go out. Q. Why didn't you care to go out? A. There was more or less trouble going on you know. Q. In Chinatown? A. Among the tongs. The chances if I would go out I might get in the way, there is so much flying bullets anyways, and one is liable to catch it, so I did not care to go out."

Man Quong Fong, general manager of the steamship company, testified that—

"After the death of Mr. Fong Wing we at that time, and even up to the present time, did not know the reason for his death."

There is no evidence that the deceased took an active part in the affairs of the steamship company which led to the trouble between the officers and the stockholders, although he joined in the request for police protection. It was testified that no weapons were taken from Fong Wing.

In weighing the probabilities of the evidence it is conceivable to me that the trial court could have concluded, as against the circumstance upon which the prevailing opinion relies—that two bullets were in Fong Wing's back—that it was more likely he came to his death as a result of a shooting affray between other Chinese than that he was the object of assassination. Upon the face of the evidence one theory would be no more speculative than the other. The fact that Fong Wing was unarmed and that there was an interval after the second shot, might have indicated to the trial court that the shooting was between other persons. Under either theory those responsible for the shooting would naturally disappear and take their weapons with them.

Evidence of the presence or absence of motive is always admissible in such cases, and often is of a most persuasive character. It must be presumed from the record in this case and in favor of the finding that the court decided there was no motive for the killing. It may also have reasoned that if the shooting was intentional Fong Wing would have said more to his fellow countryman than to merely mention his name, and that more than two of the bullets would have found lodgment in his body.

In the summary of the evidence I have not attempted to determine its probative value, but have only considered the effect which the court below might have given to it. I cannot avoid the conclusion that the evidence would support either theory, and that for this court to hold it could not have the effect stated in the findings is to invade the province of the trial court. It seems plain to me beyond controversy that in arriving at the conclusion that only one inference could be drawn from the evidence the majority opinion must of necessity have passed on its probative effect, for there is no presumption or other rule of law that the presence of two bullets in a person's back is sufficient proof of murder. I do not think it can be held on appeal that this circumstance avails as matter of law against all the other facts and circumstances which the trial court may have inferred from the evidence, for before it can be said that such a circumstance is irreconcilably opposed to the presumption its probative effect must be determined.

59 Cal. App. 158

## PEOPLE v. HERBERT. (Cr. 1061.)

(District Court of Appeal, First District, Division 1, California. Sept. 25, 1922.)

**1. Poisons ⟸9—Evidence held to connect defendant with possession of narcotics.**

In a prosecution under Poison Act, § 8, for possession of a preparation of morphine, evidence that at the time defendant was arrested he threw something away, that with the aid of a flash light the arresting officers found several packages a few feet away, which defendant admitted contained morphine and cocaine, was sufficient to show possession of the drugs in defendant.

**2. Poisons ⟸9—Instruction as to possession of narcotics held not erroneous.**

In a prosecution under Poison Act, § 8, for possession of a preparation of morphine, an instruction that the burden of proving possession of the narcotics rested on the prosecution, and such possession must have been immediate and exclusive possession, and one under the dominion and control of defendant, correctly stated the law.

**3. Criminal law ⟸730(12)—Remarks of counsel held not prejudicial.**

In a prosecution under Poison Act, § 8, for possession of morphine, remarks by the district attorney in closing argument, suggesting to the jury that defendant appeared to be and was a drug addict was not prejudicial where the court charged the jury to disregard the remarks.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Sidney Herbert was convicted of violating the Poison Act. From the judgment of conviction, and an order denying motion for new trial he appeals. Affirmed.

Reuben J. Liebman, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

TYLER, P. J. Defendant was accused of a violation of the State Poison Act (St. 1907, p. 124), was tried by a jury and found guilty, and this is an appeal from the judgment of conviction and the order denying defendant's motion for a new trial. The information charged the defendant with willfully and feloniously having in his possession a preparation of morphine, contrary to the provisions of section 8 of the act above referred to, and also with having been convicted of a prior offense under the same act.

It was proved at the trial that an inspector for the state board of pharmacy, whose duty it is to arrest violators of the State Poison Act, had received information to the effect that defendant was a narcotic peddler, and that he thereupon determined to intercept and arrest him for his unlawful practice. Accordingly he and his assistant procured a woman who was addicted to the use of narcotics to go to defendant and make a purchase of certain drugs. Defendant undertook to procure the same and accepted the purchase price therefor, and agreed to meet her at an appointed place to deliver the drugs to her. The inspector and his assistant repaired to the place designated. Defendant appeared and was immediately placed under arrest. The inspector, in taking hold of the arm of defendant, felt the latter make a motion as if throwing something away, and an object was heard to drop upon the street pavement. Upon investigation with the assistance of a flash light, several packages were found some 8 to 15 feet away from where the parties were standing. Defendant, upon being questioned as to what the packages contained, admitted that they were made up of morphine and cocaine. When asked to account for his presence in the vicinity, he stated that he was there for the purpose of returning to the drug addict the money he had received from her, as he had been unable to make the purchase of the narcotics she desired.

[1] As ground for reversal it is urged that the evidence is insufficient to show possession in defendant of the drugs in question, and that defendant's objection to the admission of the packages in evidence should have been sustained. We see no merit in this contention. Taking all the facts into consideration, together with the admission by defendant as

to the contents of the packages, they certainly constituted sufficient evidence to connect defendant with possession of the narcotics. In this connection defendant also complains of the instructions of the trial court upon the question of possession. He contends that the rule is that the possession must be personal and not constructive.

[2] The court instructed the jury in effect that the burden of proving possession of the narcotics as alleged in the information rested upon the prosecution, and such possession must have been an immediate and exclusive possession and one under the dominion and control of defendant. The instructions given by the court fully and correctly stated the law upon the subject.

[3] Complaint is also made that the district attorney erred in his closing argument by suggesting to the jury that defendant appeared to be and was a drug addict. These remarks could in no manner have prejudiced the rights of the defendant, for the court guarded those rights by charging the jury that they should disregard the statement. Under such circumstances it is not to be presumed that the jury ignored the charge, nor that the defendant's substantial rights were injuriously affected. People v. Ward, 134 Cal. 301, 66 Pac. 372.

For the reasons given the judgment and order are affirmed.

We concur: KERIGAN, J.; ST. SURE, Justice pro tem.

---

59 Cal. App. 140

**LANE v. STARKEY et al. (Civ. 4288.)**

(District Court of Appeal, First District, Division 2, California. Sept. 21, 1922. Hearing Denied by Supreme Court Nov. 20, 1922.)

**1. Executors and administrators ⊂⊃29(5) — Letters of administration conclusive of qualification and regularity of proceedings when attacked collaterally.**

Letters of administration regular on their face can be attacked only in a direct proceeding, as they are conclusive as to due qualification and authority of the administrator to act and of the regularity of the proceedings leading up to their issuance in the case of collateral attack.

**2. Limitation of actions ⊂⊃174(2) — Minor heirs barred by failure of the administrator to sue for possession of property.**

Minor heirs are barred by the statute of limitations because of the failure of the administrator or executor to sue to recover possession of real property belonging to the estate within five years after the disseizin, notwithstanding Code Civ. Proc. § 1452, providing the heirs or devisees may themselves, or jointly with the executor or administrator, sue for the possession of real estate or for the purpose of quieting title to the same against any one except the executor or administrator, but that "this section shall not be so construed as requiring them so to do."

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action by George W. Lane against Mrs. G. T. Starkey and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Charles Kasch, of Ukiah, and R. D. McLaughlin and J. B. McLaughlin, both of Los Angeles, for appellants.

Thomas, Thomas & McCowen, of Ukiah, for respondent.

LANGDON, P. J. This is an appeal by the defendants from a judgment against them in an action to quiet title to real property in Mendocino county, Cal. The case was tried upon an agreed statement of facts, from which it appears that Charles H. Starkey, the former husband of defendant Mrs. G. T. Starkey, died in the county of Mendocino on September 6, 1904. He left an estate therein consisting of certain personal property, and there was also standing of record in his name at the time of his death certain real property being the same property described in the complaint herein, upon which he was living at the time of his death.

The said decedent left as his heirs at law Mrs. G. T. Starkey, his widow; Marshall Ney Starkey, one of the defendants herein, a minor son, who was at the time of the filing of the complaint herein of the age of 18 years and appeared by his guardian; Elizabeth Margaret Starkey, a minor daughter, who died in February, 1918, at the age of 18 years, and whose interest herein is represented by the administrator of her estate; and Hazel Gertrude Starkey, a minor daughter, who died in March, 1914, at the age of 12 years, and whose interest herein is also represented by the administrator of her estate.

On October 5, 1904, Mrs. Starkey filed her petition to be appointed administratrix of the estate of her deceased husband, and thereafter, on October 17, 1904, an order was duly made and entered that she be appointed administratrix of said estate, and that letters of administration issue to her upon her taking the oath and filing a bond according to law in the sum of $500. Thereafter, and on the 20th day of October, 1904, a bond was filed in the sum prescribed, signed by Mrs. Starkey and B. Edwards and A. H. Ewert. The said sureties failed to justify on said bond in the following particular: There does not appear on said bond the name of any notary or person authorized to administer oaths, nor the seal of such officer or person. It does not appear on said bond or in the records in said probate proceeding that said bond was ever approved by any judge or other person authorized to approve the same. On October 20, 1904, Mrs. Starkey

took the oath as administratrix, and letters of administration were issued to her by the clerk of the court. Appraisers of said estate were appointed according to law, and an inventory and appraisement returned and filed on October 24, 1904. The real property involved in the present action was not returned in the inventory as a part of said estate; the only property appearing in the inventory being personal property of the appraised value of $143.50. The inventory was not sworn to by the administratrix.

On October 24, 1904, Mrs. Starkey, as surviving widow, filed her petition, praying that all of the personal property of said estate be set aside to her for the use and benefit of herself and her minor children, and an order was made in accordance with said prayer. The said estate of Charles H. Starkey has never been closed.

Plaintiff has been in possession of the real property described in the complaint since on or about February 17, 1906, during which time he has paid all taxes or assessments levied or assessed against the property, and during which time the said realty has been inclosed by a substantial inclosure, and has been occupied by plaintiff, claiming to own it against all persons, and the possession of said plaintiff has been under a claim of right and ownership, and his possession and claim have been open and notorious.

Defendants made no claim to the said property prior to the commencement of this action, and Mrs. Starkey had no knowledge that the legal title to said property was in her husband at the time of his death until on or about January 1, 1921.

Two questions are argued by the parties to the appeal. One of the contentions of the appellants is that because of the defect in the bond filed by the administratrix, heretofore mentioned, and because of the defect in the inventory caused by the absence of the oath of the administratrix, the administratrix was not duly appointed pursuant to law, and, in the language of appellants, "any acts or failures to act on her part in the matter are void."

[1] The answer to this contention is that letters of administration regular on their face may be attacked only in a direct proceeding and not collaterally. They are conclusive evidence of the due qualification and authority to act of the administrator and of the regularity of the proceedings leading up to their issuance in a case of collateral attack. Dennis v. Bint, 122 Cal. 39, 42, 54 Pac. 378, 68 Am. St. Rep. 17; Baxter v. Boege, 173 Cal. 589, 595, 596, 160 Pac. 1072; Estate of Davis, 151 Cal. 318, 322, 323, 86 Pac. 183, 90 Pac. 711, 121 Am. St. Rep. 105; Bank of Commerce v. Humphrey, 41 Cal. App. 552, 554, 83 Pac. 222.

[2] The only other question in the case is whether the minor heirs are barred by the statute of limitations because of the failure of the administratrix to start action to recover the possession of the real property within five years after the disseizin.

The appellants rely upon the cases of Crosby v. Dowd, 61 Cal. 557, 587, and Winterburn v. Chambers, 91 Cal. 170, 27 Pac. 658. The former is a direct holding in accordance with appellants' views after a most elaborate consideration of the subject, and the latter contains a sentence which, while unnecessary to a decision of the case, is in harmony with the holding in the earlier case.

However, the Supreme Court of this state has recognized that there is some conflict in the decisions upon this question (Patchett v. Pacific Coast Ry. Co., 100 Cal., at page 509, 35 Pac. 73), and after expressly taking account of the divergence among the cases, has held, in Patchett v. Pacific Coast Ry. Co., supra, that when the right of action vests in an executor, guardian, or trustee who is under no legal disability, the statute will commence to run despite the disability of the minor, and if the right is lost by the neglect of the representative to sue, the minor is barred. This conclusion was based upon some of the very arguments which were discussed and rejected in the case of Crosby v. Dowd, supra. Under such circumstances, we apprehend that it is not the province of this court to analyze the conflicting cases. We think we are bound by the latest expression of the Supreme Court upon the subject which settled the question in this state.

Appellants do not fail to take note of the cases in conflict with their views, but they argue that because of certain language contained in section 1452, Code of Civil Procedure—i. e., "The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same, against any one except the executor or administrator: but this section shall not be so construed as requiring them so to do"—the holding in Crosby v. Dowd, supra, presents the better rule. In reply to this, we take occasion to point out that, while section 1452 of the Code of Civil Procedure in its entire present form was not a part of our Code of Civil Procedure in 1893, when the case of Patchett v. Pacific Coast Ry. Co. was decided, the portion of the same relied upon by appellants and herein quoted was in force and effect at that time, and had been the law of this state since 1872. The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

59 Cal. App. 230

## BAR ASS'N OF SAN FRANCISCO v. DEVALL. (Civ. 4316.)

(District Court of Appeal, First District, Division 2, California. Sept. 29, 1922.)

**1. Attorney and client ⟸53(2)—Evidence in disbarment proceedings held insufficient to show responsibility for insertion of date in will.**

In disbarment proceedings, evidence *held* insufficient to show that accused inserted a date or caused it to be inserted in a purported will before it was offered for probate.

**2. Attorney and client ⟸42—Attorney suggesting erasure of printed matter in will violates duty not to mislead judge by artifice of fact.**

An attorney who, believing that certain printed matter on a will invalidated it under Civ. Code, § 1277, suggested that it be erased, may be removed or suspended, under Code Civ. Proc. § 287, subd. 2, for violation of his duty under section 282, subd. 4, never to seek to mislead the judge by an artifice of fact.

**3. Attorney and client ⟸58—Attorney suggesting erasure of printed matter on will suspended for six months.**

An attorney who appeared in propria persona at the hearing on June 29, 1922, of accusations filed June 6th by the bar association looking toward his disbarment under Code Civ. Proc. § 287, subd. 5, for commission of an act involving moral turpitude, following a hearing on January 24th of charges based on acts done about the middle of July, 1921, entered no dilatory pleas or motions, and made no objections, submitted himself as a witness against himself without objection, and testified that he would never again do such an act, suspended from the practice until January 1, 1923.

Application by the Bar Association of San Francisco to disbar Arthur M. Devall for commission of an act involving moral turpitude. Accused suspended.

Harold E. Haven, of San Francisco, for accusant.

Arthur M. Devall, of San Francisco, in pro. per.

STURTEVANT, J. This is an original proceeding brought in this court by the Bar Association of San Francisco against the accused to obtain a judgment of disbarment. It is the claim of the accusant that the accused should be disbarred under subdivision 5 of section 287 of the Code of Civil Procedure. As sustaining that claim the accusant contends that the accused did advise the altering of a paper purporting to be the will of George A. Holland, deceased. The charges against the accused are pleaded in two counts, and no question has been presented as to the sufficiency of the pleadings.

George A. Holland, formerly of Boston, Mass., resided in San Francisco for a period of time prior to December, 1920. About Christmas of that year he died, and at least some of his effects were so located that one W. D. Potter had access thereto. Thereafter the said W. B. Potter informed the accused of the facts regarding the death of the decedent, and the accused undertook to locate the heirs of the deceased. Later he took such steps that at least some of the heirs were located, and some of the correspondence between the accused and the heirs was introduced in evidence. The purported will was produced in court and exhibited to the court, and an enlarged photographic copy was filed as an exhibit. Three exemplars of the writing of the deceased were produced and filed. The purported will is very short, and is in words and figures as follows, to wit:

"The Boston Five Cents Savings Bank,
"Boston,—Mass. Nov. 8th 1920.
"please notify William J. McCurdy if anything Should happen me I feel as though I havn't long to stay William McCurdy Emma McCurdy Lillian & Elanor are my cousins. I wish them to have all I leave they are poor industerious people and need all the assistance possible George A. Holland
"formerly of Boston Mass."

The words, "The Boston Five Cents Savings Bank, Boston,—Mass.," are printed in the upper lefthand corner, and the printing is in large block type. It is the contention of the accusant that the accused either wrote or caused to be written on the purported will, before the paper was offered for probate, the words and figures "Nov. 8th 1920." The proof offered in support of this contention is as follows:

The letter admitted to be signed by the accused and dated July 18, 1921, contains statements among others as follows:

"I have decided to tell you now the full details in regard to the property, or rather the money. I am pledging you, however, to absolute secrecy, as it will help no one else, and might prove a loss to you and those George wanted to benefit by the little he had. * * * Now, George A. Holland left an imperfect will. There was a technical omission that made it absolutely void. Although it was as clear as day that he wanted you, William, Lillian and Eleanor to have his money. The paper stated so in so many words. I will send you a copy of it. On another paper also he left words to the same effect although this paper was more imperfect than the other. Fortunately these papers came to my hand. My first move was to find you and see if you and your immediate relatives would get this money under the intestate laws. That was the reason of not wanting to have relatives who were not friendly know about the matter, and also in getting the details as to relatives. When I got all these details I found that this money would not all go where George wanted it to go, and there was a possibility that none of it would, and if any of it did, it would be very little. I then took it upon myself, with the aid of a

friend of George's to perfect that will. That was done. A good will perfected, planted in the trunk where it was found, and is now in the hands of the public administrator and will be found to be a good will."

[1] On the trial in this court an expert was called who testified that the date was not in the handwriting of the decedent, but he did not testify that it was in the handwriting of the accused. The accused took the stand and testified that he did not write the date nor authorize the writing of the date; that he did not see it written, and never saw the will until it was offered in this court. He further testified that at one time he telephoned Mr. Potter that the public administrator would call on Mr. Potter for the effects of the decedent; that in the course of that conversation Mr. Potter informed the accused that he had found a paper (the will) and read the contents over the telephone. "We had a talk about it and he said there was some printing—the name of a bank on it. I says, 'Can't you erase it?' and he says, 'Yes,' and I says, 'If I was in your place, I would go ahead and do it.' That was our complete conversation and only conversation in regard to that." As to whether the date, "Nov. 8th 1920" was inserted in the will by the accused or by some one else acting on the suggestion of the accused, the foregoing testimony is all that was adduced on the subject. It does not show conclusively to our minds that the accused either inserted the date or caused it to be inserted.

[2] The attorney for the accusant has cited to this court certain authorities to the effect that the printed matter, "The Boston Five Cents Savings Bank, Boston,—Mass.," on the face of the will does not violate the provisions of section 1277 of the Civil Code. The accused has not cited to us any authorities on the subject. However, it is proved by all of the testimony, and, indeed, is admitted by the accused, that he believed the presence of such printed matter invalidated the will; and, so believing, he suggested to Mr. Potter that Mr. Potter erase the printed matter. Such conduct was reprehensible. Section 282 of the Code of Civil Procedure provides:

"It is the duty of an attorney and counselor: * * * 4. * * * never seek to mislead the judge * * * by an artifice * * * of fact. * * *"

And it is provided by section 287 of the same Code:

"An attorney and counselor may be removed or suspended * * * by any district court of appeal * * * for either of the following causes, arising after his admission to practice: * * * 2. * * * violation * * * of his duties as such attorney and counselor. * * *"

[3] The admitted facts clearly sustain the second count pleaded in the accusation on file against the accused. It remains for us to determine what should be the punishment. The acts of commission by the accused were done about the middle of July, 1921. The matter was taken up by the Bar Association on the 24th of January, 1922, at which time a hearing was had. The association filed in this court its accusation on June 6, 1922. The accused entered no dilatory pleas of any kind or nature, but appeared for a hearing and the same was had on June 29, 1922. At the hearing the accused appeared in propria persona, and without objection submitted himself as a witness against himself and entered no objections of any kind or nature and made no dilatory motions. Bearing on whether the accused would hereafter engage in similar practice, the accused stated when testifying before this court, "So far as doing it again, I would not do it again in that case or any other."

Considering all of these matters together and as bearing on the punishment, we think that the accused should be suspended from the practice of the law until the 1st day of January, 1923, and it is so ordered.

We concur: LANGDON, P. J.; NOURSE, J.

190 Cal. 51

## OLIVER v. ROBNETT et al. (Sac. 3243.)

(Supreme Court of California. Nov. 3, 1922.)

1. Waters and water courses ⟸143—Title by prescription extends only to waters reasonably necessary to use.

The water must not only be actually diverted and adversely used to give title by prescription, but such title extends only to so much of the water so used as is reasonably necessary for the purpose for which it is used.

2. Appeal and error ⟸995—Weight of evidence not considered on appeal.

The question of the weight of evidence cannot be considered on appeal.

3. Waters and water courses ⟸137—Adverse user for five years establishes title by prescription.

An adverse user of water for five years only is required to establish title by prescription.

4. Waters and water courses ⟸152(6)—Upper riparian owner presumed to use waters from stream in exercise of right, and not adversely to lower owner.

An upper riparian owner, using water from stream, is presumed to be doing so in the exercise of his right, and if he has openly used a certain amount for the statutory period, this right, to the extent that it is a mere exercise of a riparian right, has no effect on the riparian rights of the lower owner, and title by prescription is only gained to the extent to which the rights of the lower riparian owner are interfered with.

5. Waters and water courses ⟸138 — Rule where upper riparian owner's use is adverse to lower owner's stated; "adverse use."

The use of water by an upper riparian owner is adverse to the rights of the lower riparian owner only when it constitutes such an interference with the rights of the lower owner as would justify an action to restrain such interference.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adverse Use or User.]

In Bank.

Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge.

Action by Charles M. Oliver against Isaac Robnett and others. From judgment for defendants, plaintiff appeals. Reversed.

McCamant & Thompson, of Portland, Or., for appellant.

Daly B. Robnett, of Alturas, for respondents.

WILBUR, J. The plaintiff owns land through which Cottonwood creek flows. He brought this action to quiet his title to a portion of the waters of this stream. Defendants Charley C. Larkin and Ellen Larkin and defendant Isaac Robnett also own riparian land on Cottonwood creek, above plaintiff's land. The defendants Dick own nonriparian land to which water has been diverted from Cottonwood creek, and Isaac Robnett also owns a tract of nonriparian land known as the "Home Place," to which water has been diverted. The action thus involves both riparian rights and the prescriptive rights of nonriparian owners in the waters of Cottonwood creek. The creek is fed by mountain snows, and about April 1st carries over a thousand miner's inches of water. This flow gradually diminishes during the irrigating season, which lasts from April 1st to July 1st, and for gardens extends through the month of August, until there is a very small stream of water. The court awarded the defendants a continuous flow of 350 miner's inches of water as follows: To defendants Larkin, 80 inches, to defendant Robnett, 100 inches for his riparian land and 120 inches for his home place, and to defendant Dick, 50 inches, thus awarding 180 inches to riparian and 170 inches to nonriparian land, and then apportioned the remainder of the water, awarding the Larkins two-sevenths thereof for 158.54 acres, defendant Robnett, five-fourteenths for 160 acres, and plaintiff Oliver five-fourteenths upon his 221 acres, of the surplus over and above 350 miner's inches. The plaintiff contends that the evidence is insufficient to show a prescrip-

tive right to the 350 miner's inches of water, not only because an uninterrupted user for the statutory period was not shown, but also because the amount allowed was unreasonably large. The amount allowed was approximately one miner's inch per acre per annum for each acre irrigated, whereas it is claimed that one-half miner's inch per acre per annum was amply sufficient, if reasonably used, to irrigate the lands which were in fact irrigated.

We have heretofore had occasion to advert to the excessive allowances of water by some of the decisions in the northern part of California. In Northern California Power Co. v. Flood, 186 Cal. 301, 304, 199 Pac. 315, 316, it was said:

"The right to the use of waters of a stream may be acquired, as against others entitled thereto, by taking and beneficially using the same adversely and continuously under a claim of right for a period of 5 years. But in such a case the right, with respect to the quantity of water therein, extends only to the quantity actually put to a beneficial use. The fact that one has a ditch running through his land which he keeps full of water diverted from a stream does not give him any right to such water against others who have rights therein. In order to gain a right to the water the diverter must actually use it and the quantity used measures the extent of his right. The use of all the water in the ditch, or a specific portion thereof, for only a part of the time, is not a sufficient use to give title to that quantity of water continuously. For example, if twenty acres of land requires irrigation once a month during the irrigating season and the entire flow of the ditch for two days is necessary to accomplish one irrigation, the fact that the claimant has used the water in that manner once a month during every irrigating season does not give him the right to the entire flow during the intervals of non-use. If others are using the water during such intervals of non-use by him, his right would include only one-fifteenth of the full flow of the ditch. We emphasize this point because we have found that in recent cases the question of the duty of water seems to have received very little attention. From comparison with many other cases on the subject, we are disposed to doubt whether the use of a continuous flow of seventeen and a half miner's inches of water for each acre irrigated can ever be necessary, or can ever be otherwise than excessive and wasteful. * * *"

[1] The water must not only be actually diverted and adversely used to give title by prescription, but such title extends only to so much of the water so used as is reasonably necessary for the purpose for which it is used. California etc. Co. v. Madera etc. Irr. Co., 167 Cal. 78, 138 Pac. 718.

[2] The briefs are largely devoted to a discussion of whether or not an uninterrupted and adverse use of water for the prescriptive period is shown by the evidence to the extent found by the trial court. We cannot consider the question of the weight of the evidence, and for that reason we might be compelled to the conclusion that the very general and very vague testimony of the defendants' witnesses, to the effect that the diverting ditches used by them were always running full, and that the water was actually and necessarily used, was sufficient evidence to support the findings of the trial court; notwithstanding more definite evidence as to the actual use and necessity therefor, contradicting such general and sweeping testimony was offered by the plaintiff.

We need not determine that question because the judgment must be reversed for other reasons. In view of a new trial, however, it is proper to say that it is much more satisfactory to establish the amount of land irrigated from time to time, and to ascertain the amount of water reasonably necessary for the irrigation of that amount of land, and allow the adverse claimant such necessary amount, than it is to rely upon general statements concerning the amount of water kept flowing in ditches and used, where such water has not been measured nor economically used, and where, as here, there has been a large amount of waste water from time to time. For instance, in this case the court found 80 inches of water had been used on the Larkin place for more than 40 years, while the evidence shows without dispute that up to 1893 not more than 5 or 6 acres of this land were irrigated, and up to 1898 not more than 20 acres were watered, all but 5 or 6 of which were covered with brush. In 1904 there were 10 or 12 acres in alfalfa. In 1905 and 1906, 50 or 60 acres were cleared and sown to alfalfa, and yet it is found that 80 inches of water was beneficially used for 40 years on this land; that is, that eighty inches of water, continuous flow, was necessary to irrigate, and was used for irrigating, less than six acres of land from 1881 to 1893.

[3, 4] In this connection, however, it should be said that an adverse user for 5 years only is required to establish title by prescription and that the finding need only be supported by evidence of 5 years' continuous user, and that the defendants rely upon evidence of such user from 1910 to 1917. Our reference to the finding of 40 years' adverse user is solely for the purpose of illustrating the unsatisfactory result of basing findings upon generalities, such as those testified to by the defendants' witnesses. It will be unnecessary for us to determine whether or not the evidence is sufficient to sustain the finding of adverse user for the prescriptive period. The trial court evidently rendered its judgment on the theory that the use of water by an upper riparian owner was adverse to the lower riparian owner and that by the use of 80 miner's inches of water by the Larkins and 100 inches of water on Robnett's upper riparian land, the owners of these

lands had acquired by prescription the right to such water and that this prescriptive right was a right over and above and in addition to the riparian rights to the waters of the stream. This position is untenable. An upper riparian owner who is using water from the stream is presumed to be doing so in the exercise of his right so to do, and consequently, if he has openly, notoriously, and continuously used a certain amount of water for the statutory period, this right to the extent that it is a mere exercise of the riparian right, has no effect on the riparian rights of the lower riparian owner, and title by prescription is only gained to the extent to which the rights of the lower riparian owner are interfered with. The rule on that subject is stated in Peake v. Harris, 192 Pac. 310, in an opinion denying a transfer from the District Court of Appeal as follows:

"It is also settled that the lower riparian owner, the plaintiff being such owner, cannot complain of the use by an upper riparian owner except by showing that the upper owner uses an unreasonable quantity of the stream, having regard to the needs of the lower owner, and, consequently, that the lower owner cannot enjoin the use by an upper owner unless he alleges such unreasonable use to his injury. Swift v. Goodrich, 70 Cal. 105; Hargrave v. Cook, supra; Heilbron v. Land, etc., Co., 80 Cal. 193; Anaheim W. Co. v. Semi-Tropic Co., 64 Cal. 192."

[5] The use of water by an upper riparian owner is adverse to the rights of the lower riparian owner only when it constitutes such an interference with the rights of the lower owner as would justify an action to restrain such interference. Kinney on Irrigation and Water Rights (2d Ed.) p. 1861, § 1040. In so far as the use by the defendants Larkins and Robnett, of 80 and 100 miner's inches of water, respectively, was justified by their riparian ownership such use was not adverse to the plaintiff. The riparian rights of Oliver in the waters of the stream should be ascertained without regard to the amount of water actually diverted by the defendants Larkins and Robnett on their riparian lands. The riparian rights of the plaintiff would be diminished by such use only to the extent that the diversions above his riparian lands were adverse to such riparian rights.

The judgment of the trial court was erroneous in that it gave Robnett and the Larkins the full amount of water used by them for more than 5 years on the theory that they had a prescriptive title thereto, and then prorated the excess over that amount and over the amount of the other diversions, as an additional right belonging to the Larkins and Robnett by reason of their lands being riparian to the stream. The right of the appropriators to 170 miner's inches of water, that is, of Dick to 50 miner's inches and of Robnett to 120 miner's inches for the home place, established by the decree, might be affirmed, and the rights of Oliver, Robnett, and the Larkins alone left to be determined on a new trial, were it not for the fact that we are satisfied from an examination of the record that the whole case should be retried in the light of the legal principles laid down concerning riparian and nonriparian ownership, and the reasonable use of water, particularly as it appears that Robnett sometimes used the water diverted for his riparian lands on his nonriparian land.

Judgment reversed.

We concur: SHAW, C. J.; WASTE, J.; LENNON, J.; LAWLOR, J.; RICHARDS, Justice pro tem.

---

190 Cal. 33

## UNION IRON WORKS et al. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (S. F. 10214.)

(Supreme Court of California. Oct. 31, 1922.)

**1. Master and servant ⟸346—Principle underlying Workmen's Compensation Act stated.**

The underlying principle upon which the Workmen's Compensation Act rests is the providing of compensation to an employee for injuries resulting from his employment; the industry being made to bear the burden as part of the cost of production.

**2. Master and servant ⟸348—Purpose of Compensation Act stated.**

The primary purpose of industrial compensation provided for by the Workmen's Compensation Act is to insure to the injured employee and his dependents adequate means of subsistence while he is unable to work, and also to bring about his recovery as soon as possible in order that he may be returned to the ranks of productive labor.

**3. Master and servant ⟸385(16)—"Medical treatment" required by Compensation Act.**

The medical treatment required by Workmen's Compensation Act, § 15(a), to be furnished an injured employee by his employer is such as will reasonably and seasonably tend to relieve and cure the injured employee from the effects of the injury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Medical Treatment.]

**4. Master and servant ⟸385(16)—Refusal of employers' physicians to operate held refusal to furnish medical treatment within Compensation Act.**

Where an employee who had suffered fractures of both legs and an arm was unsuccessfully treated by the employers' physicians for three years, their refusal to operate despite his repeated requests, extending over nine months, during which time he continued to suffer, and his condition apparently grew worse, was tan-

tamount to a refusal to furnish the treatment seasonably required by Workmen's Compensation Act, § 15(a), so as to warrant recovery of expenses for subsequent successful operations by a physician of his own selection.

**5. Master and servant ⟸385(16)—Elements of liability under Compensation Act for expenses of physician of employee's own selection stated.**

Before an injured employee will be entitled to compensation under Workmen's Compensation Act, § 15(a), for expenses incurred in the treatment of him by a physician of his own selection, it must appear that such treatment not only was a success, but that it was reasonably and seasonably necessary to cure and relieve the injured employee, taking all the circumstances into consideration.

**6. Statutes ⟸224—When construction of intent of Legislature must be ascertained and applied.**

That a word or phrase is common to two statutes will not suffice to make decisions as to one controlling as to the other, since in the construction of a statute the intention of the Legislature must be ascertained and applied pursuant to Code Civ. Proc. § 1859.

**7. Master and servant ⟸385(16)—Extension of time for furnishing medical treatment under Compensation Act held lawful.**

Under Workmen's Compensation Act, § 15(a), as amended by St. 1915, p. 1082, § 4, the Industrial Accident Commission may extend the right of an injured employee to medical services notwithstanding 90 days has elapsed since the injury, the length of time for which an employee is entitled to medical services being the length of time necessary to his complete recovery, and the Commission having continuing jurisdiction under section 20(d) as amended St. 1917, p. 850, over all awards for 245 weeks.

**8. Master and servant ⟸385(16)—Objection to extension of time for furnishing medical treatment under Compensation Act held waived.**

Where for three years after the injury the employers supplied, and expressed their willingness to supply, the injured employee with further medical treatment, such action was tantamount to a consent to an indefinite extension of the 90-day period limited by Workmen's Compensation Act, § 15(a), and constituted a waiver of the employers' right to object to the power of the Commission to proceed after such period.

**9. Master and servant ⟸419—Successful operation held to justify amendment of compensation award.**

Where an employee who had been unsuccessfully treated for three years by his employers' physicians employed a physician of his own selection, and underwent a successful operation, the Industrial Accident Commission was thereafter justified in amending its original award, performance of such operation constituting a new development arising after the date of the original award, sufficient to furnish the basis for the amendment.

**10. Master and servant ⟸385(16)—Medical expenses held allowable under Compensation Act, although employee's union paid part.**

It is proper to allow medical expenses under Workmen's Compensation Act, § 15(a), to an employee treated by a physician of his own selection after unsuccessful treatment by employer's physicians, although part of such expenses was paid by his union, where there is no showing that the money was voted as a gratuitous gift, or that the union undertook to become primarily liable for the expenses.

In Bank.

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Thomas Henneberry, employee, by John W. Henneberry, his guardian ad litem, opposed by the Union Iron Works and its successor, the Bethlehem Shipbuilding Corporation, Limited, employers. Award of compensation was made to the employee, and the employers bring certiorari. Affirmed.

Thos. W. Slaven, of San Francisco, for petitioners.

A. E. Graupner, of San Francisco, for respondents.

LENNON, J. This proceeding presents the petition on certiorari of Union Iron Works and its successor in interest, Bethlehem Shipbuilding Corporation, to have reviewed an award of the Industrial Accident Commission to one Thomas Henneberry of $1,446.90.

The facts upon which the award is founded, briefly stated, are these:

On September 14, 1916, said Thomas Henneberry, 16 years of age, hereinafter referred to as the injured employee, while employed as a rivet heater by the Union Iron Works, fell from a ladder, breaking both legs and an arm. It is conceded that his injury arose out of and in the course of his employment. The petitioners herein placed him under the care of Drs. Buell and Hunkin, but later removed him to their own private hospital, where he was treated by petitioners' own physicians. The injuries were severe, and for four years after the injury there was a continuous discharge of pus from one leg, due to necrosis of the bone and unhealed wounds. During that time the injured employee was obliged to go about on two crutches, and was wholly unable to work. During the entire period of four years after leaving the hospital he called daily at the hospital for medical treatment, which consisted largely in changing the dressing of the injured leg. His condition apparently growing worse, and having lost faith in the treatment administered him by the physicians at petitioners' hospital, he of his own accord, on February 18, 1920, consulted Dr. Hunkin, who advised an immediate operation to remove the diseased bone. This advice was reported to the petitioners' physicians, but it was their opin-

ion that such an operation would not be opportune until the clearing up of a discharging sinus in the left leg, and in this conclusion they were confirmed by the opinion to the same effect of another physician and that of the medical director of the Industrial Accident Commission. Petitioners therefore refused to operate. After waiting nine months for petitioners' physicians to relieve his condition, the injured employee in November, 1920, abandoning the treatment of petitioners' physicians, placed himself under the care of Dr. Hunkin. Two operations were performed by Dr. Hunkin, one on November 22, 1920, and the other on January 2, 1921. The operations were a complete success. The flow of pus was stopped, the broken bones were united, the wounds were healed, and the injured employee discarded his crutches and again became self-supporting.

On May 17, 1918, nearly two years after the injury, a controversy having arisen as to the fixing of the injured employee's wages for the purpose of determining the proper rate of disability compensation payable to him, petitioners herein filed with the Industrial Accident Commission a petition setting forth, among other facts of the controversy, that the injured employee was still under medical treatment, and that the extent of his disability was still incapable of determination, and asking that an award be made as to the amount to which he was then entitled. A hearing was had thereon on July 1, 1918. The Commission made and filed its findings and award, allowing the injured employee the sum of $682.50 and the further sum of $15 a week, payable until the termination of the period for which permanent disability might be payable, or until the further order of the Commission. Upon the last-mentioned hearing it was agreed by all of the parties that the petitioners herein had continued to furnish medical treatment to the injured employee, and that they would continue to do so as long as it was needed. The Commission did not in its findings direct or provide for the furnishing by the petitioners herein of any further medical or surgical services, nor did it extend by formal order the 90-day period during which petitioners were required by the terms of section 15(a) of the Workmen's Compensation Act to furnish medical and surgical services. The Commission, however, by its findings in this behalf, reserved to itself the power to make a further award in the premises by declaring that—

"The extent of said permanent disability cannot be determined at this time, but will, upon request of any party in interest after such disability is in a condition to be rated, be determined and award amended accordingly."

In April, 1921, three months after the last operation by Dr. Hunkin, and nearly three years after the making of the original award, the injured employee applied to the Commission for an award of $1,446.90 for the payment of expenses incurred by him in having the said operation performed by Dr. Hunkin and for hospital fees and treatment attendant upon the operation. On May 17, 1921, the Commission made an order granting said application and further directing the petitioners' physicians "to furnish such further medical and therapeutic treatment as may be required to cure and relieve the employee from the result of said injuries," and providing further that "the time within which such treatments are required under the terms of the aforesaid act is * * * extended accordingly."

Section 15(a) of the Workmen's Compensation, Insurance and Safety Act, which governs and controls the jurisdiction of the Commission to allow an award for medical treatment furnished an injured employee, as originally enacted in 1913, read as follows:

"Where liability for compensation under this act exists such compensation shall be furnished or paid by the employer and be as provided in the following schedule: (a) Such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches and apparatus, as may reasonably be required at the time of the injury and within ninety days thereafter, to cure and relieve from the effects of the injury, the same to be provided by the employer, and in case of his neglect or refusal seasonably to do so, the employer to be liable for the reasonable expense incurred by or on behalf of the employee in providing the same." Stats. 1913, c. 176, p. 279.

In 1915 this section was amended to read as follows:

"Where liability for compensation under this act exists such compensation shall be furnished or paid by the employer and be as provided in the following schedule.

"(a) Such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches and apparatus, including artificial members, as may reasonably be required at the time of the injury and within ninety days thereafter, *unless such time is extended by the Commission*, to cure and relieve from the effects of the injury, the same to be provided by the employer, and in case of his neglect or refusal seasonably to do so, the employer to be liable for the reasonable expense incurred by or on behalf of the employee in providing for the same." Stats. 1915, c. 607, p. 1079.

The only difference between the statute in force in 1915, at the time of the accident, and the statute as originally enacted is the insertion of the italicized words, "unless such time is extended by the Commission." The statute was again amended in 1917 (St. 1917, p. 836, § 9) by eliminating the 90-day time limit, but leaving the statute in every other particular identical in its provisions as it existed in 1915. The accident, however, occurred in September, 1916, and therefore the

power of the Commission to make the award in question must be found within the provisions of the statute as it stood in 1915.

The award was allowed by the Commission under the provisions of the statute as it existed in 1915, upon the theory that, even though it be conceded, as, indeed, it must be, that petitioners' physicians in refusing to operate acted in the utmost good faith, and upon what then seemed to them to be best for the injured employee, nevertheless the successful result of the operation performed by another physician demonstrated that, despite the opinions of petitioners' physicians, an operation was necessary to cure and relieve the injured employee, and that therefore the refusal of petitioners' physicians to operate seasonably was in effect the refusal of petitioners to furnish such medical and surgical treatment as was reasonably and seasonably required.

It is the contention of petitioners herein that the provisions of the statute in question renders the employer liable for expenses incurred by the injured employee for medical services only in the event of the employer's neglect or refusal to furnish competent physicians and proper medical services, and that, if, as in the instant case, the employer offers to or does furnish competent and skilled physicians, he cannot be held liable for the expenses incurred by the injured employee in procuring another physician. It is insisted that this must be so even though while under the care of the employer's physician the injured employee's condition does not improve. In other words, it is one of the contentions made in support of the writ that the duty of the employer is not to furnish services which will cure the employee, but to furnish in good faith the services of a competent physician.

It may be conceded that, if this were an action for malpractice, or one founded upon the old common-law liability of the employer, the time to determine whether a surgical operation was reasonably required would be before the operation, and that, if, at that time, there was a difference of opinion among competent physicians as to the necessity of an operation, no liability could be predicated upon a failure to operate. The proceeding before the Commission, however, was not an action for damages, nor was it based upon the idea of fault on the part of the employer. It is founded upon the provisions of the Workmen's Compensation Act, from which the theory of fault is wholly eliminated.

[1] The underlying principle upon which the Workmen's Compensation Act rests is, as its title indicates, the providing of compensation to an employee for injuries resulting from his employment. It emanates from the economic thought that personal injury losses incident to an industry is a part of the cost of production, to be borne, just as the depreciation and replacement of a machine is borne, by the industry itself, which compensation will be included in the cost of the product of the industry. Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 398.

[2, 3] The primary purpose of industrial compensation is to insure to the injured employee and those dependent upon him adequate means of subsistence while he is unable to work, and also to bring about his recovery as soon as possible in order that he may be returned to the ranks of productive labor. By this means society as a whole is relieved of the burden of caring for the injured workman and his family, and the burden is placed upon the industry. That the injured workman and his dependents may be cared for, compensation in the form of disability benefits is provided for by the act approximating the wages earned by the employee, and varying with the degree of disability and dependency. And, to secure the speedy return of the workman to productive employment, it is provided that medical and surgical services shall be furnished by the employer. This liability for medical and surgical services is not, therefore, a burden placed upon the employer as a penalty for any failure of duty on his part, but is merely a part of the whole compensation due the employee as the result of his injury. It therefore follows that the medical and surgical services contemplated and called for by the statute in question should be such as will tend to secure the return of the workman to productive employment. In other words, and perhaps more precisely stated, the treatment required by the statute is such as will reasonably and seasonably tend to relieve and cure the injured employee from the effects of the injury, and, manifestly, if the treatment practiced and persisted in by physicians furnished by the employer, even though they be conceded to be skilled and competent in their profession, does not within a reasonable time effect a cure, and thereafter a course of treatment prescribed by other physicians procured by the injured employee does in fact seasonably effect a cure, then it cannot be said that the employer has furnished such medical and surgical treatment as was reasonably and seasonably required.

[4] The successful result of the operation in the instant case demonstrated, we think, that it was the treatment reasonably required to cure and relieve the injured employee from the effects of his injury, and, that being so, the refusal, after more than three years of unsuccessful treatment, on the part of petitioners' physicians to operate, despite repeated requests to do so, which refusal extended over a period of nine months, during which time the injured employee continued to suffer, and his condition apparently grew worse, was tantamount to a refusal to furnish the treatment seasonably required by the statute.

[5] It is insisted by the petitioners that the award cannot be allowed to stand without giving to the injured employee not only the absolute right to refuse such medical services as may be tendered and furnished to him by his employers, but the right as well to seek and secure the services of other physicians and surgeons at the expense of the employer if, perchance, a physician or surgeon can be found who will prescribe and advise a treatment different from that prescribed by the physicians furnished by the employer. In other words, it is contended that an employer will be required to pay any and all doctor bills which an employee might at his whim incur. No such result, however, follows from the view which we have taken of the situation presented in the instant case. Before the injured employee would be entitled to compensation for expenses incurred in the treatment of him by a physician of his own selection, it would have to be shown that the treatment not only was a success, but that it was reasonably and seasonably necessary to cure and relieve the injured employee. Moreover, all the circumstances attending the treatment by the employer's physician would have to be weighed by the Commission in order to determine whether or not the treatment prescribed by the employer's physicians would, if it had been persisted in, have produced as speedy and as satisfactory a cure as did the treatment of the physicians resorted to by the injured employee. And, of course, in coming to a conclusion in this behalf, the Commission would necessarily take into consideration the period of time covered by the treatment of the employer's physicians and the results obtained during that time. In other words, the injured employee will be permitted, at the peril of having himself to pay the expenses of medical treatment, to secure the services of physicians other than those provided by his employer, and this peril will attach unless it can be shown from all of the circumstances of the situation, including the success of the operation, that his desire and decision to secure the services of other physicians was warranted.

On the other hand, if we were to hold, as petitioners contend, that the only duty of the employer is to provide competent physicians who prescribe a particular course of treatment, it would mean that, if the physicians of the employer, even though they in good faith persisted in a course of treatment manifestly ineffective, and demonstrated ultimately to be wrong and ineffectual, the employee, nevertheless, would be compelled to continue under such treatment or secure at his own expense effective surgical treatment. This cannot be so. In Mass. Bonding, etc., v. Pillsbury, 170 Cal. 767, 770, 151 Pac. 419, this court held that, although in the first instance the employer had a right to designate the physician who should attend the injured employee, nevertheless, if, becoming dissatisfied, the injured employee was directed to another physician who was out of town, the injured employee was not bound to wait indefinitely for his return, but could seek the advice of his own physician, and the employer would be liable for the expense so incurred. So in the instant case the injured employee became dissatisfied with the course of treatment. The employer, however, instead of directing him to another physician, as in the former case, absolutely refused to change the treatment, whereupon the injured employee sought the services of a physician of his own selection. The award was upheld in the former case upon the ground that the injured man acted upon reasonable and proper grounds in seeking the services of his own physician. In view of all of the circumstances, including the successful result of the operation, it cannot be denied that the injured employee in the instant case likewise acted reasonably and upon proper grounds in seeking the services of Dr. Hunkin. The opinion in the case above cited, while not definitely deciding the point here involved, strongly supports the conclusion arrived at in the instant case.

[6, 7] It is the contention of petitioners that, in any event, the right of the injured employee to medical services was limited to 90 days. And in this behalf it is argued that section 15(a) as amended in 1915 limited the right of an injured employee to medical services to a period of 90 days after the injury was received, unless such time was extended by the Commission prior to the expiration of the 90 days, or, in other words, that the Industrial Accident Commission could in its award, if made within 90 days after the injury, or by a separate order made within such time, have extended the time for the furnishing of medical and surgical treatment to an injured employee, but that, the Commission having failed within such 90 days by formal order to grant such an extension of time, its power to grant compensation for such services rendered to the employee after the expiration thereof ceased, and was as if it had never existed.

As previously indicated, the section last above referred to, as originally enacted in 1913, merely provided that, as part of his compensation benefit, the injured employee should be entitled to medical services for 90 days. Under the statute as then worded, the employer could, therefore, at the expiration of the 90 days, cease entirely to furnish any and all medical services regardless of the nature or the seriousness of the injury, and notwithstanding the fact that further medical attention was necessary to effect a cure. This would be so although the prolongation of the recovery of an injured employee beyond the 90-day period might be due to the mistake or wrong diagnosis of the physician furnished by the employer and the Commission, because of the arbitrary limitation imposed by the statute, would be powerless to

compel the employer to furnish further medical attention. In 1915, however, the section was amended to render the employer liable for the medical services required "within ninety days thereafter, unless such time is extended by the Commission." Whether or not it was within the power of the Commission to make the award in the instant case, therefore, depends upon the purpose and intention of the Legislature in so amending the statute.

The argument in part advanced by petitioners in support of their contention is that this section of the Workmen's Compensation Act is analogous to section 1054 of the Code of Civil Procedure, in that both contain a reference to an extension of time, and that, inasmuch as it has been held that the extension of time allowed by section 1054 of the Code of Civil Procedure must be granted within the time allowed by the Code for the doing of the act, and that an order made after the expiration of the Code time or of a prior order extending the time is void, we must, in the instant case, so interpret section 15(a) of the Workmen's Compensation Act.

The fact that a word or phrase is common to both statutes will not suffice to make those decisions a controlling criterion for the construction of the statute before us. In the construction of a statute the intention of the Legislature is to be ascertained and applied. Code Civ. Proc. § 1859. The rule and reason for the rule enunciated in the decisions referred to, that an extension of the statutory time to do the things covered by section 1054 of the Code of Civil Procedure may not be had unless made within the time originally designated, do not apply with equal force to the statute in question here. The two sections are, we think, dissimilar in purpose and effect, and wholly unrelated in principle. The extension of time involved in section 1054 of the Code of Civil Procedure relates to purely procedural acts, which, pursuant to the provisions of other sections of the same Code, must be performed by one of the parties to pending litigation within a designated time. The nature of the acts to be performed in the first instance, considered in conjunction with the condition that good cause must be shown as a prerequisite to an extension of the designated time, indicates that it was the legislative intent that the time within which the acts should be performed was intended as a limitation of the power of the court to grant an extension of time. In other words, the provisions of the Code sections which designate the time within which the procedural acts covered by section 1054 of the Code of Civil Procedure are to be performed are mandatory, and the fact that an extension of time within which to do any of the enumerated procedural acts may be had under the provisions of section 1054 only upon application of the party desiring it, and upon good cause shown, carries with it the necessary implication that the application and order for the extension of time must be made within the time fixed by the statute in the first instance for the performance of the act. On the other hand, section 15(a) of the Workmen's Compensation Act neither in terms nor by necessary implication places a limit upon the time within which, nor does it prescribe the method by which, an extension shall be made. Obviously the statute gives to the Commission the power of determining of its own motion whether, under all the facts of any individual case, further medical treatment is necessary, and the authority of the Commission to extend the period of liability carries with it, no limitation to the contrary appearing in the statute, the power to make the extension during or after the expiration of the 90-day period. Hart v. Plum, 14 Cal. 149. This is so because of a rule of statutory construction which, generally and substantially stated, provides that, in the absence of a good reason why the statutory grant of a right may not be exercised beyond as well as within the limits of a designated time, and nothing appearing, either in the statute granting the right or in other statutes creating and controlling the same subject-matter, indicating that the Legislature did not intend that the right granted should be exercised beyond the time designated in the first instance, rather than not exercised at all, it may be assumed that it was the legislative intent that, if the right granted be not exercised within the statutory limit, it might be exercised after the expiration of that time. Black on Interpretation of Laws (2d Ed.) § 155; State ex rel. Cothren v. Lean, 9 Wis. 279.

In the instant case no good reason appears why the Commission should be compelled to make an extension, by formal order, within the 90-day period. Clearly the amendment conferring the power of extension was enacted by the Legislature solely for the benefit of the injured employee. And it must have been the intention of the Legislature that the right to medical services so conferred for a period longer than 90 days should depend upon the necessity for such services. The primary purpose of the act being the payment of compensation in avoidance of the possibility of pauperism, often attendant upon the loss of earning power of the wage earner, and thus relieve society of a consequent burden, the amount of compensation to accomplish this result would be that which would preserve to the workman practically the same economic status which he held prior to the injury—that is, the amount necessary to save his family from dependency during his period of unemployment plus the cost of his own rehabilitation. It follows that the length of time for which the employee should be entitled to medical services is the length of time necessary to his complete recovery. Otherwise, if he be required to pay his med-

ical expenses after a certain time, by just so much is the compensation for the support of his dependents lessened. If, therefore, his right to services be construed to depend upon the fact of whether or not an order was made by the Commission within a certain time, the purpose of the statute is defeated. The statute imposes a duty on the Commission, but, as the injured employee has no control over its conduct, it would be a harsh construction which would deprive him of the benefits of the statute merely because the Commission had neglected or failed to properly and promptly perform a duty.

Furthermore, the interpretation of the statute contended for by petitioners would place upon the Commission the duty of following one of two impractical courses. Thus, before the expiration of the 90 days, it would be necessary for the Commission to hold a hearing to determine in advance whether or not the necessity for medical services would continue longer than 90 days. Unless such hearing were held just immediately prior to the 90-day expiration it would in some cases be impossible to determine the necessity for further medical services. Again, other cases might arise in which, even though the hearing were held just before the expiration of the statutory time, the employee would lose the right to such services because of the difficulty, if not impossibility, of determining in advance the necessity for such services. As the only alternative the Commission would, in order to avoid this result, be forced to make an order extending the time automatically upon the report of the injury.

The power of the Commission being then the determination and declaration of whether an employee reasonably required further medical or surgical treatment after the expiration of the 90-day period, there is no reason why such determination should not be made after the 90-day period. Indeed, in most cases this would seem, as a practical matter, to be the better if not the only, course. Under section 20(d) of the Workmen's Compensation Act, the Commission is given continuing jurisdiction over all its orders and awards for 245 weeks, and the Commission, therefore, had the power at any time within that period to make an award determining that further medical services were necessary after the expiration of 90 days from the injury.

[8] Aside from the foregoing considerations, the record before us shows, as has been previously indicated, that for three years after the expiration of the 90-day period the petitioners here not only continued to supply, but expressed their willingness to supply, the injured employee with further medical treatment. This was tantamount to a consent to an indefinite extension of the 90-day period, and, the petitioners having, by word and conduct, acquiesced in a course of procedure which was in fact an extension of the statutory period of liability for medical services, will not now be heard to complain of the manner in which such extension was made, and will be held, by reason of such word and conduct, to have waived their right to object to the power of the Commission to proceed in the premises.

[9] It is the further contention of petitioners that, conceding the power of the Commission to make an extension after the expiration of the 90-day period, nevertheless the Commission had no jurisdiction or authority to amend the original award made in July, 1918. This contention is based upon the decision in the case of Georgia Cas. Co. v. Industrial Accident Commission, 177 Cal. 289, 293, 170 Pac. 625, which held, in effect, that the continuing jurisdiction of the Commission to rescind, amend, or alter its own orders, decisions, and awards for a period of 245 weeks was limited to making such changes as were required by the occurrence of new facts arising after the date of the original decision. In this behalf it is insisted that there are no new facts arising after the date of the original decision, inasmuch as the necessity for a surgical operation existed at the time of the original award. The power of the Commission to make the amended award was denied in the case above referred to, and relied upon by petitioners upon the express ground that no evidence was presented as to any new facts occurring, and the award had been based solely upon a reconsideration of the facts upon which such former award was made. While it may be conceded that all the conditions as to the necessity of medical and surgical services to the injured employee which existed at the time of the amended award existed at the time of the original award, the amended award in the instant case was not based solely, or at all, upon a reconsideration of the facts upon which the former award was made. The award was based upon the fact that an operation had been performed subsequent to the original award, and this was, in our opinion, a new development sufficient to justify the Commission in amending its original award.

[10] Concerning the contention of petitioners that the allowance to the injured employee was improper, inasmuch as part of the expenses for the operation had been paid by the Boilermakers' Union, it will suffice to say that there is nothing in the record to show that such money was voted by the union as a gratuitous gift to the injured employee, or that the union undertook to become primarily liable for the expenses so incurred by the injured employee for such medical treatment. In the absence of such showing, the defense necessarily fails.

The award is affirmed.

We concur: SHAW, C. J.; LAWLOR, J.; WASTE, J.; WILBUR, J.; RICHARDS, Justice pro tem.

(190 Cal. 28)

## In re FRANCK'S ESTATE.

## FRANCK v. SPENCER.

(S. F. 10040.)

(Supreme Court of California. Oct. 30, 1922.)

**1. Wills ⇐102—Particular words not requisite to create legacy or devise.**

Particular words are not requisite to create a legacy or a devise; it being essential merely that the intention of the testator to make the gift be shown.

**2. Wills ⇐441 — Construed by ascertaining testator's intention from language used.**

The cardinal rule for the construction of wills is to ascertain the intention of the testator from the words of the will, considering the circumstances under which it was made, if there is any uncertainty in its language.

**3. Wills ⇐441—Matters considered in construing will stated.**

The will and its entire scheme, the property disposed of, the persons named as devisees and legatees, the words and the context should be considered together, and the words used in the will should be construed according to their surroundings.

**4. Wills ⇐478—Devise or bequest by implication arises only if intent is clear.**

A devise or bequest may arise by implication, but to warrant the court in so declaring there must be something more than conjecture, and the probability of an intention to make the gift implied must appear to be so strong that an intention contrary to that imputed to the testator cannot be supposed to have existed in his mind.

**5. Wills ⇐564(2), 573(2)—Unqualified devise of profits of fund or property constitutes a gift thereof.**

The unqualified gift of the rents, issues, and profits of a fund or real or personal property constitutes a gift of the fund or the property itself.

**6. Wills ⇐575—Will held to give personalty on real estate as well as real estate itself.**

Under will giving to legatee "all the net profits or net income that may be derived from" described premises, and directing executor to pay for the care, custody, and proper education of legatee until she shall have reached the age of 20 years, and to pay her the income remaining in his hands when of such age, and providing that legatee is to receive "the above-described real property when thirty-five years of age," *held* a gift to legatee of not only the real estate, but the personal property thereon, in view of circumstances under which will was made.

In Bank.

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

In the matter of the estate of Ella Hubbard Franck. Application by Mary Ray Spencer, a minor, by Rose A. Bernard, Guardian, for distribution to her of property to which she was entitled under the will, to which Al. J. Franck, as executor, etc., filed objections. From an order of partial distribution, Al. J. Franck, as executor and as residuary legatee, appeals. Affirmed.

M. B. Moore, of Reno, Nev., and Tobin & Tobin, of San Francisco, for appellant.

Ralph H. Wight, of Martinez, and Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for respondent.

WASTE, J. This is an appeal from an order of partial distribution. Ella Hubbard Franck died testate on the 20th of February, 1917, being at the time of her death a resident of Reno, Nev. She left an estate in California, a considerable portion of which was in the city of Richmond, and her will was duly admitted to probate in the superior court in and for Contra Costa county. Letters testamentary were issued to the appellant, who was named in the will as executor, and also as the residuary legatee and devisee.

The portions of the will germane to this appeal are as follows:

"Fifthly. I give and bequeath to Mary Ray Spencer, aged about thirteen years, now an inmate of Notre Dame Academy, Alameda, California, all the net profits or net income that may be derived from those certain premises situate, lying and being in the city of Richmond, State of California, and particularly described upon that certain map entitled 'Nicholl Macdonald Avenue Civic Center, Richmond California,' said bequest being controlled by the following conditions, to wit: That my executor hereinafter named keep an accurate account of the net profits or net income from said above described premises, and from the moneys so derived pay for the care, custody and proper education of the said Mary Ray Spencer until she shall have reached the age of twenty years, and when she shall have reached the said age of twenty years then whatever of said moneys there may be remaining in the hands of said executor shall be paid and turned over to the said Mary Ray Spencer. I further direct that when the said Mary Ray Spencer shall have reached the age of thirty-five years, the said above described real property is hereby bequeathed to her as her property."

"Fourteenthly. I give and bequeath to the aforesaid Mary Ray Spencer all my cut glassware, china dishes, crockery and jewelry.

Fifteenthly. I give and devise all the rest, residue and remainder of any real or personal property, of every name, nature and kind whatsoever owned by me, at the time of my death, to my most trusted friend Al. J. Franck, of the city of Reno, county of Washoe, state of Nevada."

Mary Ray Spencer, through her guardian, applied to the court for distribution to her of the property to which she was entitled under the will. Appellant, as executor, filed an objection to the petition. At the hearing it was

established by competent evidence that the real property devised by the fifth paragraph of the will to Mary Ray Spencer was improved; that the building erected thereon was known as the "Raymond Apartments," and that said apartments were "rented furnished, and that the furniture, fixtures, and other personal property situated therein had at all times been used as a part of the apartments." By its decree the court ordered distributed to Mary Ray Spencer all the net profits or net income that might be derived from "those certain premises situate in the city of Richmond," the description being the same as in the will, and, "also all the personal property, furnishings and fixtures contained in or about the building situated thereon and which building is known as 'Raymond Apartments.'" It was further ordered that possession of the personal property and the residue from the rents and income due therefrom be given to appellant until Mary Ray Spencer shall attain the age of 20 years, namely, August 20, 1922, and upon the trust that he manage, control, maintain, rent, and keep the premises in good repair, collect the rents, keep an accurate account of receipts and disbursements, and pay Mary Ray Spencer such sum monthly as might be necessary and proper for her support, maintenance, care, and education until she should reach the age of 20 years, which sum was fixed by the court at a minimum of $100, and upon her attaining the age of 20 years to pay over to her whatever money remained in his hands or should be chargeable to him from such rents and income, and to surrender possession of the personal property to her.

The appellant appeals from the decree of distribution, but objects only to that portion distributing the personal property in the apartment house to Mary Ray Spencer and ordering that its possession be surrendered to her upon her attaining the age of 20 years. He contends that, under the provisions of the will, no disposition was made of the personal property comprising the furniture and equipment of the apartment house, and that, under the residuary clause of the will, that property vested in him upon the death of the testatrix.

[1-5] Particular words are not requisite to create a legacy or devise. It is essential that the intention of the testator to make the gift be shown. Estate of Barclay, 152 Cal. 753, 757, 93 Pac. 1012. The cardinal rule for the construction of wills is to ascertain the intention of the testator, and this is determined from the words of the will, considering the circumstances under which it was made, if there is any uncertainty in its language. Estate of Budd, 166 Cal. 286, 292, 135 Pac. 1131; Estate of Henderson, 161 Cal. 353, 357, 119 Pac. 496; Estate of Mitchell, 160 Cal. 618, 117 Pac. 774; Estate of Carothers, 161 Cal. 588, 119 Pac. 926; Estate of Spreckels, 162 Cal. 559, 123 Pac. 371. The will and its entire scheme, the property disposed of, the persons named as devisees and legatees, the words and the context should be considered together, and words used in the will should be construed according to their surroundings. Estate of Koch, 8 Cal. App. 90, 96 Pac. 100. It is equally well settled that a devise or bequest may arise by implication. To warrant the court in so declaring there must be something more than conjecture. The probability of an intention to make the gift implied must appear to be so strong that an intention contrary to that imputed to the testator cannot be supposed to have existed in his mind. Bishop v. McClelland, 44 N. J. Eq. 450, 452, 16 Atl. 1, 1 L. R. A. 551; Estate of Blake, 157 Cal. 448, 468, 108 Pac. 287. It is also equally well settled that the unqualified gift of the rents, issues, and profits of a fund or property, real or personal, amounts to a gift of the fund or property itself. 1 Schouler on Wills (5th Ed.) §§ 507, 610; Page on Wills, § 491; Jennings v. Conboy, 73 N. Y. 230, 236; In re Sproul's Appeal, 105 Pa. 438, 441; Gulick v. Gulick's Executors, 27 N. J. Eq. 498, 500.

[6] Appellant contends that the rule last stated should not apply to the present case. He argues that—

> "it is far from true that a devise of the rents and profits of real property will carry title to the personal property contained in or about said devised real property."

In making this contention the appellant does not appreciate the full effect of the fifth clause of the will. Not only does the testator thereby devise the real property to Mary Ray Spencer, but she also gives to her the net profits, or net income (the words are there used in the same sense), that may be derived from "those certain premises," of which the real property was but a part. If it be claimed that the word "premises" should be held to only apply to the real property devised, it sufficiently appears from the will, the circumstances under which it was made, the persons named as devisees and legatees, and the properly itself, that Mrs. Franck intended to make no subtle distinction between the realty and the personalty, which, by unity of use, comprised the apartment house premises. She was providing for the education and support of one to whom, if we may judge by the identity of names used in the will, she was closely related, and for whom the provisions of her last testament indicate she had more than ordinary affection. It seems clear that she intended the object of her benefaction to have sufficient funds to insure her education, and to provide for her maintenance until she arrived at an age of discretion, at which time the corpus of the fund should become hers absolutely. The testator may have attempted to define the day when the devisee shall fully enjoy possession of the real property, but we are not now concerned with that phase of the situation. It is hard-

ly to be thought that she intended to segregate realty from personalty in making the gift. She made no specific disposition of the personal property, comprising the furniture and equipment of the Raymond Apartment House, nor bequest over in the event of Mary Ray Spencer's death. Her's was an absolute gift of the income arising in part from personal property, and in so far as the personalty was concerned, making no direct mention of the principal. It amounted to a general gift of the personalty itself. Hatch v. Bassett, 52 N. Y. 359, 362. The fact that there is a general residuary clause in the will in favor of appellant does not militate against this construction. Sproul's Appeal, supra.

The order appealed from is affirmed.

We concur: SHAW, C. J.; RICHARDS, Justice pro tem.; LENNON, J.; LAWLOR, J.; WILBUR, J.

---

190 Cal. 25

## WESTERN FUEL CO. v. SANFORD G. LEWALD CO. (S. F. 9783.)

(Supreme Court of California. October 30, 1922.)

**1. Payment ⊂⊃17—Execution of notes for a debt not a discharge of it, but precludes action on it until default on notes.**

Where notes are executed by debtor for the amount of the debt, the indebtedness is not paid in the sense that it is absolutely discharged, unless it is distinctly so understood by the parties, and, if debtor defaults in payment of notes, an action can be maintained upon the original debt as if the notes had never been given.

**2. Mortgages ⊂⊃218—Creditor to whom debtor gave mortgage for debt must foreclose before suit on original debt.**

Under Code Civ. Proc. § 726, a creditor to whom debtor had given a note for the amount of indebtedness secured by mortgage on real estate could not sue on original debt, but must first exercise his remedy by foreclosure of mortgage.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Henry M. Owens, Judge.

Action by the Western Fuel Company against Sanford G. Lewald Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Ira S. Lillick, of San Francisco, for appellant.

Lucius L. Solomons and Walter H. Robinson, both of San Francisco, for respondent.

WASTE, J. Plaintiff brought this action to recover the sum of $8,000, as a balance due on a book account. The complaint alleged that on November 30, 1916, the defendant was indebted to plaintiff in the sum of $13,513.15 for coal sold and delivered; that on the 2d day of December, 1916, the defendant made, executed, and delivered to plaintiff two promissory notes for $3,750 and $8,000, respectively, payable one day after date; that the note for $8,000 was secured by a mortgage upon real property, of even date, and duly recorded; that the full face value of said notes was credited to defendant on said book account on the date of their execution, and the balance of $1,763.15 was carried forward on said book account, and was thereafter paid by the defendant; that no part of the principal of said $8,000 note has been paid; that on or about the 26th of November, 1920, plaintiff canceled and offered to redeliver said $8,000 note to defendant, and at said time offered to defendant to redeliver the mortgage securing the same, together with the release thereof, duly executed, but the defendant refused to accept said offer of plaintiff, and said note and mortgage, together with said release, are now held by plaintiff for defendant, subject to his directions. A demurrer on general and special grounds was interposed. It was sustained without leave to amend, and from the judgment which followed plaintiff has appealed.

[1, 2] On the face of the complaint no question can be raised but that the amount of the original indebtedness of the defendant to the plaintiff, represented by the book account, was covered by the two notes executed by the defendant on December 2, 1916. It is not alleged in the complaint that the notes were taken in payment. The situation is therefore governed by the well-established rule that in such a case the indebtedness for which the notes are taken is not paid, in the sense that it is absolutely discharged. If default be made upon the notes, an action can be maintained upon the original debt, as if the notes had never been given. Ellison v. Henion, 183 Cal. 171, 174, 190 Pac. 793, 11 A. L. R. 444. The taking of a note for a pre-existing debt is not payment, unless it is distinctly understood that the note is taken as such. The note only postpones the time of payment of the old debt until default is made in payment of the note. Guarini v. Swiss-American Bank, 162 Cal. 181, 184, 121 Pac. 726. It was the contention of the plaintiff, therefore, that as the complaint does not show that the unpaid portion of the original debt was extinguished by the acceptance of the secured note, he may sue on the open book account as if the note and

mortgage had not been given, and the complaint states a cause of action. In making this contention appellant overlooks the rule of law in this state that there can be but one action for the recovery of any debt or the enforcement of a right secured by mortgage. Section 726, Code Civ. Proc. The plaintiff cannot waive the security and sue on the indebtedness, but must bring his action of foreclosure. The statute is imperative. Barbieri v. Ramelli, 84 Cal. 154, 156, 23 Pac. 1086; Gnarini v. Swiss-American Bank, supra. Under the Code sections an independent action at law cannot be maintained for a debt whatever the form, if it is secured by a mortgage. Biddel v. Brizzolara, 64 Cal. 354, 358, 30 Pac. 609. This is so even where a mortgage is given to secure a debt already secured. The Code provides, in effect, that *whenever* a mortgage is given to secure a debt there can be but one action for its recovery or enforcement. After it is given, the law steps in and limits the action to foreclosure proceedings to enforce the debt. Commercial Bank v. Kershner, 120 Cal. 495, 498, 52 Pac. 848. We find nothing in Martin v. Becker, 169 Cal. 301, 146 Pac. 665, Ann. Cas. 1916D, 171, so much relied upon by appellant, to militate against the application of section 726 to the facts in this case. The court was there dealing with the question of liens, and it was held (169 Cal. 317, 146 Pac. 672, Ann. Cas. 1916D, 171) that a materialman, in taking mortgage security from the contractor for the value of the material which he might sell to him, did not lose his right to a mechanic's lien. The court said (169 Cal. 305, 146 Pac. 667, Ann. Cas. 1916D, 171):

"That the law never contemplated that because a man had taken a mortgage he could not take other independent security for his debt, and, if the contract for such security permitted it, enforce such contract without recourse to the mortgage debt."

That case points out that section 726 is designed for the protection of the primary debtor, and in the action to foreclose the materialman's lien, the plaintiff was not proceeding against the mortgagor, who was not even a necessary party to the action. 169 Cal. 309, 146 Pac. 668, Ann. Cas. 1916D, 171.

It is clear under the facts alleged in the complaint that the promissory note taken by the plaintiff from the defendant was but the evidence of the debt represented by the pre-existing book account. The mortgage was taken as security for the payment of that indebtedness. No waiver by respondent is pleaded, and the security is not shown to have become valueless. Appellant has not therefore brought himself within a statement of facts sufficient to state a cause of action; it not being shown that he has exhausted the remedy provided through foreclosure of the security taken by him for the payment of the original indebtedness.

The demurrer to the complaint was properly sustained.

The judgment is affirmed.

We concur: SHAW, C. J.; LENNON, J.; LAWLOR, J.; WILBUR, J.; RICHARDS, Justice pro tem.

---

190 Cal. 48

## FREIDEN et al. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.
(L. A. No. 7362.)

(Supreme Court of California. Oct. 31, 1922.)

**Master and servant ⊂⊃367—Party unloading automobile shipment held an "independent contractor" whose assistant was not consignee's "employee" within Compensation Act.**

One furnishing his own appliances and selecting his own assistants, sharing in his pay for the work of unloading automobiles from a freight car for a dealer who exercised no control over the work paid for at the regular rate of $1.50 for each machine, *held* an independent contractor, whose assistant injured in doing the work was not the dealer's "employee" within Workmen's Compensation Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Independent Contractor.]

In Bank.

Certiorari to Industrial Accident Commission.

Proceedings under the Workmen's Compensation Act (St. 1917, p. 83) by Jim Caldwell, employee, against J. W. Freiden, employer, Howard Harper and the Ocean Accident & Guarantee Corporation, Limited, of London, England, insurer. From an award of compensation by the Industrial Accident Commission, employer and insurer bring certiorari. Award annulled.

George W. Moore, of Los Angeles, for petitioners.

A. E. Graupner, of San Francisco, for respondents.

WASTE, J. On November 12, 1921, Caldwell, one of the respondents herein, and the applicant before the Industrial Accident Commission, was engaged with two other men in unloading automobiles from a box car in the city of San Diego. The automobiles were consigned to J. W. Freiden, the defendant before the Commission and one of

the petitioners here, who was in the business of selling automobiles in said city. While unloading the car Caldwell suffered an injury, and it was to recover compensation for the period of his disability that the proceedings were inaugurated before the Industrial Accident Commission. At such hearing an award was made in his favor, which is the subject of the review here. The sole question presented is whether or not Caldwell was an employee of J. W. Freiden at the time of the injury.

It appears from the record that Howard Harper, a longshoreman, had for a period of approximately 10 years previous to the date of the injury been engaged during the greater part of his time in unloading automobiles from cars for various dealers in San Diego. It was his custom to ascertain when shipments were due and had arrived, whereupon he would notify the dealers, and they would let him know when to start in to unload them. He looked after that work alone, hiring such assistants as he required. He collected the pay from the dealers at the rate of $1.50 for each machine unloaded, and divided the money with his assistants. In unloading the machines from the cars Harper and his fellow workers used three chain falls, made fast to the roof of the car. By this means and with chain slings the automobiles were lifted out onto the unloading platform. The appliances used were furnished by Harper; they having been found by him on the railroad property and being used by him. While one of the automobiles was being "slung up to the rafters of the car with the chain fall" the supports under it were taken out. "The chain carried away," and the automobile toppled over and fell on Caldwell, inflicting the injuries for which he seeks compensation. From these facts the Industrial Accident Commission found that Caldwell was injured while employed as a laborer by J. W. Freiden, the petitioner here. We are unable to agree with this conclusion.

While the testimony as to the nature of the alleged employment of Harper and the others by Freiden relates more to the general custom followed in such matters than to the particular instance which we are considering, it sufficiently appears that Harper was the only person with whom Freiden dealt in the matter, and was the only one with whom he made any arrangements concerning the matter. The transaction, reduced to simple terms, was that for the sum of $1.50 each Harper agreed to unload the machines and place them on the platform. Travers, who had been helping him on previous occasions, secured the assistance of Caldwell on this particular occasion. It does not appear that Freiden exercised the slightest control over either Harper or his assistants in the matter of unloading the machines from the cars. He did not know either of Harper's assistants, and did not authorize Harper to secure the services of either of them. He merely gave the usual direction to Harper to unload the cars. Nothing appears to have been said in this particular instance as to the price, but it was understood to be at the regular rate of $1.50 for each automobile removed to the platform. Harper testified that the arrangement that he had with Freiden was "just to unload the cars at $1.50 a machine."

When Harper had placed the automobiles on the platform his connection with the transaction ceased and he had no longer any interest in the matter and no further relations with Freiden until another shipment of automobiles arrived.

We are unable to arrive at any other conclusion from the facts in this case than that Harper was an independent contractor in the matter of unloading the automobiles for the petitioner. He furnished his own tools and implements for the unloading, selected his own assistants, directed the work at his own pleasure, and was not under the authority or direction of Freiden in any way. It follows, therefore, that Caldwell was not in any sense an employee of the petitioner. We are unable to differentiate the facts in this instance from those considered by this court in other cases where it was held that under such circumstances the injured party is not entitled to look to the owner of the property on which the labor was bestowed for compensation. Fidelity & Deposit Co. v. Brush, 176 Cal. 448, 168 Pac. 890; Donlon Brothers v. Industrial Accident Comm., 173 Cal. 251, 159 Pac. 715; Pryor and Globe Indemnity Co. v. Industrial Accident Comm., 186 Cal. 169, 198 Pac. 1045.

It follows that the award must be annulled; and it is so ordered.

We concur: SHAW, C. J.; LAWLOR, J.; WILBUR, J.; LENNON, J.

---

59 Cal. App. 144

## PEOPLE v. LAUMAN. (Cr. 879.)

(District Court of Appeal, Second District, Division 1, California. Sept. 22, 1922. Hearing Denied by Supreme Court Nov. 20, 1922. Dissenting Opinion. Dec. 8, 1922.)

**1. Criminal law ⊂=976, 1083—Granting motion in arrest and appeal by people suspended statute as to pronouncing sentence.**

The granting of defendant's motion in arrest of judgment and appeal therefrom by the people suspended Pen. Code, § 1191, providing that the court must pronounce sentence in not less than two days nor more than five days after verdict has been rendered.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

**2. Criminal law ⟸1190 — Determination of people's appeal from an order granting motion in arrest of judgment revived verdict.**

Determination of the people's appeal from an order granting defendant's motion in arrest of judgment and the sending down of the remittitur revived the verdict, which in law should be considered as being given new life as of the date of the filing of the remittitur.

**3. Criminal law ⟸1192—Defendant entitled to new trial where seven days elapsed between filing of remittitur and day of sentence.**

Where at the filing of the remittitur after determination of the people's appeal from an order granting defendant's motion in arrest of judgment defendant was out on bail, and from the day he appeared in court after the filing of the remittitur and until the day of sentence seven days had elapsed, he was entitled to a new trial under Pen. Code, §§ 1191, 1202, providing that sentence must be pronounced in not less than two nor more than five days after the verdict has been rendered.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Roy R. Lauman was convicted of presenting false proofs of loss under policy of fire insurance, and he appeals. Reversed.

LAWLOR, J., in Supreme Court, dissenting to ruling on motion for hearing.

Davis, Rush & MacDonald, John L. Richardson, T. E. Parke, and Chandler P. Ward, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman and Erwin Widney, Deputy Attys. Gen., for the People.

JAMES, J. [1, 2] Appellant was convicted of a felony; it being charged that he presented false proofs of loss under a policy of fire insurance. He presented a motion for a new trial, which was denied, and then made a motion in arrest of judgment, which motion was granted. Upon an appeal taken by the people the Supreme Court reversed the order arresting the judgment. People v. Lauman, 187 Cal. 214, 201 Pac. 459. Remittitur certifying the judgment of the Supreme Court was received and filed in the trial court on the 14th of November, 1921. Defendant had been released on bail, and a bench warrant was issued to bring him into court. Upon information received by his attorney that such warrant had been issued, defendant surrendered himself into custody, and appeared before the court on November 21st with his counsel. At that time his counsel presented the objection that, under the provisions of sections 1191 and 1202, Penal Code, no sentence could be pronounced, but a new trial should be ordered, because more than five days had elapsed from the date of the verdict of the jury. The court stated that he could not hear the argument at that time, owing to the fact that another cause was on trial, and continued the hearing until the next morning. At that time defendant's counsel presented a written demand for a new trial. The hearing was continued until 2 o'clock of the same day, and the court said: "I want to think about this for a little while. I will continue the matter until Friday." Friday was the 25th of November. On the latter day, the matter being called again, the court stated that he would take further time to consider the questions presented, as he was not ready to decide them, whereupon a further continuance was ordered until November 28th; that being Monday. At the last-named time the court denied the application for a new trial, and overruled an objection to rendering of judgment, and proceeded to sentence the defendant to a term of imprisonment in the penitentiary. This judgment appellant contends was erroneous. He first insists that the provisions of section 1191, requiring that judgment must be pronounced within not less than two or more than five days after the verdict, are mandatory, and that, where there are no proceedings pending on a general motion for a new trial or for probation, as was this case, if the judgment is pronounced after the five days have elapsed, it must be reversed. The motion in arrest of judgment and the ruling of the court granting the same, and the subsequent appeal by the people, must be held to have suspended the requirements of the statute as to the passing of sentence until the appeal had been determined. When the appeal was determined and the remittitur sent down, it revived the verdict, which in law should be considered as being given new life as of the date of the filing of the remittitur.

[3] There was a condition attending this case which extended the date when the court was required to act further, to wit, the condition that the defendant was out on bail, and was not available for the purpose of having sentence imposed upon him. The court could not legally sentence the defendant for a felony in his absence; hence was powerless by reason of the law itself to do the very thing that would have been required of him where the person of the defendant could be produced at any time upon the order of the court alone. From the record then it appears that the first day after the filing of the remittitur when the defendant was available for the purpose of being sentenced was the 21st of November, 1921. Under the terms of the statute as they have been construed, it was the court's duty, within a period of time not to exceed five days from that date, to pronounce judgment. Had appellant rest-

ed alone upon his contention first made, that sentence could not be pronounced at any time after the filing of the remittitur because more than five days had elapsed from the date when the verdict was returned by the jury, his plea would have been insufficient for reasons already stated. But he particularly specified the objection against the pronouncement of the judgment that more than five days had elapsed after filing of the remittitur, and asked for a new trial. In Rankin v. Superior Court, 157 Cal. 192, 106 Pac. 719, the court said:

"If judgment was not pronounced within the time limited, a new trial was made imperative if the defendant so desired; he became 'entitled' to it."

"The delay beyond the time specified for pronouncing judgment renders it imperative that defendant have a new trial *if he asks for it.*" People v. Winner, 31 Cal. App. 352, 160 Pac. 689.

In People v. Okomoto, 26 Cal. App. 568, 147 Pac. 598, the court said:

"It appears that the defendant was entitled to a new trial; but it further appears that a new trial was not refused, inasmuch as he did not ask for it. * * * It has been held by this court that, in the absence of any objection made by the defendant at the time of pronouncing judgment, and in the absence of any demand made by him for a new trial upon the ground that the legal time limit had expired, the court might rightfully enter the judgment. People v. Polich, 25 Cal. App. 464, 143 Pac. 1065."

From the day the defendant appeared in court after the filing of the remittitur, until the day of sentence, seven days elapsed, which brought the date of sentence outside the period prescribed by the statute. A new trial should have been ordered. See the further cases, People v. Boling, 32 Cal. App. 42, 161 Pac. 1169; People v. Gilbreth, 33 Cal. App. 23, 164 Pac. 18.

The judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

Opinion of Supreme Court in Bank Denying Hearing.

SHAW, C. J. The petition to have the above-entitled cause heard and determined by this court, after judgment in the District Court of Appeal of the Second Appellate District, Division 1, is denied.

All Justices present concur, except

LAWLOR, J. I dissent. I agree with the contention of the Attorney General that sections 1191 and 1202 of the Penal Code, as amended in 1909, have no application, so far as the time within which judgment must be rendered after the reversal of an order arresting judgment is concerned. It is true that the purpose of the amendment is to secure expedition in the disposal of cases, and that the conclusion announced by the District Court of Appeal would tend to expedite proceedings after reversal; but as the provisions refer specifically to the remedies, and the sequence of and the time within which they may be availed of after plea or verdict of guilty, and no reference is made to proceedings after reversal, I think there is no statutory warrant for the construction given to the amended provisions.

The remedies provided in section 1191, which have any pertinency here, are the motions for a new trial and arrest of judgment, which must be decided within 15 days after plea or verdict, and an application for probation for the determination of which the court is allowed 20 additional days, and, on motion of defendant, this may be extended to 90 days. In this case the first two of the remedies were exhausted. The defendant was still entitled to apply for probation. It is for this reason the order of reversal in the first appeal did not direct the superior court to proceed to judgment, but remanded the cause for further proceedings in contemplation of sections 1191 and 1202.

But, even if the time schedule prescribed in the statute does apply after reversal of an order arresting judgment, the decision of the District Court of Appeal is based on an erroneous theory. It is because of the confusion to which this case may hereafter give rise that I deem it advisable to state my views on the subject.

It appears from the record on the original appeal that the verdict was rendered on November 25, 1919. On that day the case was set down for November 28 for judgment and sentence. When the case came up on November 28, defendant interposed his motions for a new trial and in arrest of judgment. The case was thereupon continued to December 1, then to December 5, and finally to December 6, each time for the hearing of said motions and for judgment and sentence. On the latter date the motion for a new trial was denied, and the motion in arrest of judgment granted. This consumed 11 out of the 15 days which might have been appropriated under section 1191; but, as the trial court did not find it necessary to use the 15 days, no time remained, so far as those two remedies were concerned, after the order appealed from was made. The appeal from the order granting the motion in arrest of judgment was taken on December 6. This, of course, had the legal effect of suspending jurisdiction in the superior court until the remittitur was filed.

It follows that, when the remittitur was filed and the court acquired jurisdiction over the person of the defendant, and relief was not sought by probation, judgment should have been rendered forthwith. Hence,

since judgment was not rendered on the first day the defendant appeared after the filing of the remittitur the court was without jurisdiction to pronounce judgment and should have granted a new trial. The theory of the District Court of Appeal is that on the filing of the remittitur the verdict "should be considered as being given new life as of the date" of such filing and that a new period of 5 days within which the case must be set down for judgment thereby created under section 1191.

I find no warrant for this interpretation in the statute. Not only the verdict, but all the proceedings subsequent to verdict, including the motions for a new trial and in arrest of judgment, were revived on the filing of the remittitur and determined the course the court should pursue. The maximum of 5 days referred to in the first paragraph of section 1191 fixes the time the court must appoint for pronouncing judgment after a plea or verdict of guilty or a plea of former conviction or acquittal, or once in jeopardy. That time may be extended for the indicated purposes and no other. Except for probation the time provided in section 1191 had been exhausted when the appeal was taken. There was no more authority under that section to allow 5 days for rendering judgment after the filing of the remittitur and the appearance of the defendant than there would have been for granting any other number of days. To hold there was such authority is to add to the terms of the statute.

It seems to me the proper procedure would have been to arraign the defendant, review the proceedings up to date, and then inquire of him whether he had any legal cause to show why judgment should not be rendered. In that situation he might have asked for probation, in which event the case would probably have been continued. But, as he did not, judgment should at once have been pronounced.

---

59 Cal. App. 164

## BROWN v. CHOWCHILLA LAND CO. et al.

(Civ. 2446.)

(District Court of Appeal, Third District, California. Sept. 26, 1922. Hearing Denied by Supreme Court Nov. 23, 1922.)

**1. Vendor and purchaser ⟸101—Notice of cancellation held not operative as restoration of right to declare forfeiture.**

Where vendor's notice of cancellation contained no demand for payment of what was due nor afforded intimation that vendor would insist upon prompt payments in the future, it could not operate as a restoration of the right to declare a forfeiture for failure to pay what was due, nor be considered as notice that vendor would insist on prompt payments in the future.

**2. Vendor and purchaser ⟸101—Requirement of notice of intention to forfeit, after receipt of overdue payments without objection, based on equitable estoppel.**

The requirement of notice to forfeit, after receipt of overdue payments without objection, is based upon the equitable consideration that vendor by his conduct has led purchaser into the belief that he will continue to waive strict performance, but where parties have provided that acceptance by vendor of payments overdue should not be deemed waiver of the provision that time was of the essence of the contract, and should not be a relinquishment of vendor's right to claim forfeiture for any subsequent default, it would not be illegal for vendor to insist on forfeiture for any subsequent default.

Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Action for specific performance by R. C. Brown against the Chowchilla Land Company and others. From judgment for defendants, plaintiff appeals. Affirmed.

Fee & Ring, of Madera, for appellant.

Butler & Van Dyke, of Sacramento, for respondents.

BURNETT, J. The action was brought for specific performance of three separate contracts for the purchase and sale of different pieces of real estate. The contracts provided for monthly payments of interest and part of principal on the first day of each month, extending over a period of 7½ years, although the purchaser had the privilege of paying the full amount sooner. The contracts contained these covenants:

"And it is further agreed that, in case of a default in the payment of any of said sums, or any installment or interest due thereon, for the period of two months after they become due, all money previously paid by the purchaser shall, at the option of the seller, become forfeited to the seller and retained as settled and liquidated damages and rent for the use and occupation of the property as herein permitted, and thereupon the seller shall be released from all obligation in law and equity to convey said real property, and the purchaser shall immediately deliver possession thereof to the seller, and herein it is agreed that time is of the essence of this contract.

"The purchaser covenants and agrees that a breach or violation on his part of any of the conditions, restrictions, or covenants contained in this indenture shall immediately terminate all rights and interests of said purchaser thereunder, and all rights, title, ownership and interest whatsoever in and to said real property, and every portion thereof shall immediately, without notice or entry or compensation or obligation of any kind to said purchaser, revert to and become absolutely vested in the seller, its successors, and assigns.

---

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

"The waiver by the seller of any breach of any covenant or agreement herein contained on the part of the purchaser shall not be deemed or held to be a waiver of any subsequent or other breach of said covenant or agreement, nor a waiver of any other covenant or agreement herein contained."

The contracts also provided that the purchaser should have the privilege of entering into possession of the premises and continuing therein "unless forfeited by the nonpayment of the purchase money or any installment thereof," but in consideration of said right of possession he should pay all taxes levied against the property. The contracts were executed on October 1, 1913, and the first seven payments were made within a few days after the time when they were due. The June and July payments of 1914 were made on August 20, leaving the August payment in arrears, but this was paid September 25. Two more monthly installments were paid on January 3, 1915, two on March 11, and two on August 6, following, leaving plaintiff at that time six months in arrears on each contract. For nearly three years thereafter plaintiff paid no other installment on the property in controversy herein. In April, June, and July, 1918, he made payments aggregating $120 on one of the contracts. No other payments were thereafter made or offered to be made on any of the contracts until January 9, 1920, other than the small amount for taxes paid for the use of the property, the last payment therefor having been made in December, 1918. On February 5, 1919, plaintiff received three letters from defendant, all substantially alike but referring separately to the three lots of land, as follows:

"Please be advised that we have this day canceled the contract between this company and yourself, covering block 130, because of your failure to make the payments due thereon. This cancellation is in accordance with the provisions of said contract."

On January 9, 1920, the plaintiff wrote defendant as follows:

"Please prepare deeds as per contract in blocks 129, 130, 131, money for same at Chowchilla National Bank."

To which, on the next day, defendant replied as follows:

"We are very much surprised at your letter of January 9th requesting deeds covering blocks 129, 130, and 131. As you were notified over a year ago, your contracts covering these lots were canceled because of your failure to make the payments provided for thereunder."

Suit was then brought to compel defendant to convey to plaintiff said blocks, and, after the cause was argued and submitted, the court rendered judgment for the defendant for costs, from which judgment the appeal has been taken.

One of the main controversies relates to the question of waiver. As to this the trial court found:

"That defendant has never waived the provision in said contract that time was of the essence thereof, nor waived nor agreed to waive its right to cancel and terminate said contract for failure to make the payments therein agreed to be made as and when agreed to be paid, or the right to keep and retain upon such cancellation the moneys theretofore paid by it pursuant to said contract."

Plaintiff's theory and contention was and is:

"That the power of the Chowchilla Land Company to forfeit his rights under the contract was temporarily suspended by reason of its accepting payments thereunder long after the same were due, and its course of dealing with him which evinced a purpose to permit him to meet his obligations as best he could; that the right to forfeit could only be revived by a demand upon plaintiff to make up his past delinquencies, and that in the future it would exact and expect a strict compliance with the contracts by him, and because such demand was never made, the notices of cancellation of February 5, 1919, were legally insufficient to forfeit his rights, notwithstanding the provision" in the contracts that "time is and shall be of the essence of this agreement."

In support of the legal doctrine thus stated, many cases are cited, but we may notice only the leading California decisions. In Boone v. Templeman, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126, the whole question was exhaustively considered with the citation of many authorities. The action therein was by the purchaser, Boone, for specific performance, and it appears that, during the entire period in controversy, he was in possession and in actual use of the land. After reciting the facts showing that many payments were accepted without protest by the vendor long after they were due, the Supreme Court said:

"We think from these facts a court might infer a waiver of the conditions regarding forfeiture and time, and that they supported the general allegation of the complaint that Templeman had waived those conditions. The authorities with practical unanimity so hold."

And the court quoted with approval the following from Monson v. Bragdon, 159 Ill. 66, 42 N. E. 385:

"While * * * not necessarily an absolute permanent waiver, yet in a court of equity there was at least such a temporary suspension of the right [of forfeiture] as could only be restored by his giving a definite and specific notice of an intention to that effect."

It is to be observed that Templeman did not exercise his option to declare the whole price due upon the default for 60 days in paying any of the installments, but permitted all to become due by lapse of time. In

that respect the case differed from this, as herein some of the installments did not become due until after the suit was brought.

In Stevinson v. Joy, 164 Cal. 279, 128 Pac. 751, the action was brought by the vendor to quiet his title to a parcel of land and to enjoin the vendee from removing therefrom a building which the latter had erected thereon. Therein also numerous payments were made by the vendee and accepted by the vendor, after the time provided for their payment by the contract, and the Supreme Court reiterated the rule stated in the Templeman Case, supra.

In the Stevinson Case, supra, it is worthy of note that the contract provided that "no waiver of times of payments for continuance of option shall be valid in favor of the first party, unless reduced to writing and subscribed by the second party thereto." No comment was made by the Supreme Court as to this provision, but, as it simply referred to the manner in which the waiver was to be expressed, it might properly be held that this was waived by the conduct of the vendor in receiving the overdue payments without executing said written testimonial. Arnold v. American Ins. Co., 148 Cal. 660, 84 Pac. 182, 25 L. R. A. (N. S.) 6.

In Hayt v. Bentel, 164 Cal. 680, 130 Pac. 432, the action was brought by the vendee to cancel the contract and to recover the moneys paid thereunder by the plaintiff, the vendor being unable to convey a good title. The main contention of appellant was that respondent was not entitled to recover by reason of the fact that the latter had made default in the payment of the installments as they became due, but the Supreme Court held that the vendor, by accepting the payments after they became due, had waived the delay, and that to put the vendee in default he would be required to tender a deed. The last expression of the Supreme Court on the subject is found in Bairos v. Barlin, 46 Cal. App. 665, 190 Pac. 188, wherein it was said:

"Acceptance of overdue installments of the price, on an executory contract for the sale of land, waives any right to declare a forfeiture on account of the previous failures to pay when due. But such acceptance alone does not change the terms of the contract as to forfeiture for future failures, nor eliminate the provision that time is of the essence of the contract. There may be conduct and acquiescence by the vendor sufficient to justify the inference by a court as a matter of fact that the vendor has waived the conditions of a contract regarding a forfeiture, which he afterward claims the right to enforce, and when, in such a case the waiver has continued until after all installments are due, the condition cannot be revived, except by notice to the vendee."

If that decision is to be construed as holding that notice to the vendee to revive the right of forfeiture is required only when all the installments have become due, then manifestly no such notice was required herein, since the installments were not all due at the time the action was brought.

However, it is the claim of respondent that if notice was required, it was furnished by the service of the so-called notice of cancellation, and Pearson v. Brown, 27 Cal. App. 125, 148 Pac. 956, is cited as authority for that position. Therein the notice was:

"This is to advise you that I have on this day canceled your contracts for lots in the Brown Andrade tracts on account of nonpayment of installments, as you are now delinquent 10 months, and I feel that I have carried this account long enough," etc.

After citing Boone v. Templeman, supra, and other authorities as to waiver by reason of accepting overdue payments, the court said:

"This statement of the rule accurately defines what the rights of the respondent in this case were on December 5, 1911, the date of his letter to the appellants, in which he assumed to cancel the appellant's contracts by reason of their default in making payments according to their terms. The respondent was not entitled to work such cancellation, and his said letter could not be given that effect. The utmost effect under the foregoing rule which would be given to it would be that of a notification to the vendees that the vendor intended thereafter to insist upon a strict compliance with the terms of the contracts; and that, unless within a reasonable time the vendees paid up their deficiency, and thereafter made their payments strictly in accordance with the time conditions of their contracts, the forfeiture clauses would be enforced."

The court did not decide that this was equivalent to a notice, but declared simply that such was the utmost effect that could be given to it. Besides, the vendees did not, as does the vendee herein, question the sufficiency of the instrument to constitute such notice, but they responded immediately with an offer of payment of all that was due.

Moreover, the decisions are to the effect that where notice is required it must contain definite and specific warning of an intention to enforce the forfeiture. In Stevinson v. Joy, supra, the court said that in case of waiver the right of forfeiture could only be restored "by giving a definite and specific notice of an intention to enforce it."

In Hoppin v. Munsey, 32 Cal. App. Dec. 468,[1] it was said that—

"where a vendor has waived his right to a forfeiture given him under a contract of sale of real estate it cannot be deemed revived except upon a notice to the vendee that if he does not comply with the terms of the contract as to payments called for by the same

[1] Superseded by opinion of Supreme Court on hearing. See 198 Pac. 398. Superseded opinion not published in official reports or Pacific Reporter.

within a time specified therein, which as fixed must be reasonable, the right to forfeiture would then be exercised."

In that case, the notice which was held sufficient, stated:

"Unless you pay up the interest, amounting to $87.00, before the 10th of March, 1917, I will have to cancel deal with you on lot."

In Hill Co. v. Pinque, 179 Cal. 759, 178 Pac. 952, 3 A. L. R. 669, it was said:

"It was the settled rule at common law that a demand for payment of the exact sum due was a necessary prerequisite to a forfeiture of a lease for nonpayment of rent. 24 Cyc. 1355. The same rule was laid down in this state at an early date (Gage v. Bates, 40 Cal. 384; O'Connor v. Kelly, 41 Cal. 434), and these decisions have never been questioned (Mossi v. Fairbanks, 19 Cal. App. 355, 125 Pac. 1071)."

The same rule of waiver and the suspension of the right to forfeit, according to the authorities, applies with equal force to contracts of sale as to indentures of lease.

[1] Said notice of cancellation contained no demand for the payment of what was due nor did it afford any intimation that the vendor would insist upon prompt payment in the future. In fact, it was equivalent to a declaration that the contract was at an end and that no further payments would be accepted. It could not therefore operate as a restoration of the right to declare a forfeiture for failure to pay what was due, nor could it be considered as notice that the vendor would insist upon prompt payments in the future.

[2] But we are satisfied that, by the terms of the contract, the parties expressly covenanted that no such result as claimed by appellant would follow the acceptance of overdue payments. That the parties had the legal right to so provide is not and cannot be disputed. If the parties had expressly provided that the acceptance by the vendor of payments after they were due should not be deemed a waiver of the provision that time is of the essence of the contract and should not be considered a relinquishment of the vendor's right to claim a forfeiture for any subsequent default on the part of the vendee, then it would not be illegal or inequitable for the vendor to insist upon forfeiture for any such subsequent default. The requirement of notice after the receipt of overdue payments without objection is based upon the equitable consideration that by his conduct the vendor has led the vendee into the belief that the former will continue to waive the strict performance of the contract. The principle of equitable estoppel is involved. But the reason for the rule does not exist where the parties have expressly agreed that such waiver shall not affect any subsequent breach or relinquish the right of the vendor to insist thereafter upon a strict observance of the terms of the contract. We think the parties could not have more effectually provided that a waiver of a breach of the contract should not be held to have occurred by reason of the forbearance of the vendor to take advantage of any prior default.

The parties could not fail to understand from the particular covenant in question that the acceptance of any overdue payment or payments was to be regarded as an indulgence to the vendee, but as to the future the whole contract remained in full force and effect and rendered the vendee subject to the penalty of forfeiture for any default thereafter. We may repeat that the right to declare a forfeiture for the failure to pay on time is one of the covenants of the contract and hence it is a part of the agreement which the parties have in effect declared shall not be deemed waived or affected by any previous default. The case therefore stands as though there had been no belated acceptance of payments, and since there were several installments long overdue at the time the action was brought, plaintiff was clearly in default, and the right of forfeiture existed in behalf of defendant, no affirmative action being required on his part to work a cancellation. Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Fresno Irrigated Farms Co. v. Canupis, 39 Cal. App. 184, 178 Pac. 300.

Plaintiff also claims that there was a subsequent oral agreement by which he was granted the privilege of paying as he could on one block at a time. As to that he testified:

"I went to Mr. Coombs (respondents' agent) and asked permission to pay one at a time. He never did make a reply. I think he told me he would write to Sacramento. I understood the reply was favorable because he accepted the money. I did not go to Mr. Coombs to ascertain what kind of a reply he received, because when I went to him first I told him I wanted to pay one at a time. There was no other reply I can remember that was made."

Conceding, for the purpose of the case, that the foregoing would support a finding that such agreement existed, it is sufficient to say that the finding to the contrary is amply supported by the testimony of Mr. Coombs.

As to the question of waiver, the trial court further found:

"It is untrue that by any act or course of conduct of defendant, plaintiff was led to believe that defendant did not intend to insist on the provision of said contract relative to forfeiture or that it had waived the provision in said contract relative to forfeiture."

This is a finding of fact, as we understand it, and not a mere legal conclusion as claimed by appellant (Bairos v. Barlin, supra), and we regard it as justified by the evidence. That respondent treated appellant with great indulgence and extended him every opportunity to make the payments is quite apparent from the record. He was notified by letter on July 12, 1917, that there were 29 delinquent installments, and was requested to call at respondents' office and give information as to what he intended to do about it. But he did nothing until 9 months thereafter, as we have seen when he made a small payment on one of the lots, followed in June and July of 1918 with other payments on the same lot, aggregating $120, and nothing else was done by appellant except the payment of the small amount for taxes, until this suit was brought, nearly a year after he received said notice of cancellation, appellant thereby committing 12 other breaches of the contract before he offered to make any further payment. As suggested by respondent, plaintiff seems to have assumed that—

"he could wait for as long a time as he pleased and make payment whenever the spirit moved; and that in the meantime he could stand by, watching the market, and determine, according as values increased or decreased, whether he would thereafter compel the company to convey the property."

We may add that when he did finally demand a conveyance, he could expect no more favorable treatment than the offer he received from respondent to credit him with all that he had paid in as payment on one block, and upon receipt of the balance due to execute to him a conveyance of said block.

We think there is no merit in the claim that the findings do not support the judgment. They show the execution of said written contracts, that they were not superseded or modified by any other agreement, that plaintiff had failed to make payments as claimed by respondent, that there was no waiver of any of the terms of said contracts, and that plaintiff was in default, and had been for months at the time the suit was brought. It is true that there was no specific finding that such notice as to the amount due and demand for its payment within a specified time, and notice that defendant would thereafter insist upon prompt payment, as appellant insists upon, was given, but, as before indicated, we deem this immaterial under the contracts of the parties. The forfeiture followed as a consequence of plaintiff's default, and it was sufficient to claim it in the answer.

We think the judgment should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

59 Cal. App. 160

## HELMUTH et al. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.

(Civ. 4314.)

(District Court of Appeal, First District, Division 2, California. Sept. 26, 1922.)

1. **Master and servant ⊂⊃401—Variance between application for compensation and proof held not prejudicial.**

Where an application for compensation for injuries to an employé blasting holes alleged that he was paid 1¼ cents per hole, and blasted about 400 to 450 holes a day, and the Industrial Commission found in accordance with the proof that his average daily earnings at said rate equaled $4, the employers were not prejudiced by any variance; the finding being substantially in accordance with the allegations and within the liberal rule provided in Code Civ. Proc. §§ 469, 470, for pleadings in ordinary actions.

2. **Master and servant ⊂⊃367—One paid under piecework system for blasting holes held an "employee" within the Compensation Act, and not an independent contractor.**

One employed to blast out holes who was paid at the rate of 1¼ cents per hole, and furnished nothing but his labor, and who was not required to work any certain number of hours, being free to come and go as he wished, and free to discontinue his work at any time without legal liability, *held* to be an employee within Workmen's Compensation, Insurance, and Safety Act and not an independent contractor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employee.]

3. **Master and servant ⊂⊃363—Blasting holes in farm land not employment excluded by Compensation Act.**

One employed to blast holes for his employers, having a contract for drilling and blasting holes in farm land as a preparation for planting vines and trees, is not excluded from the Workmen's Compensation, Insurance, and Safety Act, as being engaged in an employment under the classification of agriculture.

Application by George H. Helmuth and another, copartners, doing business under the firm name of Helmuth & Stuckert, for certiorari to review an order of the Industrial Accident Commission awarding compensation to Henry Hettinger. Award affirmed.

A. M. Drew, of Fresno, for petitioners.

A. E. Graupner, of San Francisco, for respondents.

LANGDON, P. J. This matter comes before us upon a writ of review, and we are asked to annul the award of the Industrial Accident Commission granting to Henry Hettinger $50.64 for medical service and indemnity for temporary disability at the rate of $14.82 a week until the termination of the

disability or the further order of the commission.

[1] The applicant was injured by an explosion while blasting holes for the defendants upon some farm land near Fresno. The facts will be related in connection with the discussion of the several points raised by petitioners. The first of these is that there is a material variance between the application filed with the Industrial Accident Commission and the proof offered at the hearing. The applicant stated in his application for adjustment of claim that he was paid 1¼ cents per hole, and blasted about 400 to 450 holes a day. The commission found:

"The rate of pay of the said employee in said employment was one and one quarter cents for each hole blasted, and the average daily earnings at said rate equalled $4.00, working six days in the week. The average weekly earnings were $22.80."

It is true there is a conflict in the testimony upon this question by reason of the fact that the applicant testified that he was working for $4 a day at the time of his injury, and his compensation at that time was not dependent upon the amount of his work. However, the testimony of the applicant's son, who was working with him, and of the employer and the evidence of the canceled checks issued in payment of wages, removes the question from the realm of doubt, and supports the finding of the commission. We cannot see how the petitioners were prejudiced in this matter. The finding of the commission is in harmony with their contention, and it is substantially in accord with the allegations of the application. Any variance in the finding from the allegations of the application is in favor of petitioners, as 400 holes at 1¼ cents per hole would be more than $4 a day. In the case of a complaint filed in an ordinary action at law and a variance therefrom in the proof, the court would be empowered to order an amendment to conform to the proof or to find in accordance with the facts proven. Sections 469 and 470, Code Civ. Proc. The rule applicable to the informal pleadings before the Industrial Commission should be at least as liberal.

[2] The second contention made by petitioners is that Henry Hettinger, the applicant, was an independent contractor, and not an employee. Petitioners had taken a contract for drilling and blasting holes to break up hardpan on certain land in Fresno at the rate of 10 cents a hole. Mr. Stuckert, one of the petitioners, operated one drilling machine, and employed a man to operate another one. The applicant and his son were engaged to follow up these machines and blast out the holes drilled thereby. They were paid 1¼ cents a hole for this work. The powder and blasting materials were furnished by the owner of the land. The applicant furnished nothing but his labor, and it appears that he was not required to work any certain number of hours, but was free to come and go as he wished. It is because of this latter fact that petitioners contend that applicant was an independent contractor. It is, of course, difficult to lay down any hard and fast rule by which to measure one's status in this respect, and it is unnecessary to do so in the present case. For it seems clear from the entire evidence that the applicant was an employee of petitioner, although he was paid under a system known as "piecework" rather than a regular daily wage. Mr. Stuckert, one of the petitioners, stated that he had found that men worked better under that system, and he always employed them thus. If applicant had been an independent contractor, he would have been legally obligated to complete his contract, but there is nothing in the record to indicate that applicant was not free at all times to discontinue his work without legal liability. He did not contract to drill any certain number of holes, nor to do any certain amount of work, but he merely engaged to work from day to day upon a wage to be measured by the actual amount of work done. His employment was no different in this respect from the employment of Mr. Liepsick, who drove one of the drilling machines. Mr. Liepsick stated that he was paid at the rate of 1½ cents a hole for the drilling; that he never drilled over 300 holes a day. The method of estimating his wages did not make him an independent contractor, and the case of the applicant is no different in principle.

[3] The other objection urged is that the applicant was engaged in an employment excluded by the Workmen's Compensation, Insurance, and Safety Act. It is insisted that his work comes under the classification of either farming, viticulture, horticulture, or agriculture. We think there is no merit in this contention. The record shows that the petitioners made contracts with various owners of land to drill and blast holes in the land as a preparation for the planting of vines and trees. The evidence shows that the applicant was experienced in the use of explosives and in the work of blasting. His work was only incidentally, in this instance, connected with the farm. Blasting of holes might as well be done for the planting of telegraph poles, or in mining or building operations and in many other connections. It is not, inherently, farm work, and our courts are not disposed to cramp and narrow the meaning of the Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831); it is their duty and policy to liberally construe said act, with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment.

The award of the Industrial Accident Commission is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

---

59 Cal. App. 191

**STEEL et al. v. THOMPSON. (Civ. 2462.)**

(District Court of Appeal, Third District, California. Sept. 27, 1922.)

**1. Landlord and tenant ⟸109(1) — Written agreement not required to surrender lease.**

A written agreement is not required to constitute a surrender of a lease, as it may be accomplished by operation of law.

**2. Landlord and tenant ⟸233(2)—Surrender of lease a question of fact.**

Whether there has been in a given case a surrender of a lease is a question of fact, to be determined in the first instance by the trial court.

**3. Appeal and error ⟸1010(1)—Finding of trial court sustained by substantial evidence conclusive.**

Where the findings of the trial court are sustained by substantial evidence, they are conclusive on appeal.

**4. Landlord and tenant ⟸184(2)—Evidence held not to show unconditional acceptance of surrender of lease.**

In action to recover a sum deposited by a tenant to secure payment of rent under a lease, evidence *held* not to show an unconditional acceptance of surrender of lease.

**5. Landlord and tenant ⟸194(1) — Notice that lessor will rent surrendered property for lessee's benefit evidences lessor's refusal to accept surrender.**

Purpose of a notice to the lessee from the lessor that surrendered property will be rented for lessee's benefit is to furnish evidence that the lessor does not release the lessee from liability for rent under the lease.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by George F. Steel and others against Richard G. Thompson. Judgment for defendant, and plaintiffs appeal. Affirmed.

W. H. Hatton and Thomas M. Anaya, both of Modesto, for appellants.

Hawkins & Hawkins, of Modesto, for respondent.

BURNETT, J. The action was brought to recover the sum of $375 deposited by appellants with respondent to secure the payment of rent under the terms of a lease executed by the latter to the former. As stated by appellants:

"The only point relied upon for a reversal of the judgment in this case is that it appears conclusively that there was a surrender of the lease by the tenants and an unqualified acceptance by the landlord of such surrender."

If the last statement be true, then, as the trial court stated, the plaintiffs or appellants herein are entitled to the $375. In relation to this controverted point the trial court found:

"As to paragraph IV of plaintiff's complaint the court finds that on the 17th day of October, 1920, that plaintiffs vacated the said premises and left the same vacant and thereupon and thereafter surrendered to the defendant the keys to the said building but did not surrender the lease, but kept the same in their possession, and that the defendant did not accept the surrender of said lease; and did not accept the surrender of the said possession of said leased premises until after the same had been vacated and he thereupon did re-enter and take possession of said leased premises and did attempt to lease the same to other parties."

It is claimed by appellants that this finding is entirely unsupported.

As to the principle of law involved there can be no controversy. It is clearly stated in Baker v. Eilers Music Co., 26 Cal. App. 371, 146 Pac. 1056, as follows:

"A lease contract may be brought to an end by the surrender of the leased premises and the acquiescence in such surrender by the lessor. Such acquiescence is perhaps best evidenced by his taking possession of the property and assuming again all of the authority over it of an owner in possession. * * * A lessor who takes possession of property delivered to him by his tenant and does so unqualifiedly, thereby releases his tenants. He may accept possession of the property for the benefit of the tenant and relet the same; in the latter case he has no action except one for damages for the difference between what he was able in good faith to let the property for and the amount provided to be paid under the lease agreement. Bradbury v. Higginson, 162 Cal. 602 (123 Pac. 797); Oliver v. Loydon, 163 Cal. 124 (124 Pac. 731)."

[1] Of course, it is not disputed that a written agreement is not required to constitute such surrender, as it may be accomplished by operation of law. Welcome v. Hess, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145.

[2] It is also the established rule that whether in any given case there has been such surrender is a question of fact to be determined in the first instance by the trial court. Triest & Co. v. Goldstone, 173 Cal. 240, 159 Pac. 715.

[3] It necessarily follows that, if there is any substantial evidence in the record to sustain the finding of the trial court that there was no unqualified acceptance of the surrender by the lessor, this court is bound by said finding. In other words, if it can be said from a review of the whole record that

ground exists for a rational conclusion that it was the understanding of the parties that notwithstanding the surrender of possession by the lessees they would still be held for whatever damages might accrue thereby to the lessor, we cannot interfere with the judgment although it may be opposed to our view as to the preponderance of the evidence.

[4] One consideration to which the trial court attached much importance is the unreasonableness of the position that the lessor would voluntarily release the lessees from further liability when the former had no assurance that he could secure another tenant. As the trial court declared:

"To my mind, it is quite apparent that there never was any mutual cancellation of this lease. Mr. Thompson wasn't mutually giving up $125 a month rent when he had no possible, or at least no definite plan for receiving that amount of rent from anybody else under another rental, * * * especially when he had a deposit of $375 to guarantee the payment of rent."

The trial court was also of the opinion that if "the lease had been actually canceled and it was understood that the deposit was to be returned that it would have been a part of the agreement." Those considerations may have been entitled to some weight in the determination of the ultimate question, but as we view it they would hardly be sufficient of themselves to justify the finding. The inference, however, is strengthened by a fair construction of the testimony of Mr. Thompson, who, in reply to the question, "Well now will you state to the court your recollection of what you said about his leaving the premises?" answered:

"Mr. Steel told me that he was unable to make his business pay, and I told him that it was indeed regrettable that he had to lease; I said that I hated to see anybody lose out on a deal that they got into; and we discussed the possibilities of utilizing the building, Mr. Steel informing me that he felt quite certain that he could get another tenant; that he had somebody in mind. I don't know who it was."

Furthermore he testified:

"He said: 'I have had a hard time, Mr. Thompson, and I want you to be as easy on me as you can.' This was in regard to the money that he had put up. And I told him that we could not do anything at this time because we did not know whether we would get it released or not. The Court: You mean not released, but the property leased again. A. Yes the property leased again, the supposition being if we could get a new tenant that would pay us as much as he was paying before the expiration of the time, that this that was put up as a deposit on the lease, that undoubtedly we would be able to give some of it back to him."

Again, in reply to the question, "What did you tell Mr. Steel?" He answered:

"That I could not do anything for him in the way of his deposit until later on, until we found out how things were coming out."

Since there was no express agreement as to the surrender, we must, of course, arrive at the intention of the parties from their conduct and statements, and it is, assuredly, not an unfair inference from what we have related that it was understood that respondent did not accept the surrender unqualifiedly and unconditionally but that he would hold appellant for the actual loss—making it as light as possible. The parties were not required to use any particular form of expression, but it is sufficient if it may be rationally gathered from the whole transaction that the parties understood that the acceptance was qualified as we have indicated.

[5] Appellant urges the importance of a notice to the lessee from the lessor that the property will be rented for the lessee's benefit, but the purpose of such notice is to furnish evidence that the lessor does not release the lessee from liability under the lease and the same result may follow from other evidence. That such conclusion may be reached from a consideration of the whole record we think there can be no serious doubt. It is to be supposed that these parties were not familiar with the intricacies of the law or the technical phrases that would be employed by a lawyer, but applying the usual tests to what was said and done, we are satisfied the finding of the court is supported.

Some suggestion is made that the material allegation of the complaint as to the surrender and acceptance was not denied in the answer, but such is not the case. The second paragraph of said answer is as follows:

"Defendant denies that on the 17th day of October, 1920, or at any other time, defendant accepted the surrender of said lease or accepted the surrender of the possession of the premises described in the complaint or re-entered or took possession of said premises or relet the same to other parties other than plaintiffs, except defendant admits that after said premises were vacated he took possession of the said premises and endeavored to lease the same to other parties as hereinafter stated."

To recapitulate: To release the lessee from liability he must surrender the property and it must be accepted unqualifiedly by the lessor. The question of whether it is so accepted is one of fact to be determined by the trial court from the whole transaction. If the possession is given up and the lessor re-enters without any agreement, express or implied, that the lessee's liability for rent is to continue, the lessee is acquitted of any further responsibility. But if it may be said from the conduct and declarations of the parties that the acceptance was conditioned that the lessee would be still

liable under his contract of lease for whatever loss might be suffered by the lessor, the former may be held for the damage, notwithstanding there may be no specific admonition by the lessor to the lessee that the property will be rented for the latter's benefit. For the purpose of such notice is to furnish evidence that the lessor does not release the lessee from liability, but this condition and understanding may be shown, of course, by other evidence.

The judgment is affirmed.

We concur: FINCH, P. J.; ANDERSON, Justice pro tem.

---

(59 Cal. App. 174)

## PEOPLE'S STATE BANK v. PENELLO.

## SAME v. BERTAINA. (Civ. 2454.)

(District Court of Appeal, Third District, California. Sept. 26, 1922. Rehearing Denied Oct. 26, 1922. Hearing Denied by Supreme Court Nov. 23, 1922.)

**1. Bills and notes ⟸365(1)—Note in hands of indorsee for value in usual course before maturity and without notice not subject to equities between original parties.**

Under Civ. Code, §§ 3105–3110, a note in the hands of an indorsee for value in the usual course of business before maturity, if taken without notice of any infirmity in the instrument, and without knowledge of any facts that would excite the suspicion of a prudent person, is not subject to existing equities between the original parties.

**2. Bills and notes ⟸358—Indorsee of note as collateral security a holder for value and in usual course.**

The indorsee of a note merely as collateral security for a pre-existing debt owing to him by his indorser is a holder for value and in the usual course of business in view of Civ. Code, § 3106.

**3. Bills and notes ⟸525—Indorsee of note as collateral security held not to have notice of defects in consideration.**

In an indorsee's action on notes taken as collateral security for a pre-existing debt owing by the indorser, evidence *held* to show that plaintiff acted in good faith and without actual or constructive knowledge of any defect in the consideration therefor.

**4. Bills and notes ⟸337—Banks taking notes as collateral may presume a sufficient consideration in a fair and regular transaction in the ordinary course of business.**

In transactions conducted according to the usual method obtaining in business, banks have a right to act upon the presumption in taking notes as collateral security that the notes were given for a sufficient consideration, that private transactions have been fair and regular, and that the ordinary course of business has been followed in view of Code Civ. Proc. § 1963, subds. 19–21.

**5. Bills and notes ⟸330—Special form of indorsement held not to show suspicion by indorsee as to validity of consideration for note.**

Where, in a bank's action on notes given as collateral security, the claim of fraud in the original consideration is set up, the fact that the form of indorsement relieved the bank of all responsibilities as to presentment, protest, and notice of dishonor *held* not evidence showing that the bank suspected the validity of the notes.

**6. Bills and notes ⟸497(5)—To be bona fide holder indorsee need not show want of notice of fraud in consideration.**

In an indorsee's action on notes taken as collateral security, wherein fraud in the original consideration was set up, an instruction that, if the fraud had been proven, the burden of proof was upon plaintiff to show that it took the notes before maturity for a valuable consideration without notice of the fraud, and in good faith, *held* erroneous as requiring proof that the indorsee had no notice of the fraud; the burden of showing such fact being on defendant.

**7. Bills and notes ⟸430—In absence of agreement, renewal note does not extinguish original debt.**

A renewal note does not extinguish the debt represented by a note for which it is given in lieu unless there is a distinct and unqualified agreement that it shall so operate.

**8. Novation ⟸4—No change in parties on note shown by different place of indorsement thereon.**

In action on notes given by defendants for stock in a corporation, which notes defendants claimed were procured by fraud, defendants' argument that, since the old notes were signed by the corporation, and indorsed by the principal stockholders on the back, whereas a new note which had been given the bank was "signed by all parties as makers," there was a novation, extinguishing the old notes, could not be sustained, for, although an indorsement is usually made upon the back of an instrument, the place is not essential, and a signature on the face of a bill or note may be an indorsement if so intended.

**9. Pledges ⟸58(1)—Indorsee of note as collateral security may sue thereon without resorting to original debtor.**

A bank holding notes as collateral security for a debt may bring suit thereon as indorsee without first resorting to the original debtor, in view of Civ. Code, § 3006.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Separate actions by the People's State Bank against B. Penello and against George Bertaina, consolidated by stipulation, and tried before the same jury. Judgment for defendants and plaintiff appeals. Reversed.

W. N. Graybiel, of Turlock (Andrew R. Schottky, of Merced, of counsel), for appellant.

F. W. Henderson, of Merced, and Henry W. Longsdorf, of Fresno, for respondents.

BURNETT, J. By stipulation these two actions were consolidated and tried together before the same jury. The complaints were filed the same day, each seeking to recover from the defendant the aggregate amount of $1,000 upon three promissory notes, the circumstances in both cases being identical. The notes were originally given to the Hunt-Jewett-Bontz Company, a corporation of Turlock, for $1,000 worth of stock in said corporation to be issued to each defendant. After execution said notes were assigned before maturity, along with other notes of the Hunt-Jewett-Bontz Company, to plaintiff as collateral security for an indebtedness due from said company to plaintiff, said indebtedness being in excess of the aggregate amount of all the notes assigned. The execution of the notes and the assignment by the Hunt-Jewett-Bontz Company to plaintiff were not disputed, but each defendant in his answer alleged that fraud was perpetrated by the company in obtaining the notes and that plaintiff at the time of the assignment had knowledge of the fraud or of such facts as to put it upon inquiry. The jury found for the defendants, and the appeal is from the judgment entered thereon.

The defense was set forth in the answer as follows:

"That there is not now, nor was there at any time any consideration for any of said notes; that said defendant has at no time received any consideration therefor; that said plaintiff in said action took all of said notes with knowledge of said fact and with full knowledge that said defendant had received no consideration whatever for any of said notes."

In the following paragraph is set forth an account of the transaction between the agent of the Hunt-Jewett-Bontz Company and the defendants resulting in the execution of the notes. Therein certain fraudulent representations are disclosed, and the averments are sufficient to justify a finding that the instruments were without consideration and void as far as the company is concerned. Then come these allegations:

"That defendant is informed and believes, and therefore alleges upon information and belief, that said plaintiff took said notes from said company with full knowledge of all the facts herein alleged, and with full notice that said defendant had been induced to sign said notes for stock in said company and that there had not been and has not been at any time any consideration therefor. Defendant is informed and believes, and therefore alleges upon information and belief that said plaintiff has parted with no consideration for said notes and holds the same for the use and benefit of said company."

[1] For the purpose of this decision we may concede that, if the action had been brought by the original payee, the defense would be sufficient to defeat it, but the vital question herein affects the rights of an indorsee for value, in the usual course of business, of a note before maturity. The rule in such cases is well established by the authorities, and, indeed, it is embodied in the provisions of the Civil Code (sections 3105–3110) that the note in the hands of such indorsee, if taken without notice of any infirmity in the instrument and without knowledge of any facts that would excite the suspicion of a prudent person, is not subject to existing equities between the original parties. For a fuller discussion of this legal proposition we may refer to Citizens' Bank v. Stewart, 22 Cal. App. 91, 133 Pac. 337; Griswold v. Morrison (Cal. App.) 200 Pac. 62; Eames v. Crosier, 101 Cal. 260, 35 Pac. 873; Blochman Commercial & Savings Bank v. Moretti et al., 177 Cal. 256, 170 Pac. 419.

[2, 3] As to the facts, there is no dispute that the notes were assigned to plaintiff before maturity as collateral security for the payment of a debt owing by the assignor to said assignee. There is no doubt that the indorsee of a note merely as collateral security for a pre-existing debt owing to him by his indorser is a holder for value and in the usual course of business. Griswold v. Morrison, supra; section 3106, Civ. Code. We think it equally plain that the only rational inference from the evidence is that plaintiff, in taking an assignment of said note, acted in good faith and without knowledge, either actual or constructive, of any defect in the consideration therefor. To show this it will be necessary to quote extensively from the testimony of two witnesses, J. E. Weaver and R. K. Bontz, who, as admitted by respondents, "are the only persons who know what actually transpired and what was said when the notes passed into the bank's possession."

Mr. Weaver, the president of the bank, testified:

"The Hunt-Jewett-Bontz Company was indebted to the People's State Bank to the amount at that time of $10,300. I had previously, a few days before this, requested them, or informed them rather, that the notes were not in a satisfactory condition at the bank, and requested them to do something about it. Mr. Bontz came to see me, young Mr. Bontz, now, I am speaking of, and he asked what they should do; naturally, the first thing that I told him, I would like to have the notes paid; he said they were not in a position to do that then; then I told him that part of it must be paid, and would like to have the other secured in some way; then he agreed at that time that he would pay a small note, a $1,300 note—the $1,300 note previously had been a $1,500 note, but $200 had been paid—and the $4,000 and $5,000 notes; so he told me that they had a considerable amount of small notes that he would leave with me as collateral. Now this conversation was a few days prior to the 16th; so on the 16th he came in and brought these notes, these with a number of others, and he paid the $1,300 note as he agreed to do, and left this list of notes, these being among the

others, and we held them there; I questioned him at the time about the ones that I did not know; some of them were notes given by people in the vicinity that I knew well, and others were not; these were among the ones that I did not know; I questioned him about the standing of these men; he informed me that they were perfectly good; he indorsed the notes in my presence."

He answered "No" to this question:

"Had you any knowledge as to the making of the notes and the conditions surrounding the making of the notes, at the time the notes were transferred to you by the Hunt-Jewett-Bontz Company."

In explaining further his desire to have the bank secured he testified:

"I never had a statement from the Hunt-Jewett-Bontz Company, but I surmised they were heavily in debt. * * * I knew the first year of their storing sweet potatoes there that they could not have helped but to have made a loss, because they stored a great many potatoes, and they rotted to a great extent. I knew the bulk of the business was not with us, and I had no means of knowing which way they were losing, as they were not doing the bulk of business with us; I knew these notes were not in a satisfactory condition, and I wanted to be a little safer."

As to the consideration for the notes, in the deposition of the witness taken by respondents appear these questions and answers:

"Q. What conversation was had as to the consideration of these notes? A. I don't know as I ever knew that, no explanation made, I cannot tell you, they were given for different things, the information was not given to us at the time. Q. What did Mr. Bontz say to you, what these notes were for; what the company had taken them for? A. I would not say; I can tell what my understanding was; some of them was given for stock of Hunt-Jewett-Bontz Company and others given for seed potatoes. There were other notes besides these, anywhere from $25 up to these larger ones, one for $500 just paid."

Again he testified:

"I have no recollection of making any inquiry about why the notes were given; I made inquiries about who the parties were and their financial standing; that is the only thing that interested me; I don't remember that I asked, because I already knew that some of these were given for seed potatoes, that he got for seed; I knew they were taking out the potatoes when he bought them; he had a contract; and that was just as far as I knew; I just happened to recognize the note in here, and I know it had been given; I was not concerned as to why these notes were given; I was only concerned whether they were negotiable notes; I knew I did not inquire, and I did not know at the time what the consideration was; I did not understand what a single one of them was for, and what I may have thought, it was wholly immaterial to me what they were given for."

Mr. Bontz testified as follows:

"Mr. Weaver called me in to speak to me relative to the notes that we had at the bank, and stated that he would like to have them rearranged in some manner, in answer to which I said I would take up the one for $1,300 and put up security on the balance. This security was notes we held in the office, some for seed and for general stock shares. As I remember it, nothing was said at the bank relative to what the notes were taken by ourselves for, and on taking them over to the bank later on they seemed perfectly agreeable to Mr. Weaver, and he took them in as security."

He further testified that Mr. Weaver inquired who Mr. Penello was, and likewise as to Mr. Bertaino, and "I recollect very distinctly that he didn't ask what the consideration was for," and did not inquire how the notes had come into his possession.

[4] In the transaction as detailed by these witnesses we find nothing startling or suspicious. As far as we are advised, the conduct of Weaver and of Bontz was entirely reasonable and what might be expected under the circumstances. It was quite natural that the creditor should want some security for the indebtedness, and there is nothing to show that Weaver had any reason to question the integrity of the debtor, or was not entirely justified in assuming that the notes were what they purported to be. We cannot doubt that the business was conducted as is usual in such cases. Assuredly, banks are warranted in assuming that their customers, with whom they have done business, and whose honesty they have no reason to suspect, have not resorted to fraud in obtaining notes which they proffer as collateral security. They have a right, in transactions conducted according to the usual method which obtains in business, to act upon the presumption that "a promissory note * * * was given * * * for a sufficient consideration," that "private transactions have been fair and regular," and "that the ordinary course of business has been followed." Section 1963, subds. 21, 19, and 20, Code Civ. Proc.

However, the able counsel for respondents contend that the following significant circumstances were indicative of a suspicion of some infirmity in the execution of said notes: (1) "Mr. Weaver knew that the preceding year had been a disastrous one for the Hunt-Jewett-Bontz Company, and had surmised that it had suffered heavy losses"; (2) he knew that "the financial condition of the company was so precarious that he was unwilling to continue the loan at that amount, or at all, unsecured; (3) he knew that the company in its desperate situation was trying to sell stock bearing a high rate of interest and carrying a preference"; (4) "since he had been solicited to purchase stock he knew what representations were being used to in-

duce prospects to buy; (5) he had the 'impression' at the time of taking them that some of the notes received as collateral were stock subscription notes, and it is fairly inferable that he know the Penello and Bertaino notes were such"; and, finally, it is claimed that there is evidence of bad faith in the form of the indorsement by which the notes were transferred to the bank. "The bank took them under a special and peculiar form of indorsement, which relieved it of all the responsibilities as to presentment, protest and notice of dishonor which ordinarily attach to absolute ownership and which guaranteed payment by the indorser." In none of these circumstances or all combined do we see anything that suggests fraud in the inception of the notes. No reason appears therein to inspire suspicion that the company had perpetrated a gross wrong—in fact had committed a crime—in obtaining these notes. The situation would simply awaken apprehension that there might be difficulty in liquidating the indebtedness, and would prompt an effort to obtain better security.

Moreover, in these statements respondents have mistakenly portrayed the evidence in the case. For instance, in answer to a question relating to Mr. Weaver's knowledge of the sale of stock at the time of the execution of the notes, he testified:

"I cannot say whether I knew at that time or not, but I knew later that they were selling stock. Whether I knew it at that time or not, I don't know. I never knew very much about it, I can tell you that."

As to the effort made to sell Mr. Weaver stock, he testified that some man came in to sell some stock, and in answer to the question whether he bought any he replied:

"I don't buy anybody's stock; that is the rule that I have made; I would not listen to them five minutes, I don't care what the scheme is, I would not talk to this man three minutes. I said I did not know anything about their scheme, and I did not want to know."

He testified further that this occurred after he had taken over the notes.

[5] In reference to the form of indorsement appellant declares:

"That is the common indorsement that any bank requires and this particular indorsement was the indorsement printed upon the back of the notes in written stock form at the time the defendant originally signed the notes in favor of the Hunt-Jewett-Bontz Co."

And that these blank notes must have been secured from the First National Bank of Turlock, since the name of that bank appeared upon the face of said notes, and the only thing needed to complete the indorsement was the signature of said company. At any rate, there is no evidence that this so-called special form of indorsement was prepared by appellant. Moreover, we do not regard this circumstance as any evidence that appellant suspected the validity of the notes, but only as indicative of natural caution on the part of the creditor. We may add that in Commercial Security Co. v. Modesto Drug Co., 43 Cal. App. 162, 184 Pac. 964, this court held that—

"The fact that the plaintiff took a bill of sale of the notes with a guaranty from the [payee] that they would be paid, in lieu of the customary indorsement in such a case, does not constitute a circumstance sufficiently significant to justify a suspicion that the notes were not all that they on their face purported to be."

In this connection we may refer to the following instruction given by the court on request of defendants:

"In this action I charge you that in the event that you find that the fraud, if any, as alleged in the answers on file herein has been proven, that the burden of proof is upon the plaintiff to show that it took the notes in question before maturity, for a valuable consideration, without notice of said fraud, if any, and in good faith."

[6] The uncontroverted evidence showed that plaintiff did take said notes before maturity, for a valuable consideration and in good faith, but notwithstanding these facts, in order to recover, this instruction directed the jury that plaintiff must go further and prove that it had no notice of the fraud. Such, as we understand it, is not the law. The true doctrine is clearly set forth in the Eames Case, supra, quoted with approval in Blockman Commercial Bank v. Moretti, supra, as follows:

"Upon proof by the defendant of fraud or illegality in the inception of the note, the burden is cast upon the indorsee to show that he is an innocent holder. This the latter may do by showing that he purchased the note before maturity, or from an innocent indorsee for value, in the usual course of business. When this is done, unless the evidence shows that the note was taken by the plaintiff under circumstances creating the presumption that he knew the facts impeaching its validity, the burden is cast upon the defendant to show, if he would defeat the plaintiff in his action, that the latter took the instrument with notice of the defendant's equities."

Since there was no evidence of any suspicious circumstances in connection with the transfer of the notes, and there could be no presumption that the indorsee knew any facts that might impeach the validity of said instruments, the burden was upon defendants to prove knowledge of said facts. The instruction was therefore erroneous. It is true that Mr. Weaver testified that he had no knowledge of any fraud or of failure of consideration, but the jury may not have regarded that as sufficient to satisfy the requirement of the instruction as to the burden

of proof. As to the suggestion of respondents that appellant should have proposed the modification or limitation of said instruction as indicated in the above quotation from the opinion in the Eames Case, supra, it is sufficient to say that the appellant did request the proper instruction, which was given by the court, as follows:

"The court also instructs the jury that the burden of proof is on the defendant to show that the bank had actual knowledge of the defense made here when it acquired the notes or had actual knowledge of such fact indicating the defense that its action in taking the instrument amounted to bad faith; and the court further instructs the jury that, unless there are circumstances which incite suspicion, the purchaser is not bound to make inquiry at the time of purchase."

From the verdict, though, we conclude that the jury must have followed the instruction proposed by defendants.

We are satisfied that respondents are in error in the claim that the original indebtedness to the bank from said company was canceled, and therefore the notes held as collateral were released and discharged as security. It is true that a new note was given, but Mr. Weaver testified:

"This is a renewal, that number on there signifies a renewal note. That is the number of the former note."

He was positive and unshaken in repeated declarations that the debt was not extinguished, but the last note simply involved a different promise to pay the same indebtedness.

[7] Of course, the rule is well settled that—

"A renewal note does not extinguish the debt represented by a note for which it is given in lieu, unless there is a distinct and unqualified agreement that it shall so operate." Andrews v. First National Bank of Los Angeles (Cal. App.) 203 Pac. 156; Savings Bank v. Central Market Co., 122 Cal. 28, 54 Pac. 273; Sather Banking Co. v. Briggs Co., 138 Cal. 724, 72 Pac. 352.

[8] Respondents argue that, since the "old notes were signed by Hunt-Jewett-Bontz Company and indorsed by the principal stockholders on the back," and "the new note was signed by all parties as makers," there must have been a novation; that is, the substitution of a new obligation for the old. However, the "signature on the face of a bill or note may be an indorsement if it was so intended by the parties to the transaction. An indorsement, as the word signifies, usually is made upon the back of an instrument, but the place is held not to be essential." Shain v. Sullivan, 106 Cal. 208, 39 Pac. 606. As to the manner in which the signatures were made, Mr. Weaver testified that they indorsed these notes on the face, but ordinarily notes were indorsed on the back.

We think the only rational conclusion from the whole record is that the indebtedness was not extinguished by the new note, that said note was intended as renewed evidence of the portion of the original obligation which had not been paid, and that the notes of respondents were still held as collateral security for said amount which was greater than the face value of the security.

[9] Respondents make the point that—

"The bank cannot prevail as against these notes because the principal obligation is collectible. Hulett v. Marine Bank, 143 Mich. 219, 106 N. W. 879, 4 L. R. A. (N. S.) 1042. It does not appear that the Hunt-Jewett-Bontz Company were not financially responsible, though they were heavily involved. They maintained a balance with appellant and honored their checks for amounts equal to those claimed from either defendant."

The case cited seems to support the contention of respondents, but it is against the weight of authority and the rule that prevails in this state.

In the case note found in 4 L. R. A. (N. S.) 1042, it is stated that—

"Ordinarily, the bona fide holder of a note as collateral security may enforce it without first resorting to the original debtor, the liability of the maker thereon not being conditional on the nonpayment of the principal debt, but being primary and absolute."

Many cases and authorities are therein cited to justify said statement of the rule, but it is unnecessary to mention them specifically in this opinion. In this state, it may be said, the statute imposes no such condition as a prerequisite to the collection of a note pledged as security. Section 3006, Civ. Code. The note affords concurrent security, and the object of giving it is to furnish another fund out of which the principal debt may be paid, and its payment does not depend upon any condition or contingency not expressed in the note. We may add that the Supreme Court, in Sonoma Valley Bank v. Hill, 59 Cal. 107, indorsed the doctrine announced in Robinson v. Hurley, 11 Iowa, 410, 79 Am. Dec. 497, as follows:

"After the debt falls due the pledgee under the law has his election to pursue one of three courses: First, to proceed personally against the pledgor for his debt without selling the collateral security; or, second, to file a bill in chancery and have a judicial sale under a regular decree of foreclosure; or, third, to sell without judicial process, upon giving reasonable notice to the debtor to redeem."

However, as we have seen, where the collateral consists of evidence of debt, the statute has taken away the remedy of sale, but the creditor has his option to proceed against the principal debtor or to recover on the pledged note.

We can perceive no merit in the claim that appellant was an agent for collection only of

said notes. The evidence all shows that they were assigned as security for the payment of the company's indebtedness to the bank, and in such case the indorsee is regarded as a holder for value and in the usual course of business, and if the note is taken in good faith the indorsee is not subject to the equities existing between the original parties.

We think the judgment should be reversed; and it is so ordered.

We concur: FINCH, P. J.; HART, J.

---

59 Cal. App. 196

## FRANCIS v. MERKLEY. (Civ. 2457.)

(District Court of Appeal, Third District, California. Sept. 27, 1922.)

**1. Sales ⇐87(3)—Evidence held to show sale contract not contingent on third person's doing work of value of goods for buyer.**

In an action for the value of a tractor and plows sold, evidence *held* to show that the contract of sale was not contingent on a third person's doing sufficient work under his contract with the buyer to entitle the third person to a credit for an amount equal to the agreed value of the machinery.

**2. Sales ⇐156—Delivery to another at buyer's direction held delivery to buyer.**

Where at the time a sales agreement was made buyer directed delivery of the goods to a third person, such delivery was a delivery to the buyer.

**3. Sales ⇐92—Demand for return held not to amount to a rescission by consent of sale of machinery.**

Seller's letter, through his attorney, to the buyer, stating that seller, being unpaid, demanded return of the machinery sold, merely amounted to an offer to acquit buyer of further liability if he would return the property, and, not being accepted, was not a rescission by consent within Civ. Code, § 1689.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by G. C. Francis against A. A. Merkley. Judgment for plaintiff, and defendant appeals. Affirmed.

Arthur C. Huston, of Woodland, for appellant.

J. M. Inman, of Sacramento, for respondent.

BURNETT, J. Plaintiff brought the action to recover the value of a C. L. Best 75 H. P. tractor and one set of John Deere plows which he claims to have sold to the defendant, and he had judgment for the sum of $1,995, from which judgment the appeal has been taken.

Appellant states that—

The "appeal is taken upon the following grounds: (1) That the arrangement between plaintiff and defendant and the delivery of the memorandum was contingent on Davenport doing sufficient work under his contract with the defendant to entitle Davenport to a payment of $2,500, the agreed value of the tractor, and that the finding of the court to the contrary was against the weight of evidence; (2) that it was conclusively proved at the trial that the tractor was not delivered to the defendant, but was delivered to Davenport; (3) that the plaintiff elected to rescind the contract between himself and defendant."

[1] As to the first of these the statement by appellant is sufficient to condemn it. He claims only that the finding is against the weight of evidence, thereby implying that there was substantial evidence to support it. Indeed, in elaborating the point, he admits that "the evidence of the plaintiff, standing by itself, justified the court in finding that the memorandum signed by Merkley constituted an agreement by the plaintiff to sell and an agreement by the defendant to purchase, and that it contained the entire arrangement between the parties," but the contention is that this is contradicted by Davenport and the defendant. Appellant seems to have forgotten the well-established rule that must govern an appellate court where there is a substantial conflict in the evidence. Nevertheless, to show how utterly baseless is this first ground we may recite the important facts upon which said finding was based. It was admitted by defendant that he executed a written memorandum as follows:

"This is to certify that I have this day sold 1,000 sacks of barley to G. C. Francis at $2.50 per sack, same to be allowed on the purchase of a C. L. Best (75 H. P.) and set of John Deere plows (10 plows) on basis of $2,500 as purchase price of said implements. [Signed] A. A. Merkley."

The contention of defendant was that the real purchaser was one Davenport, who had entered into a contract with him to do certain land leveling, and who did not have the money or machinery to complete the work, or at least that the parties understood and agreed that defendant was not to pay for said machinery until Davenport was entitled to a credit for said amount on account of his work. As to this Davenport testified as follows:

"Q. And did you purchase a tractor from Mr. Francis? A. No. Q. Did you purchase this machinery from Mr. Francis at any time? A. I did not. Q. Did you have any conversation with Mr. Merkley in regard to the machinery? What was to become of it, or with relation to it generally? A. I was to do sufficient work for Mr. Merkley to pay $2,500 for the machinery before I owned the engine. Q. You said nothing in your—in your talk about selling this. A.

Yes. Q. To Mr. Merkley. A. About what? Q. About Mr. Merkley buying the engine from Mr. Francis. A. We talked that. Q. Did Mr. Merkley buy the engine? A. Bought the engine for me to do the work. Q. For you? A. Yes."

The plaintiff testified as follows:

"Q. You have read this agreement, of course, which I just introduced in evidence? A. Yes, sir. Q. Where was that signed? A. Signed in Mr. Merkley's office. Q. Was there at the signing of this contract, or at any time, any understanding of any kind between you and Mr. Davenport, or between you and Mr. Merkley, in regard to doing of certain work by Mr. Davenport for Mr. Merkley, as a portion of this transaction? A. No. sir; there never was. Q. Did you hear a discussion between Mr. Davenport and Mr. Merkley in reference to the taking of this machinery? A. All the discussion was—Mr. Davenport was there when the agreement was made out—Mr. Merkley agreed, before Mr. Davenport, to take the engine himself, and deliver me 1,000 sacks of barley for the engine, at $2.50 a sack. I told him to write it out; consequently it was written out. Q. Was there any portion of that conversation relating to doing of work on Mr. Davenport's part? A. Absolutely none; no, sir. Q. So far as any understanding between you and Mr. Merkley is concerned, was it all contained in that agreement? A. Yes, sir."

From the foregoing it is manifestly true, as stated by respondent, that the court was entirely justified in concluding "that the intent of all the parties was plain and fully expressed in this written contract," and the court was fully warranted in declining to write into the contract something that does not appear therein.

[2] Upon the second point it is sufficient to quote the following testimony of plaintiff:

"Q. Where is the engine now? A. So far as I know, it is over at Mr. Merkleys. Q. To whom did you deliver the engine? A. At the request of Mr. Merkley, I delivered it to Mr. Davenport. Q. When did Mr. Merkley make that request? A. At the time the agreement was made out. Q. What did he say? A. He said let Mr. Davenport have the engine."

Of course, under such circumstances, a delivery to Davenport was a delivery to the defendant.

[3] The third contention is based upon the fact that on December 30, 1920, plaintiff's attorney wrote this letter to the defendant:

"Inclosed please find copy of memorandum between yourself and G. C. Francis. He tells me that he was unable to secure this barley and he now demands return of the machinery. Kindly let me know what your disposition in the matter is."

In the first place, rescission was not pleaded by the defendant. In fact, his sole claim was that the machinery was purchased by or for Davenport, and it was the agreement that it should be paid for by him either directly or indirectly. Moreover, said demand did not amount to a rescission, nor was it a case wherein there was any ground for rescission, unless by consent (Civ. Code, § 1689), and defendant refused his consent, stating:

"This machinery was moved to my place by W. L. Davenport and should be returned by him."

Said demand amounted, at most, to an offer to acquit defendant of further liability if it would return the property. Since, however, it was not accepted, it created no rights in favor of appellant. In truth there is evidence that the parties thereafter agreed that, instead of returning the machinery, defendant would deliver the barley according to the written contract. Subsequently he declined to do this, and plaintiff properly brought the action for its value.

We discover no merit in the appeal, and the judgment is affirmed.

We concur: FINCH, P. J.; ANDERSON, Justice pro tem.

---

59 Cal. App. 125

## KIRKPATRICK et al. v. PYE. (Civ. 4285.)

(District Court of Appeal, First District, Division 2, California. Sept. 20, 1922. Hearing Denied by Supreme Court Nov. 16, 1922.)

**1. Sales ⟸59—Letter of box company to seller held not part of sales contract.**

Where acceptance of plaintiffs' order for 220,000 lug boxes constituted a complete contract, a subsequent letter to defendant seller from a box company, contracting to supply him 300,000 lug boxes, was not made part of the contract between plaintiff and defendant by the fact that plaintiff's contract was written upon a letter head which had printed at the top "Quotations are for prompt acceptance and acceptance by mill," plaintiff's contract being an accepted order, not accepted quotation, nor by the fact that plaintiff saw fit to advance to the seller a $2,000 advance, which the box company required as an advance on its contract.

**2. Sales ⟸79—Contract for delivery of lug boxes construed to mean delivery to buyer at buyer's city in 40 days.**

Where Sacramento buyer contracted with seller on August 19th to purchase lug boxes at a price fixed on the Sacramento freight rate, and the entire order was to be completed within the next 40 days, the boxes being intended for use in packing fruit, and having been resold by buyer, *held*, that the entire order was to be delivered to Sacramento or to other place directed by plaintiff within 40 days from date of contract; Civ. Code, § 1754, as to place of delivery of personal property sold when not in existence, being inapplicable where the parties have contracted as to place of delivery.

**3. Sales ⟸81(4)—Buyer not bound under contract to pay for goods in transit.**

Where a contract for the sale of lug boxes was conditioned on seller's ability to secure cars for transportation, and subject to labor

troubles and strikes, and the purchaser agreed that in case that any of such conditions causing him to make cancellation of any part of the order, to accept and pay for boxes made that might be in transit or were being loaded at the mill, the buyer was not bound to pay for six carloads which were in transit and not delivered in time, where the order was not canceled because of failure of transportation facilities or of labor, but for unexcused failure of seller to deliver in time.

**4. Evidence ⟹448—Where terms of contract ambiguous, court may inquire as to understanding of parties.**

Where the terms of a written sales contract were not entirely free from ambiguity on the question of delivery, it was permissible for the trial court, under Civ. Code, § 1649, to inquire as to the understanding of the parties.

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Action by Glen E. Kirkpatrick and others against B. J. Pye. Judgment for plaintiffs, and defendant appeals. Affirmed.

Edwin M. Otis, and McKannay & Hunt, all of San Francisco, for appellant.

Ford & Johnson, of San Francisco, for respondents.

LANGDON, P. J. This is an action for money had and received. The plaintiffs did business under the name of Sacramento Brokerage Company and the defendant under the name of California-Oregon Lumber & Box Company, and hereinafter they will be thus referred to, respectively. On August 19, 1919, the Sacramento Brokerage Company contracted, in writing, to purchase from the California-Oregon Lumber & Box Company 220,000 Los Angeles lug boxes at $12 a hundred, price fixed on the Sacramento freight rate. Several days after the making of the aforesaid contract the California-Oregon Lumber & Box Company showed to plaintiff's agent a letter, wherein it was set forth that, unless a deposit of $2,000 was made by defendant with the Pacific Wirebound Box Company, which company was to manufacture boxes for the defendant, the boxes would not be made. Thereupon the Sacramento Brokerage Company, through its agent, advanced the $2,000 so demanded, and, having accepted and paid in full for all boxes received by it, made demand for the return of the $2,000 theretofore advanced. Defendant refused to repay the $2,000 deposit, contending that plaintiff had failed to accept six carloads of boxes which were a part of the 220,000 box order. Plaintiff admits that it refused to accept six carloads of boxes and justifies its action in so doing on the ground that the boxes were not delivered to plaintiff within the time prescribed in the written contract.

[1] The sole question to be determined is as to whether or not plaintiff breached its contract by failing to accept the six carloads of boxes, as it is, of course, clear that if it accepted and paid for all the boxes required by the contract, the Sacramento Brokerage Company is entitled to a return of its $2,000 accommodation advance, which is the subject of this action.

To determine whether or not this contract was breached by plaintiff requires an examination of the contract and the interpretation placed thereon by the parties before the alleged breach. It is the contention of the appellant that the entire contract between the parties consists of the written contract of August 19, 1919, and the letter from the Pacific Wirebound Box Company to the defendant, written a week later. We must first determine, then, whether this letter from a third party is a part of the contract and binding upon the plaintiff; and, second, we are required to ascertain from the contract where delivery of the boxes was to be made.

The contract of August 19, 1919, is set forth in the record as follows:

"California-Oregon Lumber & Box Company.

"Forest Products. Telephone Sutter 1028.

112 Market St., San Francisco.

"Aug. 19, 1919.

"Sacramento Brokerage, Sacramento, California.

"Quotations are for prompt acceptance and acceptance by mill. Subject to previous sale. Unless otherwise stated, all agreements on our part are contingent upon acts or other causes beyond our control. Taxes national and state on freight bills or shipments to be paid by purchaser.

"This is to acknowledge receipt of order for 220,000 Los Angeles lug boxes. These boxes to have veneer sides and bottoms and California white pine ends and cleats.

"*Terms and Delivery.*—Price delivered on a Sacramento freight rate to be $12 per 100 without tops. Net cash with sight draft against bill of lading. Entire order to be completed within the next forty days.

"*Conditions.*—Upon our ability to secure cars for transportation of same, and subject to any labor troubles or acts commonly known as strikes and so forth, over which we have no control.

"*The Purchaser.*—Agrees in case that any of the above conditions causing him to make cancellation of any part of order, to accept and pay for all boxes made to this order that may be in transit or being loaded at mill.

"California Oregon Lumber & Box Co.,
"B. J. Pye.
"Sacramento Brokerage Co.,
"E. L. Zeigler.

"These lugs are to be standard dimensions; and in event heads and cleats are to be loaded into one car; the same number of sides and bottoms are to be loaded into the other car, so as to arrive about the same time, as these lugs go to various loading stations."

The letter from the Pacific Wirebound Box Company to the defendant is as follows:

"Pacific Wirebound Box Co.,

San Francisco, Calif., August 26, 1919.

"Dear Sir: With reference to our several conversations on the subject of supplying 300,000 *Los Angeles Lug Box Sides and Bottoms* as per our letter of August 18th, file WW-3514, desire to advise that Mr. T. A. Burns called on the phone this morning with reference to the conversations you and I had had in connection with the mode of accepting the order and making shipments thereon.

"Desire to advise that we agreed that we would accept the order, subject to conditions mentioned in our letter of August 18th, and to be shipped conditioned upon our ability to secure cars, and other conditions mentioned in the concluding paragraph of our letter; terms, however, to be changed to the following:

"Net cash with draft B/L attached, instead of 10 days from invoice datings, as mentioned in our former letter; and that an advance payment of $2,000 is to be made on this acceptance of order, to cover any liabilities that might arise, with reference to materials being cut and such as might be on hand, not being shipped 40 days from date, for causes stated. (Check for $2,000 is hereby acknowledged.)

"Mr. Burns advises that as rapidly as cars are loaded and on advice of contents, check would be given us covering the total value of the shipment; it being understood that no cancellation of order would occur, unless the stock could not be put in transit within the 40 days mentioned, and for the reasons stated.

"With this understanding we are willing to proceed with the shipment of the 10 cars, totaling 300,000 sides and bottoms, green rotary cut spruce material.

"Yours truly,

"Pacific Wirebound Box Co.,
"G. X. Wendling, President.

"Mr. B. J. Pye, Mgr., California-Oregon Lumber & Box Co., 112 Market St., City."

The trial court held that the above-quoted letter of the Pacific Wirebound Box Company to the defendant was no part of the contract between the parties hereto and refused to admit it in evidence, and this ruling is contended by the appellant to be reversible error. We think there is no merit in this contention. Appellant's position is that, because the contract between him and the Sacramento Brokerage Company was written upon a letterhead which had printed at the top thereof in small type, "Quotations are for prompt acceptance and acceptance by mill," that the Sacramento Brokerage Company became bound by any conditions which appeared in the letter of Pacific Wirebound Box Company, the manufacturer.

We think this argument is without force. In the first place, the contract between the parties hereto was not in the form of a quotation and acceptance. It is, as appears upon the face, the acknowledgment of an order for boxes, accepted by the California-Oregon Lumber & Box Company. The acceptance of this order is unconditional, except for the matters mentioned in the paragraph entitled "conditions," none of which enter into the present case.

Appellant seeks to charge the Sacramento Brokerage Company with the conditions imposed upon appellant by its vendor, because one of those conditions was that no cancellation of order should be made by purchaser unless the boxes were not put in transit within 40 days. If this condition could be imposed upon the Sacramento Brokerage Company, it would have been under obligation to accept the six cars of boxes in dispute, because they were actually in transit at the expiration of the 40 days. But we think it perfectly clear that the Sacramento Brokerage Company was in no way bound by the conditions of a contract between the California-Oregon Lumber & Box Company and Pacific Wirebound Box Company, made after the contract between Sacramento Brokerage Company and California-Oregon Lumber & Box Company had been executed. The letter of the Pacific Wirebound Box Company was dated a week later than the contract between the parties; it was for 300,000 Los Angeles lug box sides and bottoms, while plaintiff's order was for but 220,000 of these boxes. There is no evidence that Sacramento Brokerage Company knew from where its vendor was to purchase the boxes, or what conditions would enter into that purchase. Suppose that after the defendant had made its contract with plaintiff and had gone into the open market to purchase the goods, it had found that it was compelled to pay twice as much for the boxes as it was to receive for them from the plaintiff. Could it be contended that the plaintiff was bound to meet this condition imposed upon his vendor? Assuredly not; and there is no more reason why it should be bound by one condition imposed upon its vendor than by another.

Appellant seeks comfort from the fact that the Sacramento Brokerage Company advanced the $2,000 demanded by the Pacific Wirebound Box Company. We fail to see the significance of this fact. The Sacramento Brokerage Company was under no legal obligation to do this. It may have considered it expedient at that time to advance the money, regardless of its legal obligation to do so, but this could not enlarge its liabilities or the appellant's rights.

We know of no legal principle which would warrant the introduction of this correspondence between defendant and its vendor, as against this plaintiff. The plaintiff placed an order with the defendant for certain boxes, which was accepted by defendant. Where defendant chose to secure the goods contracted to be sold, or upon what terms was a matter of unconcern to plaintiff. The refusal of the trial court to admit this communication in evidence was, therefore, proper.

[2] A more difficult question confronts us in interpreting the contract upon the ques-

tion of delivery. The construction given to the contract by the trial court was that the entire order was to be delivered to Sacramento or to such other place as plaintiff should direct, within 40 days from date of contract. We think this is a fair interpretation of the language of the contract. It would seem also to be the reasonable construction of the contract, and the one acted upon by the parties in their dealings thereunder. The boxes were to be used in packing fruit and had been resold by the Sacramento Brokerage Company. For such a use, a delay of a day or two even might be of vital importance. When the plaintiff entered into its contract with the defendant it did not know, so far as the record discloses, where the defendant would secure the boxes. It is unreasonable to suppose that plaintiff would have contracted to accept delivery of the boxes at a place the location of which was unknown to plaintiff at the time of making the contract. Plaintiff contracted to have the boxes delivered during the fruit season. To take the extreme illustration advanced by respondent, if appellant's contention be correct, it might have ordered the boxes from a mill in China, and plaintiff would have received delivery when the goods were loaded on the boats, though they arrived weeks after the fruit season, and at a time when they would have been valueless to plaintiff. The plaintiff had contracted to resell these boxes and had been directing shipments directly to its customers. This course of dealing was known to the defendant, and it seems reasonable to suppose that the parties contracted with reference thereto. We think that the construction placed upon the contract by the trial court was proper under all the circumstances appearing in the record.

[3] Another contention of appellant is that the following provision of the contract applies to the present situation:

"The purchaser agrees in case that any of the above conditions causing him to make cancellation of any part of order, to accept and pay for all boxes made to this order that may be in transit or being loaded at mill."

It is contended that because of this provision, the plaintiff was bound to pay for the six carloads which were in transit, even though they had not been delivered in time to conform to the provisions of the contract. A glance at the contract between the parties, heretofore set out, is convincing of the fact that the paragraph relied upon by appellant has reference only to the paragraph immediately preceding it, wherein it is provided that the delivery is conditioned upon ability to secure cars for transportation and subject to any labor troubles or acts commonly known as strikes and so forth. It is obvious from a reading of the contract that it was intended in the event the defendant was excused from further performance because of strikes or lack of transportation facilities, the plaintiff should, nevertheless, be compelled to pay for all boxes then in transit or being loaded at the mill. Further than this, California-Oregon Lumber & Box Company was not protected. The order was not canceled because of failure of transportation facilities or of labor. It was canceled by plaintiff because of failure to deliver in the time provided by the contract, and no excuse is given in the record for the failure to deliver in time. The boxes were purchased for resale to fruit growers. Plaintiff had resold them and was forced to purchase elsewhere to fill its orders. Defendant was fully aware of all the surrounding circumstances, and telegrams between the parties advised defendant of the urgent need for the boxes.

Appellant contends for the application of section 1754 of the Civil Code, providing that where personal property is sold which is not in existence, it is deliverable at the place where it is produced. The application of this section would cause a reversal of the judgment, because, as stated, it was admitted that the goods had been loaded at the mills within the time limited in the contract. This matter is, of course, involved in our discussion of the interpretation which the trial court placed upon the contract with reference to its provisions for delivery. Section 1754, Civil Code, obviously has no application if the parties have contracted with reference to the place of delivery.

[4] In deference to the appellant's position upon this matter, it must be admitted that the contract is not entirely free from ambiguity upon the question of delivery, and for this reason it was permissible for the trial court to apply section 1649 of the Civil Code and inquire as to the understanding of the parties. We have already discussed the matters appearing in the record tending to support the view of the trial court, and one of the most convincing of such matters is the testimony of the appellant, himself, as follows:

"Q. Suppose that no diverting order had ever been made by Mr. Ziegler's company [the respondents] under the terms of this contract, where would the cars have been delivered? A. They would have gone to Sacramento. They would still have been sold under the Sacramento freight rate."

To recapitulate, then, we think that in the light of the surrounding circumstances appearing in the record and the interpretation given to the contract by the parties themselves in their dealings thereunder, the trial court correctly interpreted the contract between the parties as calling for delivery at Sacramento or at such place as should be designated by Sacramento Brokerage Company. As thus interpreted, defendant was in default in the delivery of the last six cars

and plaintiff was within its rights in refusing to accept same.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

---

59 Cal. App. 251

## In re STEVENS. (Civ. 3911.)

(District Court of Appeal, Second District, Division 2, California. Sept. 30, 1922.)

**1. Attorney and client ⟸61—District Court of Appeal on application for reinstatement by disbarred attorney convicted of crime in the federal court will consider the evidence adduced.**

Where an attorney was disbarred because of his conviction in the federal court, the District Court of Appeal on application for reinstatement, opposed by the Bar Association on the ground that the record made on the trial shows him to be devoid of that fundamental moral perception and personal integrity required of attorneys, will examine the evidence adduced during his trial in the federal court.

**2. Attorney and client ⟸61—Proof of reform of attorney, disbarred for extorting money from men frequenting houses of prostitution, must be overwhelming to warrant reinstatement.**

Where an attorney was disbarred because of conviction in the federal court of conspiracy to use the United States mail to defraud, on evidence showing that the attorney had procured from prostitutes the names of men who had frequented house of prostitution, and had tried to extort money from such men by threatening to expose them, the past misdeeds of such attorney will not preclude District Court of Appeal from granting his application for reinstatement on theory that he is necessarily devoid of that fundamental moral perception and personal integrity required of an attorney, but proof of reform to warrant reinstatement must be overwhelming.

**3. Attorney and client ⟸61—Evidence of reform of disbarred attorney held not sufficient to warrant reinstatement.**

In such case, evidence *held* not sufficiently overwhelming to warrant reinstatement.

In the matter of the application of W. H. Stevens for reinstatement as an attorney at law. Application denied.

Gates & Randles, of Los Angeles, for petitioner.

Oscar Lawler, of Los Angeles, for respondent Los Angeles Bar Association.

WORKS, J. The following is a chronology of the events which are principally involved in the present application:

On January 10, 1911, W. H. Stevens was admitted to the bar of California, although he never engaged in the practice of law until March 1, 1912; on November 18, 1913, he was indicted by a federal grand jury upon a charge of conspiracy to use the United States mails in a scheme to defraud; on September 7, 1915, having been tried and convicted under the indictment, he was sentenced to imprisonment for 6 months and to pay a fine of $2,500; on June 14, 1917, he was disbarred by an order of the District Court of Appeal of this district because of his conviction of the charge mentioned; on December 8, 1917, he completed his term of imprisonment under the conviction, and was discharged from confinement; since his discharge he has been in the employ, in various capacities, of the Los Angeles Railway Corporation, a street railway company, his service in each capacity commencing on the date specified below: February 6, 1918, as conductor; October 28, 1919, as inspector; April 1, 1920, as supervisor, apparently acting under that particular employment for nearly a year in the office of the manager of service in the performance of special work; September 20, 1921, on special work in the main office of the company. Meanwhile, on October 31, 1921, he was pardoned by President Woodrow Wilson by an instrument reciting the fact of the conviction above mentioned, and stating that the pardon was granted "for the purpose of restoring his civil rights"; and on March 8, 1922, his petition in the present proceeding was filed.

[1] As petitioner was disbarred because of his conviction in the federal court of the crime with the commission of which he was there charged, it is not only proper, but it is necessary, in considering this application for his reinstatement, to examine the evidence adduced upon his trial in that tribunal; particularly as the respondent bar association opposes the reinstatement on the ground that the record made on the trial "shows that said Stevens is devoid of that fundamental moral perception and personal integrity to which the public and the courts are entitled on the part of every person who would pursue the practice of the legal profession."

This proceeding is of such grave import, considering its effect upon the future welfare of petitioner, upon the standing of the legal profession, and upon the rights of the general public, that we have not been content to read merely the portions of the record of the trial which were pointed out to us at the oral argument, but we have carefully and circumspectly perused the entire record in so far as it may by any possibility bear upon the question which is now of interest to us. After that labor, and also after a perusal of the portions which have been submitted to us of the record made in another trial, we state the facts as overwhelmingly established by the testimony of various witnesses, sub-

stantially corroborating each other, as against the practically unsupported statements and denials of petitioner, who, on his trial in the federal court, took the witness stand in his own behalf:

Petitioner had been appointed a guardian ad litem to represent a defendant in a divorce case, the cause having been begun by the husband, and the wife being a minor. Through his acquaintance with this young woman, thus commenced, petitioner, after the exercise of much diligence in the premises, became also acquainted with three or four other girls, who, like the defendant in the divorce suit, had theretofore engaged in the indiscriminate practice of sexual intercourse, either for hire or for pleasure. The defendant in the divorce case and some of the other girls had been inmates of an assignation house in Los Angeles known as the Jonquil Apartments. From these girls, including his ward, petitioner procured the names of several men said by them to have been frequenters of the house. His activities in all these matters were spurred by the statement, first made to him by the ward, that several of these men, not content with the usual methods of carnal enjoyment, had indulged with the girls in certain unnatural and unmentionable sex practices. From one of the girls, however, who had not been a resident of the Jonquil, petitioner procured the name of the man asserted by her first to have made a successful attack upon her virtue in the ordinary manner. Some of the men whose names were now in the possession of petitioner were people of note in the communities in which they respectively lived. Petitioner became at once alert to get into personal touch with these men, making trips to Santa Ana, Monrovia, and El Centro for the purpose. On the journeys to the first and last named places he was accompanied by his ward, and, in addition to paying his own traveling and hotel expenses, he advanced hers. Not only did he go upon these quests to the places named, but petitioner called upon men in Los Angeles. Upon various of these individuals, in Los Angeles and out, he made demands for money. All but one of them refused to accede to the demands, that one paying to petitioner the sum of $2,500. Petitioner asserted at his trial in the federal court that in dealing with the men he was attempting merely to settle out of court claims which his clients had against them for damages because of the undermining of their health by the unnatural practices to which they had been subjected, except that one of the claims was for damages for the alleged rape of the girl who had not been an inmate of the Jonquil. The charge against petitioner in the federal court was based upon letters written to some of the men concerning the alleged claims against them, and the jury which tried the cause refused to believe petitioner's assertion as to the innocent character of his negotiations, including, in part, those letters. His conviction resulted, as already recited.

After reading the record which was made before the jury we cannot avoid concurring in the conclusion reached by that body. We are abundantly satisfied that petitioner studiously and deliberately embarked in an endeavor, which he pursued both diligently and relentlessly, to wrest large sums of money from these men by playing upon their fear of exposure and disgrace. It is true that he filed suits for damages against those who did not accede to his demands for a "settlement" of the alleged claims against them, but even this circumstance turns against him when it is pointed out that none of the suits were pressed and that they were all speedily dismissed.

There is yet another chapter in the story of petitioner's misdeeds. Not content with his piratical raid upon the purse of the individual through whose fears he had procured the payment of the sum of $2,500, he reported to his clients that the sum paid to him was $1,000. The truth as to this matter was not ascertained by them until long afterward.

[2] Notwithstanding the revolting character of the conduct of petitioner throughout this chain of events, we cannot join in the view of respondent that his past misdeeds show that he still is necessarily "devoid of that fundamental moral perception and personal integrity" which should undoubtedly reside in every practitioner at the bar. To adopt that theory would be to depart not only from the teachings of human experience, but from the principles upon which are based the conduct and maintenance of the punitive and corrective institutions of mankind. It is not surpassing the bounds of truth to say that civilization itself is devoted to the view that no criminal is so steeped in his crimes, no wrongdoer is so debased, that he may not be made to feel the purifying and elevating effects of reformation and regeneration. We cannot, in so far as any judgment we might pronounce could possibly have that effect, place petitioner outside the pale thus erected. We do, however, feel the pressure of the evident truth that one who has been guilty of the acts which he has committed should not be reinstated in the ranks of the legal profession except upon the most clear and convincing, nay, we will say upon overwhelming, proof of reform—proof which we could with confidence lay before the world in justification of a judgment again installing him in the profession which he has so flagrantly disgraced.

The statement just made has a particular application to the present case. The record of the trial in the federal court shows that extended newspaper publicity had

already been given to the Jonquil Apartment affair in connection with a criminal cause recently theretofore tried in the state court. This trial was under an indictment of a prominent and wealthy man for contributing to the delinquency of one of the "Jonquil girls," who was also one of the clients of petitioner in his endeavor to collect "damages" from the men whose names he had procured in the manner above stated. We cannot go outside the record made in this proceeding, but we think we are justified in assuming that the trial of petitioner in the federal court, following upon the trial in the state court, was given as great attention in the daily press as was the latter, doubtless being regarded as an added and intriguing chapter in an already celebrated newspaper story. We have no doubt that the frailties and misdeeds of petitioner were thus thoroughly advertised to the public. We have no doubt, further, that the public, remembering the offenses of petitioner, would be shocked at his restoration to the legal profession except upon such a complete and conclusive showing of reform on his part as would convince the general mind that, if reinstated, he would discharge his every duty as a lawyer with an unswerving fidelity. Such considerations must be of controlling moment in every such proceeding as this. Not only must members of the profession be people of integrity, but the public must know, if possible, that they are people of integrity. Not only must the bar be entitled to the respect and confidence of the public, but it must, if possible, actually enjoy that respect and confidence. At least, such is the goal which every lawyer and every judge should strive to aid the profession to reach. Having these precepts in mind, we could not reinstate any disbarred attorney at law if the general public could entertain any just doubt, upon the showing of reformation and regeneration made by him, whether the standing of the profession were not lowered by his return to its ranks.

With these views in mind, let us examine the showing made by petitioner in the present proceeding. We first notice a paper in the following form:

"To Whom it May Concern: We, the undersigned, employees of the Los Angeles Railway Corporation, and we and each of us, personally knowing W. H. Stevens of Los Angeles, Cal., and Stevens having worked as a conductor, an inspector and a supervisor with us, have had an opportunity of observing and have observed the conduct of said W. H. Stevens. That we verily believe he is honest, industrious, conscientious and of good moral character, and we verily believe that if he were reinstated as a member of the bar of the State of California, that it would be for the best interests of all concerned."

This document bears the signatures of 601 persons, but we can see no force in it as affecting the question now before us, except the force of numbers, and that, it must appear at once, alone amounts to nothing. Looking to the substance of the paper which has been so generously signed, we cannot see that we are to be aided by it. If we grant for the time being that there could be anything in the observed conduct of petitioner as "a conductor, an inspector, and a supervisor" which would enable any single and unremitting scrutinizer of that conduct to determine from it whether he would make an honest and a reliable lawyer—a point, however, which we reserve for further mention—we cannot perceive how this array of 600 persons could have had petitioner so closely under their observation as to enable them, en masse, and with no showing of fact except this general statement en masse, to resolve that question. Recognizing the laudable willingness of the signers of the paper to help a fellow employee out of difficulty, and with great respect for their honesty of purpose in appending their names to the document, we can ascribe no weight to the presentment made by it.

The next branch of the showing which we shall notice is made up of individual letters from various officers or employees of the Los Angeles Railway Corporation. These agents of the company, taking their letters in the order in which they are presented to us, were the manager of transportation, the general claim agent, chief special agent, superintendent of division 4, foreman of division 4, superintendent of schedules, superintendent of employment, assistant chief instructor, director of public relations, director of traffic, and superintendent of operation. Aside from these communications, there are before us two letters on the paper of the railway company, signed by individuals whose relationship to the corporation does not appear. It is certified in each of this parcel of letters, taking them generally, for they are couched in different terms, that petitioner's work for the company has been pursued in an honest and diligent manner, and that he is one of the trusted employees of the corporation. It is somewhat difficult to determine, being guided alone by the official designations following the signatures to these letters, exactly what has been the relationship between petitioner and the various writers of them; but we shall assume that some of the letters, at least, come from those who have been his superiors, who have been in close touch with his work, and who are therefore best qualified to certify to the nature of it and to the honesty and fidelity with which it has been performed. We are thus brought directly to the question whether petitioner's several employments with the Los Angeles Railway Corporation have put him to the test necessary to purge him of the taint of his old wrongdoing and to satisfy us and the public generally that he would

make a faithful and trustworthy practitioner at the bar. Are we shown that he has been tried in the fire and has not been found wanting? These questions must be answered with due regard to the nature of the offenses which resulted in his expulsion from the profession. The petitioner's employments with the railway may be set in great contrast with the position he once occupied as a lawyer, and which he would reassume if he were reinstated. There is nothing in the record here to show that he has been subjected to any particular temptation while an employee of the corporation. Lawyers are continually under great temptations, temptations to which, unfortunately, they occasionally yield, as petitioner once yielded. While with the company petitioner has always been at work under the direction, control, and supervision of others. This circumstance naturally would aid him to withstand temptation, if in truth temptation could ever have assailed him in those employments. A lawyer is his own master, and encounters frequent opportunity to prey upon his clients with but little fear of detection and punishment. In his recent employments we are not shown that petitioner has handled considerable sums of money. A lawyer is often called upon to safeguard large amounts which come into his possession, and often under his almost unbridled control. Petitioner in his positions with the company could never have become possessed of such an array of facts, valuable to the unprincipled mind, as he marshalled with diligence in the "Jonquil affair." Facts damaging to the peace of mind of individuals come almost daily into the hands of lawyers, and if petitioner were reinstated the natural consequence would follow that he might early in his practice become the recipient of information which could be used as he used his knowledge concerning the men alleged to have frequented the Jonquil. We need pursue the contrast no further. We cannot read in the letters of these railway officials and employees anything to show that, if petitioner were again placed in the position in which he found himself so soon after his admission to the bar, he might not again fall as far as he fell then.

The remainder of the showing made by petitioner consists of four affidavits from members of the Los Angeles bar, one from a justice of the peace of Los Angeles township, and one from a police judge in the city of Los Angeles. There is also a letter from the assistant United States attorney who conducted the prosecution of petitioner in the federal court. This letter does not show, nor do any of the affidavits show, any of the activities of petitioner except such as are incident to his various positions with the Los Angeles Railway Corporation. This part of the showing, although the papers constituting it come from those having a keener perception of the temptations to which a member of the bar is subjected than does the layman, must be placed so far as their effect is concerned in the same category with the branches of the showing with which we have already dealt. These lawyers and judges give us no facts upon which we can be reasonably certain that, if petitioner were reinstated, he would be faithful to the sacred trust which is reposed in every attorney at law.

[3] We cannot close this opinion without congratulating petitioner upon the standing which he has acquired with the representatives of the corporation in the employ of which he has remained for the past three years and a half, and upon the confidence with which his fellow employees regard him. We hope he may rise yet higher in the company's line of service, and that he may come to occupy yet higher posts in its employ, or in any other walks in life which he may choose to follow. Let us say, also, that such strictures as we have passed upon his character and conduct relate only to the time when he committed the acts which led to his disbarment. We do not say that he is not now qualified to be reinstated in his place at the bar. We say only that the showing made in his behalf fails to convince us that he is so qualified.

The petition is denied.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

59 Cal. App. 196

## TAHOE PINES CO. et al. v. NEWMAN.
(Civ. 4276.)

(District Court of Appeal, First District, Division 1, California. Sept. 27, 1922.)

**1. Specific performance ⟸121(11)—Evidence held to sustain judgment that vendors performed all the conditions of the contract.**

In an action for specific performance of a contract to purchase land providing that the vendor agrees to pay taxes at the present assessed value thereof until whole purchase money is fully paid, the fact that vendor paid the taxes for the first year only was not grounds for reversing the judgment that plaintiffs performed all the conditions of the contract, where there was evidence that it was the intention of the parties that the vendor was to pay the taxes only while the property was assessed as acreage and that defendant paid the taxes without protest when the assessment was apportioned to the several lots and blocks.

**2. Vendor and purchaser ⟸37(4)—Statement by vendor that he was convinced that the property could be resold at a profit was mere opinion.**

A statement by plaintiff vendors that, considering the way in which the land was selling, they were convinced that the property sold to defendant could be resold within a year at

a profit, when standing alone, amounted to no more than a mere expression of opinion and was not sufficient to avoid the contract for fraud.

**3. Specific performance ⟸92(2)—Vendor may enforce contract where he acquired land after executing the contract.**

In an action for specific performance of a contract to purchase land, evidence that vendor, at the time of executing the contract, had an agreement to purchase the land in question and afterwards did purchase it, was sufficient to establish ability on his part to sell the land and convey title to the same.

**4. Limitation of actions ⟸51(2) — Vendor may sue at law for each installment when due or sue in equity for specific performance.**

Where a contract for the sale of land provides that the purchase money is to be paid in installments, the vendor, upon default in the payments, may sue at law for each installment when due or sue in equity for specific performance after the last installment is due, at which time the right of action in equity accrued for applying the statute of limitations.

**5. Limitation of actions ⟸51(2)—Action does not accrue until last installment is due.**

The four-year limitation for bringing an action for installments due under a contract for the sale of land does not bar an action for specific performance commenced within four years after the last installment was due, as the cause of action did not accrue until the last installment was due.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by the Tahoe Pines Company and another against George Newman. Judgment for plaintiffs, and defendant appeals. Affirmed.

Edgar C. Levey, of San Francisco, for appellant.

John Breuner, Jr., and Breuner & Erb, all of San Francisco, for respondents.

TYLER, P. J. This is a suit in equity brought by the plaintiffs as vendors to specifically enforce the provisions of a contract relating to the sale of certain real property. The contract sued upon was entered into between the defendant and Ferguson-Breuner Company, a copartnership, which copartnership was subsequently incorporated under the same name. At the time the transaction was had the copartnership did not have title to the property, but it was subsequently acquired by plaintiff Tahoe Pines Company, which latter corporation was formed shortly thereafter for the purpose of acquiring title to the property, and it was ready and willing at all times to convey title to plaintiff and other purchasers, hereinafter referred to, in conformity with the terms of their contract. The full purchase price of the land in question was the sum of $2,500. As required by the terms of the agreement, defendant deposited $250 on the execution thereof, and paid $40 in monthly installments thereafter for a period of time until his total payments amounted to the sum of $1,430, when he refused to make any further payments, claiming that the plaintiffs had neglected to pay the taxes on the property as required by the contract of sale. Claim is also made that defendant's consent to the contract was obtained through misrepresentation and fraud. The contract was entered into on September 2, 1909, and defendant, as a further defense, set up that the monthly installments commencing with the 2d day of January, 1912, to and including the 2d day of January, 1914, were barred by the provisions of section 337, subd. 1, of the Code of Civil Procedure. Trial was had before the court without a jury, and judgment was rendered in favor of plaintiffs for the full sum of $1,070, the unpaid balance of the purchase price, as prayed for, and defendant appeals.

From the evidence it appears that the Ferguson-Breuner Company had acquired a tract of land on the shores of Lake Tahoe for the purposes of subdivision. The entire tract consisted of some 200 acres. This company subdivided the tract into blocks and lots, and the land here in dispute consisted of one of such blocks which was divided into eight lots. At the time the contract in question was entered into, the entire tract was assessed as a whole. On account of the different character and value of the lots and blocks as subdivided, it was deemed impossible for the parties to determine what proportion of the tax defendant should be required to pay while the tract was assessed as acreage. Accordingly, the parties inserted a clause in their contract with reference to payment of taxes. Such clause reads as follows:

"Said first party (Ferguson Breuner Company) agrees to pay taxes on said property at the present assessed value thereof, until whole purchase money is fully paid."

[1] It is first contended as ground for reversal that this condition of the contract was breached by plaintiffs, and that the evidence conclusively shows that with the exception of those levied for the year 1909 the entire taxes assessed against the property were paid by defendant, and that no part was assessed or paid by plaintiffs, for which reason it is claimed the judgment that plaintiffs performed all the conditions of their contract finds no support in the evidence. We see no force in this contention.

[2] It is manifest from the record that it was the intention of the parties that the vendor was to pay the taxes only while the property was assessed as acreage. At the

time of the execution of the contract the land was so assessed. Thereafter and when the assessment was apportioned to the several lots and blocks, defendant paid the taxes willingly and without objection or protest, and never requested plaintiffs so to do. The evidence shows that defendant and other purchasers were fully informed upon this subject, and, further, that all parties were in accord with this arrangement. Equally without merit is the claim that the contract was induced by fraud and misrepresentation. In this connection it is claimed by appellant that at the time he agreed to buy the property a printed prospectus was shown to him wherein sites for a clubhouse and hotel were set out, and representations were made that an extensive water system would be installed upon the land, and that a wharf would be built and streets constructed, and the hotel and clubhouse would be erected all within a year from the date of the agreement of purchase. It is further claimed that defendant was assured that the vendor could dispose of a portion of the property, and that from the sale of one-half of it obtain more than a sufficient amount to pay for the whole. Plaintiffs denied that any such representations had ever been made. It is admitted that defendant was informed that considering the way in which the land was selling that the vendor was convinced it could be resold within a year at a profit. But standing alone this amounted to no more than a mere expression of opinion. The entire evidence upon this subject shows that the price paid for the land was, as plaintiffs allege, just and equitable, and fully sustains the findings of the trial court upon this subject, and it further shows that plaintiffs did not make the alleged fraudulent representations which it is claimed induced defendant to enter into the agreement.

[3-5] Appellant further claims that the evidence fails to establish ability on the part of Ferguson-Breuner Company to originally contract to sell the land or to convey title to the same. The evidence shows that at the time the contract was made the copartnership had an agreement to purchase the tract in question. It was therefore in a position to contract with other parties for its sale. Wolff v. Cloyne, 156 Cal. 746, 106 Pac. 104. The case does not present any question of doubtful or defective title. It is not necessary that a vendor should be the absolute owner of property at the date of an agreement of sale. An equitable estate in the land or a right to become its owner is the subject of sale, and whenever one is so situated that he can acquire the title thereto, he is in a position to make a valid agreement with reference to the property. Easton v. Montgomery, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123. Moreover, the title to the land in question was acquired by plaintiff Tahoe Pines Company, which took over the business of the partnership and the corporation for the benefit of all purchasers in the tract, and plaintiffs were at all times in a position to convey title. And finally, with reference to the claim that certain of the installments are barred by limitation of time: It is claimed that in an action at law on an obligation nonequitable in character, to pay a certain sum in installments, that the statute of limitations begins to run upon each installment upon the date it is due. Whether this be true or not is of no consequence, as the present action is one in equity to compel specific performance, and is in no sense an action at law to recover the purchase price or certain installments thereof. While the vendors might have commenced an action at law for the recovery of each installment when due, they were not bound to do so. They had the option to pursue in the alternative either a legal or equitable remedy. It is a well-established and familar doctrine of equity that the right to specific performance, if it exists at all, is, and necessarily must be, mutual. The remedy must be alike attainable by both parties to the agreement. This is a distinctive feature of the doctrine. Pomeroy on Contracts, § 6. Where, therefore, in a contract for the sale of land, since the purchaser may, by a suit in equity, compel the execution and delivery of a deed, the vendor by a similar suit may also enforce the undertaking of the vendee, although perhaps the substantial part of the relief sought amounts to nothing more than a liability on the part of such vendee to pay a certain sum of money. The requisite of mutuality includes both a mutuality of legal rights and a mutuality in equitable remedies. Assuming, therefore, that the four-year limitation is applicable, we fail to see how the statute can be successfully invoked. The present action was filed within four years from the date the last installment was due. The cause of action upon which plaintiff has elected to stand did not accrue until that time. In a contract of the character here involved where the purchase money is to be paid in installments, neither party to the contract can maintain an action for specific performance until the last payment is due. The vendor is prevented because of the fact that the installments are not due, and the vendee for the reason that until he has made full payment he is not in a condition to demand a conveyance. Jones v. Boyd, 80 N. C. 258. Prior to this period, therefore, the cause of action upon which plaintiff relies did not accrue, and, this being so, such a suit brought before that time would have been premature. Troy v. Clarke, 30 Cal. 420; May v. Sullivan, 37 Miss. 541.

For the reasons given the judgment is affirmed.

We concur: KERRIGAN, J.; ST. SURE, Justice pro tem.

190 Cal. 60

## BREWER et al. v. RAILROAD COMMISSION OF CALIFORNIA. (L. A. 6716.)

(Supreme Court of California. Nov. 10, 1922. Rehearing Denied Dec. 8, 1922.)

**1. Waters and water courses ⟸257(1)—Commission's order not disturbed for exclusion of evidence, unless amounting to denial of due process ousting it of jurisdiction.**

In view of limited power of review, order of the Railroad Commission fixing rates to be charged by a water company, cannot be set aside on certiorari because of error in rulings on evidence, unless constituting an entire exclusion of admissible evidence on one side touching the essential issue, amounting to a denial of due process of law, and so ousting the Commission of jurisdiction, which cannot be said to be the case where the main substance of that evidence was before the Commission in the form of record of evidence presented in earlier proceedings involving the same issues.

**2. Waters and water courses ⟸232—Finding of dedication to public use not authorized by declarations of appropriators and articles of incorporation.**

Declarations of the original appropriators of the waters of a river and of the corporation formed by them as to the purposes of such appropriation, and the statement in the articles of incorporation of the corporation's purposes, are insufficient in themselves to justify a finding that the waters were to be devoted to a public use or that the corporation was a public utility.

**3. Waters and water courses ⟸232 — Acts pursuant to declared purposes of appropriators held to justify finding of dedication to public use.**

Acts of corporation formed by appropriators of waters pursuant to and consistent with their declared purposes, together with stipulation of original contracts that water rights were to be subject to "legal rates," *held* to justify finding that from the first the waters had been dedicated to a public purpose, and that the corporation was a public utility.

**4. Waters and water courses ⟸232—Company cannot, without consent of all beneficiaries, revoke dedication to public use.**

A water company, having dedicated its water to a public use, cannot revoke the dedication and convert its water into a private use, without the consent of all the beneficiaries of the use.

**5. Estoppel ⟸68(1)—Users of water held by their acquiescence in orders of Commission fixing rates to have waived right to claim company was not public utility.**

Users of water having submitted themselves and their water rights to jurisdiction of the Railroad Commission, and without attempt to review, paid rates fixed by the Commission on the theory of the company being a public utility, waived right to claim, in a subsequent proceeding before the Commission, that the company was not such a utility, and to stand on their contracts.

In Bank.

Application by John C. Brewer and others for writ of certiorari, to review orders of the Railroad Commission of the State of California fixing water rates. Application denied.

Jesse George and Clarence S. Preston, both of San Diego, for petitioners.

C. C. Crouch, of San Diego, Harry A. Encell, of San Francisco, and Sweet, Stearns & Forward, of San Diego, for Cuyamaca Water Co.

Hugh Gordon and William W. Clary, both of San Francisco, for respondent.

RICHARDS, Justice pro tem. This is an application of John C. Brewer and a large number of other users of the water of the Cuyamaca Water Company for a writ of review, wherein it is sought to have reviewed and annulled certain orders of the Railroad Commission, affecting the rates paid and to be paid by said applicants for the use of water of the said company upon their respective premises. The immediate subjects of review are three separate proceedings instituted before the Commission affecting such rates, but which were ordered by the Commission to be heard together upon the same evidence as to each proceeding. These were: First, a proceeding instituted April 15, 1919, by the Cuyamaca Water Company, a copartnership maintaining a water system in the county of San Diego for distribution of water for agricultural and domestic uses, seeking a general increase in the water rates of said company; second, a proceeding instituted shortly thereafter by the same applicant for an emergency surcharge upon its rates then in effect; third, a proceeding instituted by Robert Ross et al., embracing a considerable number of the petitioners herein who were domestic users of water of said copartnership, charging unjust and discriminatory rates and poor service, and asking for a readjustment of water rates. Upon the grouping and hearing of these three proceedings the Commission took certain testimony, refused to take or consider certain other testimony, and finally made the several orders sought to be reviewed herein. In order to rightly understand and pass upon the questions presented herein, it will necessary to give a brief recital of the history of the Cuyamaca Water Company and its predecessor, the San Diego Flume Company, and of the prior proceedings before the Railroad Commission bearing on the matters herein subjected to review.

The source of the water supply of the water system now owned and operated by the Cuyamaca Water Company is the San Diego river, which rises in the mountains to the northeast of the city of San Diego and, flowing in a general southwesterly direction, enters the ocean just north of said city. In its course it passes through the El Cajon Valley, which embraces an extensive body of agricultural land. This valley was part of an old Mexican grant, known as Rancho El Cajon, which embraced many thousand acres of land, and which came to be partitioned, in the year 1874, into 20 separate parcels. In the year 1885, Henry B. Lockwood and ten other persons owned in severalty practically all of the best agricultural lands in the El Cajon Valley, which lands, however, had remained undeveloped for want of water, without which they were of small value. In the latter year W. E. Robinson, T. S. Van Dyke, and S. H. Marlette united in filing upon and appropriating 21,000 inches of the waters of the San Diego river, being practically its entire ordinary flow. The notices of appropriation stated "that the places where said water is intended to be used are as follows: The lands and rancho El Cajon, on the mesa between El Cajon and the city of San Diego, and the city of San Diego." In order to carry into effect these purposes by means of the proper canals, ditches, etc., Robinson and his associates entered into an agreement with said landowners in the El Cajon Valley, wherein the former agreed to construct the necessary diversion and irrigation system to bring said waters to said and other lands, in consideration of these landowners transferring to them all of their rights as riparian owners in and to the waters of the San Diego river and also granting to them the necessary rights of way over their respective parcels of land for canals, pipe lines, etc. This agreement contained the following recitals:

"Whereas, W. E. Robinson and associates are about to establish and provide for a system of waterworks for the purpose of providing water with which to irrigate the lands of the Cajon Valley, part of the lands known as the Ex-Mission of San Diego, and also to provide water for distribution and sale in the city of San Diego (all in the county of San Diego), state of California; and for that purpose will on or before the 1st day of January, 1886, commence actual operations for the construction of necessary dams, aqueducts or pipe lines to impound and secure the waters of the San Diego river at a point east of the said Cajon

ranch, and to conduct said water to and upon the lands and places aforesaid as far south as the gate entering L. Chase's orchard, and will thereafter prosecute their said business with reasonable diligence and without unnecessary delay until it is brought upon and ready for sale and distribution in the Cajon Valley, as aforesaid, and thereafter continue their said works so as to bring the surplus of the water so impounded and secured to and upon the mission land aforesaid and to said city of San Diego for distribution therein."

Upon the execution of this agreement, Robinson and his associates organized a corporation known as the "San Diego Flume Company," with a capitalization of $1,000,000, to which they transferred all of their rights acquired under said appropriation and also said agreement, receiving, as the consideration therefor, capital stock of the said corporation to the amount of $450,000 par value. The original articles of incorporation of the San Diego Flume Company stated:

"That the purposes for which it is formed are to appropriate, divert, and take water from the San Diego river and other streams in the county of San Diego, Cal., and convey and sell the same for irrigation, domestic use, mechanical purposes, and use by the city of San Diego and other cities and towns in said county; to build and maintain dams, reservoirs, and any kind of aqueduct or flume; to reclaim and improve by supplying with water, dry lands in said county, and to that end to acquire, hold and convey real estate."

The San Diego Flume Company at once upon its organization reposted and recorded its own notices of appropriation of the waters of the San Diego river, in which notices of appropriation it was provided that "said water is appropriated, claimed and intended for irrigation, domestic and mechanical purposes. The places where it is intended to use said water are the city of San Diego, Ex-Mission ranch, rancho El Cajon." The company at once proceeded with the development of its water system. During the year 1886 the corporation acquired by purchase 3,145 acres of land in what is known as the Rancho Ex-Mission, lying to the westward of the El Cajon Valley and between its lands and the city of San Diego, and caused said lands to be surveyed and platted so that 1,000 acres thereof was subdivided into 100 tracts of 10 acres each, 200 acres thereof into villa lots of smaller dimensions, and 80 acres thereof into town lots, each of an area of 50 by 100 feet. The corporation then proceeded to sell off this tract of land, as thus subdivided, under a form of contract by which, through the medium of certain trustees, the corporation agreed to give to each purchaser of one of said 10-acre tracts one of said town lots, and also agreed to convey to each owner of a 10-acre tract a perpetual water right to one miner's inch of water at an annual rental of $3 per acre. The contract for the sale of these lands upon said terms stipulated that the water company was to extend its aqueduct into the city of San Diego, and this being done, to supply water to the holders of town lots for use thereon at city rates. The owners of the larger or 10-acre tracts were, however, to be first supplied with water before supplying any other lands or lots therewith. While the San Diego Flume Company was thus developing its water system for use upon its own lands, it was also, beginning with the year 1886 and continuing down to the year 1910, engaged in making water right contracts with the various owners of land in the El Cajon Valley and also in the Ex-Mission rancho aforesaid, outside of its own holdings therein. The first of these contracts and in fact the first water right contract executed by said corporation appears in the terms and conditions of a deed made by one Hawley to said corporation, conveying to it an undivided one-half interest in certain lands in El Cajon Valley, wherein one of the conditions subsequent to the grant was stated to be that—

"The said flume company is within three years to build a flume or other aqueduct across or adjacent to said tract of land, carrying water for irrigation according to the purposes of said company's incorporation, and shall grant to the grantor, his heirs, representatives, or assigns, a right to the use of water from said flume or aqueduct at the legal rates and to the amount of 1 inch, measured under a 4-inch pressure for each 10 acres of arable land in such portion as may be assigned to grantor in partitioning. Such water right is to be perpetual and without further compensation except the legal rates aforesaid, and subject only to the act of God, of the law, or public enemy."

The amount of water to be supplied under this contract was 70 inches. A second water right contract was made with Hawley a few weeks after the date of said deed by which he agreed to buy water from the San Diego Flume Company for use on certain other described lands in San Diego county, the contract containing the same provision as that above quoted from the former one. Still later in the same year a third contract was made with Hawley in substantially the same form as the two prior agreements, and wherein it was repeated that said Hawley was to have his designated "right of water from said flume or aqueduct at the legal rates."

About the time of the making of these contracts with Hawley the San Diego Flume Company entered into a contract with Wendell Easton, George W. Frink, and Frank B. Wilde, owners of a tract of land in El Cajon Valley, known as "S" or "Jarvis tract," by the terms of which certain rights of way for its aqueducts, flumes, and other waterways were granted by the latter to the corporation, which in turn, granted to said Easton, Frink, and Wilde—

"the right to purchase for the sum of $10 an acre, any portion of 200 water rights to be taken from the flume line to any point or points on said line that the said parties or their assigns may select. Each of said water rights is to be one miner's inch under a 4-inch pressure to each 15 acres of land to be designated as hereafter provided and at the legal rates as fixed by the supervisors of said county, in addition to the price of said water right. * * * Said water right is to be perpetual and without further compensation except the legal rates aforesaid."

During the years 1887 and 1889, inclusive, six other agreements for water rights were entered into between the corporation and the following water users, viz.: Terralta Land & Water Company, F. J. Wramplemeier, El Cajon Vineyard Company, C. F. Francisco, El Cajon Valley Company, and Uri Hill. Each of these six agreements was in substantially the same form as the others, and each provided for the annual payment of a fixed water rate for each inch of water supplied to the lands of these respective water users, and each also contained the proviso that "if said land is hereafter included within the limits of any incorporated city or town, said company may demand city rates," etc. It seems to be conceded that the provisions of the several contracts above referred to as having been made by the San Diego Flume Company between the years 1885 and 1889 have reference to the rate-fixing powers of the board of supervisors of the counties under statutes then in effect, and applying generally to water companies. On February 24, 1921, on petition of a number of inhabitants within the region then being supplied with water by said corporation, the board of supervisors of the county of San Diego, purporting to act under the then existing statutes (Stats. 1885, p. 95), adopted an ordinance fixing a maximum water rate to be charged by said corporation at $120 per miner's inch per annum. It appears, however, that the San Diego Flume Company at the time was not charging any of the persons to whom it was then supplying water under its outstanding agreements a rate equal to that fixed by said ordinance as the maximum rate it would be entitled to charge; and it also appears that, in its subsequent agreements for the supplying of water to its customers during the period that said ordinance remained in force, it never provided for a charge equal to said maximum rate.

Between the years 1889 and 1909 the San Diego Flume Company, as its business and water system expanded, made a large number of contracts with various persons and corporations for the sale of its water. Some of these were with landowners directly; some were with other water companies purchasing water in quantity for distribution among their own customers upon their own terms; some were with persons or corporations using the water for other purposes than either irrigation or domestic uses. Some of these agreements provided for such water rates as might be fixed by law; others provided for flat rates, omitting any such provision. It may be pertinent to note at this point that, after the board of supervisors of said county had assumed jurisdiction to regulate the water rates to be charged by the San Diego Flume Company through its ordinance, above referred to, the said water company undertook to secure, and did, in fact, secure the modification of its foregoing agreements with Hawley, with Easton, Frink, and Wilde, and with other landowners in the El Cajon Valley, by the terms of which new agreements the clause in each of the said original agreements "at rates fixed by law" was eliminated. It may be also noted that as to certain of the agreements by the corporation for the sale of water to new subdivisions or districts opened up for water consumption after the date of the said ordinance and outside of El Cajon Valley, the provision for the sale of water subject to "legal rates" was expressly retained. The significance of both these states of facts will be later commented upon. In the year 1910 the San Diego Flume Company sold and conveyed all of its property and rights in and to its aforesaid water system and all outstanding agreements relating thereto to one James A. Murray, who shortly thereafter formed a partnership with one E. Fletcher, under the firm name of Cuyamaca Water Company. Subsequently W. G. Henshaw became a member of this firm. Said copartnership has since been operating said water properties and system under said name. By the terms of the transfer by the corporation to the copartnership the latter became obligated to perform the terms and conditions of all outstanding water contracts to be theretofore performed by said corporation.

On June 25, 1912, the individuals comprising the copartnership of the Cuyamaca Water Company filed an application before the Railroad Commission for an order authorizing said applicants to increase the water rates then being charged their consumers in the county of San Diego. Notice of the hearing upon said application was ordered to be given by publication in four newspapers within the region covered by the water distributing system of said applicants, and such notice was so published according to the terms of said order. A considerable number of the customers of the applicants appeared upon the hearing of said application, the domestic consumers and certain consumers taking water for irrigation purposes being separately represented by counsel and opposing the application upon different grounds. As to just who or what number of persons was represented by the counsel who appeared for the consumers taking water for irrigation purposes does not very clearly appear, the record merely showing that Haines &

Haines and D. G. Gordon appeared for certain protestants of this class without identification by name, Mr. Gordon, who was himself a landowner in the "S" tract, stating that he appeared "for the water users on the main flume," while Mr. Haines stated that he represented the holders of water rights contracts to 428 inches of water, a list of the names of whom had been furnished by the applicants to the Commission. Upon the hearing all of the water rights contracts of the San Diego Flume Company were presented in evidence, and the Railroad Commission in its decision engaged in a very exhaustive examination into the history, business, and status of the former San Diego Flume Company, including an investigation of all of these outstanding water contracts which were presented in evidence before it and to which in said decision it specifically refers. The conclusion of the Commission as a result of such investigation was that the Cuyamaca Water Company was from its inception a public utility and, as such, subject to the jurisdiction of the Commission as to its water rates. The Commission then proceeded to fix the water rates to be allowed to be charged these several classes of consumers, which rates were in most, if not all, cases, higher than the rates which had been theretofore charged and collected under the terms of the outstanding agreements. The Commission further found that the main flume or aqueduct of the water company was in a bad state of deterioration, requiring immediate renewal, and, as a condition to the proposed increase in the rates of the applicants, provided that such increased rates should not be charged or collected until the applicants had complied with the requirement of the Commission with respect to the renewal of its flume, or until they had satisfied the Commission that they were proceeding to comply therewith in good faith. No application for a rehearing before the Commission as to the matters covered by its aforesaid orders was made by any of the parties who had appeared before it, nor by any other of the water users affected by said orders, nor was any application made to the courts calling in question the jurisdiction of the said Commission to make or enforce its said orders.

Between March 28, 1913, the date of the decision of the Railroad Commission upon this first proceeding before it, and September 24, 1920, the date of the decision of the Commission which is assailed in this proceeding, the Cuyamaca Water Company was before the Railroad Commission upon numerous occasions, and in fifteen or more separate proceedings in which its water rates were involved. In the latter part of the year 1913 the copartnership filed another application for an increase in water rates, based upon certain alleged outlays in the improvement of its plant. In this proceeding, as in the former one, D. G. Gordon and the firm of Haines & Haines appeared as representing irrigation customers of said water company holding water right agreements. Whether said counsel represented all of this class of the customers of the water company does not expressly appear from the record of said proceeding, but the objection urged by them was to the effect that the applicant was not entitled at said time to an increase in water rates, for the reason that it had not complied with the order of the Commission, made in the previous proceeding, as to the replacement of its flume. The ruling of the Commission was inconclusive, holding the matter of an increase of the rates of the applicant in abeyance until it had complied with the Commission's earlier order. In July, 1914, the Cuyamaca Water Company again applied to the Commission for an order authorizing a general increase in its water rates. In this proceeding quite an array of counsel appeared representing various classes of the applicants and consumers, among these D. G. Gordon appeared for consumers on the flume line; or, in other words, irrigation consumers. The firm of Haines & Haines also again appeared as representing Lemon Grove Mutual Water Company and Fairmount Water Company. A little later in the same year D. G. Gordon, purporting to represent himself and approximately 100 other persons having contract rights to water from the main flume, filed a complaint before the Commission alleging mismanagement, and defective distribution on the part of the San Diego Flume Company and praying for both general and specific relief. It is conceded in the briefs of the petitioners herein that said D. G. Gordon and his counsel, Sumner & May, represented in said proceeding practically all of the petitioners herein. This proceeding was by the Commission heard together with the then pending proceeding last above referred to. Public hearings were held in the city of San Diego covering in all about two weeks, during which time, by stipulation of counsel, all of the evidence, taken upon the several prior proceedings of the same applicants before the Commission was presented in evidence in that proceeding. While said proceeding was pending and undetermined, the Cuyamaca Water Company, in November, 1914, entered into a contract for the sale of its water system to an irrigation district, which had been formed within the region occupied by its water system, and it was represented to the Commission that an application would be presented to the Commission for the fixation of the price at which the Cuyamaca Water Company might be permitted to make said sale.

In view of this impending transfer the Commission concluded that it would be ill advised to make any present change in the

water rates of the applicant. In its order deferring the matter for future consideration, the Commission recited as a fact established before it that, while as yet the applicant had not complied with the earlier order of the Commission in the matter of the replacement of its flume, it had been collecting from its water consumers the increased water rates provided for in its said earlier decision. There were during the year 1915 several proceedings before the Railroad Commission affecting, with one exception, consumers of the product of the Cuyamaca Water Company other than the petitioners herein, and which need not be adverted to other than to note that in all of said proceedings the water company was alleged to be treated as and dealt with in the capacity of a public utility by all parties concerned. The excepted proceeding was one instituted by the La Mesa Development Company as the holder of a contract entered into on February 7, 1908, with the San Diego Flume Company, wherein the latter agreed to supply the former with 150 miner's inches of water upon demand therefor at any time within 20 years, for use upon lands belonging to the development company, the consideration of which agreement being the sum of $120,000. The contention of the applicant in that proceeding was that its contractual rights to such water had been injuriously affected by that portion of the order of said Commission made on March 28, 1913, in the first proceeding above referred to forbidding the water company from adding any more consumers to its system except domestic consumers. The commission, upon the hearing of this proceeding, modified its earlier order by adding thereto this provision:

"Provided however it is not intended by this order to prevent the said James A. Murray and Ed Fletcher (the then owners of the Cuyamaca Water Company) from performing any valid contract for the supply of water which existed at the time of making this order, to wit, March 28, 1913, made by the San Diego Flume Company, predecessor in interest of the said James A. Murray and Ed Fletcher."

The petitioners herein were not parties to that proceeding.

The prospective sale of the properties of the Cuyamaca Water Company to the irrigation district not having been consummated and a sale of its water system to the city of San Diego having also fallen through, the Cuyamaca Water Company, on the 6th day of January, 1916, renewed its application theretofore made before the Commission for a general increase in its water rates. In this proceeding the same array of counsel appeared purporting to represent the several sets of consumers which had been represented by them in earlier proceedings. By stipulation between counsel for the several parties to the proceeding all evidence introduced before the Commission in the several earlier matters was admitted in evidence in the instant proceeding, the hearing otherwise thereon occupying several days, and the decision thereon being delayed until January 25, 1917, at which time the Commission rendered its decision, in which it recited the history of the several prior proceedings before the Commission and its rulings upon the questions presented therein. Among other things, the Commission ruled that, upon the representation to it that the Cuyamaca Water Company was proceeding in good faith to comply with the order of the Commission in the first proceeding before it as to the reconstruction of its main flume, the company had been permitted to charge and collect from its consumers the rates specified in said earlier order, and that said rates had been accepted without contest by the water company's consumers, and had been in effect continuously since July 1, 1913, after an exhaustive review of the present condition of the properties of the water company and after directing certain betterments to be made in storage and transmission system, and after reciting that there had been considerable difficulty in the application of the water company's existing rates, which difficulties and discriminations it proposes to remove by the adoption of a block rate applicable alike to all consumers under the same conditions, said block rate to provide a uniform rate for general use with a separate rate for irrigation use in excess of 2,000 cubic feet per month. The Commission accordingly adopted a schedule of rates applicable to all of the consumers of the water company, regardless of the origin of their rights to water service, to be effective on and after March 1, 1917. No petition for a rehearing was presented by any of the parties to said proceeding or affected by said order, nor was any application for a writ of review presented or filed in the courts.

The next proceedings before the Railroad Commission were that which the petitioners herein seek to have reviewed. On April 13, 1919, the Cuyamaca Water Company instituted said proceeding before the Railroad Commission seeking a general increase in its water rates. Shortly thereafter, alleging certain abnormal conditions in the cost of service to be then existing, the Cuyamaca Water Company filed another application before the Commission for a surcharge upon its water rates then in effect. Several months prior to the inception of these two proceedings and on September 5, 1918, a proceeding had been instituted before the Commission by Robert Ross et al., consumers of water furnished by said water company within certain territory adjacent to the city of San Diego, wherein it was alleged that the water rates and charges of the Cuyamaca Water Company were excessive, unreasonable, and discriminatory as to them; that the valua-

tion of the property and plant of said water company fixed by said Commission in its earlier orders was excessive; that the service was bad and the water furnished unfit for human consumption, and praying for an order of the Commission establishing just and reasonable rates as to said petitioners and for general relief. On the 14th of July, 1919, an order was made by the Railroad Commission that the matters be heard together on the 22d day of July, 1919, and ordered general notice to be given to all of the consumers of the Cuyamaca Water Company, by both posting and mailing, of the pendency of these proceedings and of the date of hearing thereon. On said date a considerable number of the petitioners herein, who had received said notices of the hearing upon said proceedings, appeared and verbally protested against the immediate hearing hereon. The Commission, however, proceeded to take testimony in said proceedings without regard to said verbal protests and without allowing the protestants time or opportunity to present evidence in support of their objections; and thereafter and on August 11, 1919, filed its decision in the matter of the application for a surcharge upon existing rates, allowing such surcharge as against all water users and fixing the amount thereof, such surcharge to be effective from the date of said decision and to remain in effect until January 1, 1920, unless otherwise ordered by the Commission; as to the matter of the adjustment of the entire rate schedule of the water company, pursuant to its application therefor and as to the question of the jurisdiction of the Commission in such adjustment to alter the rates of consumers holding water right agreements, both of such matters were held in abeyance by the Commission until a complete hearing would be had thereon. Thereafter, and on August 30, 1919, a considerable number of consumers filed with the Commission an application for a rehearing upon the decision of the Commission, relative to the imposition of a general surcharge upon their water rates, wherein they set forth that certain of said applicants were the holders of contracts with the San Diego Flume Company, entitling the holders thereof to be furnished with water by the Cuyamaca Water Company as the successor of the San Diego Flume Company, at a fixed rate and charge, which was much less than the rate and charge allowed by said decision, and that said decision of the Commission, in so far as it attempted to impose a higher rate and charge upon said applicants, was in excess of the jurisdiction of the Commission and violative of the Constitution of the United States and of the state of California. They also alleged various other grounds of irregularity in the proceedings of the Commission and of insufficiency of notice thereof as grounds for a rehearing upon said matter. Thereupon, and on October 21, 1919, the Commission made an order fixing December 19, 1919, as the date for a hearing upon said last-named application, and also as the date for a general hearing upon the other applications of the several matters involving the water rates of the Cuyamaca Water Company then pending before it. Prior to the date set for said hearing a large number of petitioners herein holding water rights contracts from the San Diego Flume Company filed an answer to the petition of the Cuyamaca Water Company for a general increase of its water rates, wherein two separate and specific objections and defenses thereto were set forth. By the first of these the power and jurisdiction of the Railroad Commission to entertain or conduct any proceeding for the fixation of water rates of the Cuyamaca Water Company so as to affect injuriously the rights of said protestants as the holders of said water rights agreements was directly assailed. By the second of these defenses the application of the Cuyamaca Water Company for a general increase in rates was objected to upon the ground that the water system and properties of the applicant for such increase were mismanaged and were not economically operated and, hence, that their said application should be denied.

At the time of filing their said answer to the application of the Cuyamaca Company for a general rate increase, the said protestants therein, who are also the petitioners in the instant proceeding, also filed with said Commission a cross-complaint, wherein, in addition to the matters set forth in their answer and protest above referred to, they affirmatively set forth that the water rates charged by the said water company under the previous orders of the Commission establishing and fixing the rates to be charged and collected by said water company and particularly under the order in that behalf made on March 6, 1917, are excessive, unreasonable, unjust, and discriminatory in a large number of specified particulars, and praying for the setting aside of the several previous orders of the Commission establishing and regulating the water rates of the Cuyamaca Water Company and for a revaluation of the water system and properties of said water company and the establishment of reasonable rates. In their said cross-complaint the petitioners herein seek to have whatever rights they possess under their respective water rights contracts preserved, and to have such re-established rates applied only to such excess of water supplied by said water company to them above the amount called for by the terms of their said water rights contracts. The hearing upon the matters put in issue by the aforesaid answer and cross-complaint of said protestants, the petitioners herein, came before the Commission upon the date set for the general hearing upon the other matters

then pending before it. The petitioners herein were present and were prepared to produce evidence upon said hearing in support of the averments of their answer as to the existence and validity of their respective water rights contracts, and in support of their objection that the Commission had no power or jurisdiction to make any order or orders affecting the vested rights of said protestants acquired thereby, nor to establish or enforce any water rates schedule or charge increasing the rates of said protestants as fixed by said agreements. The Railroad Commission refused to permit the said protestants, in support of their said pleadings upon said hearing, to present any evidence or proof to establish or show the existence or validity of any of their said water contracts and refused to permit the protestants to offer in evidence said contracts or to prove or show that the San Diego Flume Company, from which they had received their said contracts, was not a public utility in respect to the water covered by the terms of said contracts; upon the ground that in the previous proceedings before the Commission it had been decided that the San Diego Flume Company was from its inception and as to all its water users a public utility, and hence, that such evidence on the part of the protestants and cross-complainants was immaterial; to all of which rulings the protestants objected at the time of said hearing. The Commission, notwithstanding its refusal to allow the protestants to introduce in evidence their water rights contracts and also the other evidence proferred by them, tending to show that the San Diego Water Company was not a public utility at the time of the making of said agreements, did upon its own motion put in evidence in said proceeding all of the evidence which had been offered in evidence before it in the several proceedings involving the fixation of water rates which had been heard before it in the previous years, and which not only embraced all of the contracts and records of the San Diego Flume Company, but included also the history of the development of said corporation and of its water system from the inception of its organization and acquisition by appropriation of the waters of the San Diego river, for the uses and purposes specified in both the original and reposted notices of such appropriation. The Commission had, therefore, before it in the course of said proceeding a very considerable portion of the evidence which it had not permitted the protestants on their own behalf to offer. At the conclusion of said hearing the protestants presented in writing their formal protest in much of detail against the exclusion of such evidence and against the alleged arbitrary action of the Commission in excluding the same, and also against certain other rulings of the Commission excluding certain other offered evidence of the protestants and cross-complainants respecting the alleged mismanagement of the affairs and properties of the Cuyamaca Water Company. Said formal protest so filed was accompanied by a motion that the Commission reopen the hearing and admit such evidence. Thereafter, and on September 24, 1920, the Commission denied the protestants' motion to reopen the case the Commission filing at said time its opinion and order covering all of the proceedings then pending before it and providing for a general increase in the water rates of the applicant for such increase. Thereafter the protestants filed a petition for rehearing wherein all of their prior objections and protests against the power and jurisdiction of the Commission to establish water rates affecting their vested rights under their said water rights contracts were restated, which petition was by the Commission denied on October 8, 1920. Thereafter and on October 22, 1920, the said protestants filed in this court their present petition for a writ of review.

[1] The first contention of the petitioners herein is that they are entitled to have the proceedings of the Railroad Commission assailed herein reviewed and their orders made therein annulled, by reason of the alleged arbitrary action of the Commission in its refusal to permit said petitioners, as protestants in said proceedings, to present their evidence upon the issue as to whether or not the San Diego Flume Company was a public utility, and to present in evidence their several water rights agreements upon said issue, and in support of their contention that as to them, and as to said contracts with them, said corporation was not a public utility. In addressing ourselves to a determination of this question, it must be conceded that, if the question as to whether the San Diego Flume Company was from its inception forward a public utility was in fact an issue before the Commission in said proceedings, the refusal of that body to admit the evidence proffered by the protestants upon that issue would have been grave error which upon an ordinary appeal would have compelled a reversal. But this is not an ordinary appeal, nor has this court the authority, under its limited powers of review, to set aside orders of the Railroad Commission in matters over which it has been given jurisdiction, because of errors in the admission or rejection of evidence. If however, the error of the Commission in this regard had amounted to the entire exclusion of evidence otherwise admissible touching the essential matter in issue before it, so that, in deciding such issue, the Commission had so arbitrarily ruled as to permit but one side of the controversy to be litigated before it, we would have no hesitancy in deciding upon certiorari that such arbitrary action on the part of the Commission had amounted to a denial of due process of law so as to divorce it of jurisdic-

tion to decide the matter before it. But that is not this case, as presented in the record before us, since it appears that, notwithstanding its rulings in the exclusion of their evidence, of which the petitioners herein complain, the main substance of that same evidence was presented before the Commission in said proceeding in form of the record of the evidence presented before it in the several earlier proceedings involving the same issues. The petitioners here in fact predicate a large part of their contention and argument that the San Diego Water Company was not from its inception, or ever, as to them, a public utility upon such evidence. This being so, and the Commission having in fact before it the main amount of the substantial evidence upon which the petitioners rely to support their present contention, this court cannot say that the error of the Commission in refusing to admit such evidence in the first instance and, upon its proffer by the protestants, amounted to a denial of due process of law so as to oust the Commission of jurisdiction to render its ultimate decision sought to be reviewed herein.

[2-4] The next contention of the petitioners herein is that, upon the undisputed evidence which was actually before it, the Railroad Commission cannot rightfully draw the conclusion that the San Diego Flume Company was from its inception, or ever, as to their contractual rights as water users, a public utility. This involves a brief consideration of that evidence. It is true that the declarations of the original appropriators of the waters of the San Diego river and of the corporation formed by them as to the purposes of such appropriation would not in themselves suffice to justify a finding that such waters were to be devoted to a public use or that such corporation was a public utility. Palmer v. Railroad Commission, 167 Cal. 163, 138 Pac. 997. Neither would the statement of the corporation in its articles as to its purposes be sufficient in itself to support a finding on the part of the Railroad Commission that such corporation was a public utility. Del Mar Water Co. v. Eshleman, 167 Cal. 666, 140 Pac. 591, 948. When, however, the original appropriators of water from a stream, having declared that their purposes are to secure that commodity for general public consumption, organize a corporation which, in its articles of incorporation, declares its purposes to be that of utilizing the water thus acquired for sale for irrigation, domestic use, mechanical purposes, and for use generally in cities and towns within the zone of its proposed distributing system; and when such corporation proceeds under such declared purposes to establish a distributing system having both a reginal and a constructional amplitude, a direction and a destination consistent with such purposes; and when such corporation in its earliest contracts for the acquisition of rights of way for its aqueducts, canals, pipes, etc., and for the distribution of its waters therein, expressly stipulates that whatever water rights were therein granted were to be subject to "legal rates"; and when the recitals of such agreements in most instances showed that the city of San Diego and other existing or proposed towns and town sites were to be supplied and served with water from the company's distributing system; and when in fact such corporation proceeded, as rapidly as the construction and extension of its water distributing system would permit, to sell and serve water to the general public coming within the area of such expansion for irrigation, for domestic uses, for mechanical purposes, and for whatever other uses such water might be put to by its purchasers—it must be held that substantial evidence of such a carrying into effect of the originally declared purposes of the original appropriators of such water and of the corporation formed by them has been presented as would suffice to justify a finding that the water thus acquired and utilized by such corporation had from its inception been dedicated to a public use, and that such corporation was a public utility. The Commission had before it such evidence.

In the earlier proceedings before it, at which some, at least, of the petitioners herein were present in person or were represented by counsel, the foregoing facts were made fully to appear. Generally they were contained in the recitals or covenants of the various agreements which the San Diego Flume Company made with the predecessors of most of the petitioners herein, and out of which their rights as water users arise. As to the law applicable to these facts, it may be said to be fairly well settled under the more recent decisions of this court. In the case of Palermo Land & Water Company v. Railroad Commission, 173 Cal. 380, 160 Pac. 228, the agreements which the Palermo Land & Water Company made with its customers provided that its water was to be supplied "at such rates as may be fixed by law in the district in which said lands are situated"; and this court held that, as to those who held under such agreements, it appeared that the parties contemplated at the very inception of their contract rights that the rates to be charged should be fixed by public authority; and that the fixing of rates by public authority implies that the service is to be that of a public utility. The evidence before the Commission showed that, in practically every one of the early contracts for supplying water to the owners of land in the El Cajon Valley, there was inserted the clause that the right to take and use the varying amounts of water to be supplied to each of said landowners was to be subject to "legal rates." A large majority of the petitioners herein are the suc-

cessors in interest of the original landowners who were parties to these contracts. It is true as stated by the petitioners herein that, after the board of supervisors of the county of San Diego had, under statutes then in force, adopted an ordinance declaring the San Diego Water Company to be a public service corporation and establishing a maximum water rate for its water, the said corporation undertook to call in these earlier contracts and issue new contracts to the landowners holding the same, omitting the clause providing that this water service should be subject to legal rates. This action on the part of the San Diego Flume Company was attempted to be taken six or more years after its organization and after its character as a public service corporation had become practically crystallized by its conduct in selling its water to all sorts of customers over a widely distributed system. Having thus dedicated its water to a public use, the company could not revoke such dedication and convert its waters into a private use, without the consent of all of the beneficiaries of such use. Franscioni v. Soledad L. & W. Co., 170 Cal. 221–228, 149 Pac. 161; Leavitt v. Lassen Irr. Co., 157 Cal. 82–89, 106 Pac. 404, 29 L. R. A. (N. S.) 242.

[5] The main question involved in this proceeding, and which we think affects and concludes all of the petitioners herein, is the question as to whether or not these petitioners by their acts and conduct in relation to the numerous proceedings before the Railroad Commission touching the water rates of the Cuyamaca Water Company have concluded themselves from asserting in the present proceeding that the San Diego Flume Company was, and that the Cuyamaca Water Company as its successor in interest is, not a public utility. The petitioners herein number in all 116 persons, excluding duplications as where certain of the petitioners appear as husband and wife, or as members of copartnerships. These persons assert themselves to be landowners either in the El Cajon rancho or the Ex-Mission rancho. They are subject to several classifications as to the origin of their land ownerships. They are also subject to several classifications as to their appearances before the Commission in the several proceedings instituted before it prior to the proceeding of 1919, which is assailed herein; as for example certain of said petitioners appeared or were represented by counsel in the original proceeding instituted before the Commission in 1913, wherein it was expressly held that as to all of its water users the San Diego Flume Company was from its inception a public utility. As to the several proceedings before the Commission prior to 1916, those of the petitioners herein who did appear therein assert that the orders of the Commission made therein fixing water rates were conditional upon the making of certain betterments in the distributing system, which the company did not make and said petitioners therefore argue that they were not bound by the decision of the Commission that the water company was from its inception a public utility. This reasoning will not bear scrutiny. Having submitted themselves to the jurisdiction of the Commission, such of these petitioners so doing are bound by its conclusion as to the public utility character of the water company. If it failed to comply with the orders of the Commission as to betterments, the remedy of said petitioners was by appeal to the Commission to compel the making of the betterments, but it was not the reassertion of special water rights over which said petitioners had by their acquiescence yielded to the Commission the right of control.

In 1916 certain of said petitioners appeared as complainants before the Railroad Commission through one D. G. Gordon, asserting himself to represent approximately 100 persons holding water right contracts along the main flume, in which proceeding doubtless the major portion of the petitioners herein were represented by said Gordon. In said proceeding the Railroad Commission again decided that the San Diego Flume Company was a public utility, as was also its successor the Cuyamaca Water Company, and thereafter proceeded to order a general readjustment of its water rates, which order occurred on and after March 1, 1917. Still later and in 1918, certain other of the petitioners herein appeared as complainants before the Commission in a proceeding entitled, Robert Ross et al. v. Cuyamaca Water Co., complaining of excessive water rates and seeking affirmative relief from the Commission. Coincident with the proceedings initiated by D. G. Gordon in 1916, the Cuyamaca Water Company presented an application before the Commission for a general readjustment and regulation of its water rates, in which proceeding a large number, if not all of the petitioners herein, appeared as respondents. As to these several proceedings which antedated the final proceeding assailed herein, it must be held that as to those of the petitioners herein who actually appeared as respondents in said proceedings, or who affirmatively appeared as complainants therein, they are bound by the several decisions of the Commission holding the San Diego Flume Company to have been from its inception a public utility, and its successor in interest to be such public utility and hence subject to the jurisdiction and orders of the Commission. In holding that those of these petitioners who thus appeared either affirmatively or as respondents and submitted themselves and their several asserted water rights to the jurisdiction of the Commission in the several proceedings before it prior to March 1, 1917, we do so, not upon the theory that

the decisions of the Railroad Commission are binding upon said petitioners as res adjudicata, since we doubt that the decisions of an inferior tribunal rise to the dignity and authority of being res adjudicata (Prentis v. Atlantic, etc., Co., 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150), but we do so upon the theory that such of the petitioners herein as thus by their appearance or by their affirmative action submitted their several rights and claims as water users to the jurisdiction of the Commission and having done so accepted the rulings of the Commission as determinative of their said rights and claims, without seeking to have such rulings reviewed by the courts; and accepted and paid the water rates which the Commission established and put in force, upon the theory and finding that the water company as to all of its water users was a public utility, such petitioners cannot now be heard to urge that, as to them and their water rights agreements, said water company was and is not a public utility, and as such subject to regulation by the Railroad Commission. The following authorities fully support this conclusion. Franscioni v. Soledad L. & W. Co., supra; Allen v. Railroad Commission, 179 Cal. 68–82, 175 Pac. 466, 8 A. L. R. 249; Frazee v. Railroad Commission, 185 Cal. 690, 201 Pac. 921.

This being so, it becomes important to determine from the record before us if possible the extent to which the petitioners have thus submitted themselves and their water rights and claims to the jurisdiction of the Railroad Commission. While there is considerable doubt and confusion upon this subject as to the earlier proceedings before the Commission, it would seem to be conceded by the petitioners herein that they all appeared in person or by counsel in the proceedings which were initiated before the Railroad Commission on January 6, 1916, by the Cuyamaca Water Company, praying for a general increase in its water rates affecting all consumers, and which was decided by the Railroad Commission on January 25, 1917, wherein it was held, after an exhaustive review of the past history and present condition of the water company, that it was a public utility as to all its water users; that certain betterments should be made in its distributing system, and that a general system of rates applicable alike to all consumers should be established and put into effect from and after March 1, 1917. The record shows that no petition for rehearing was presented upon this decision nor was any writ of review applied for, but that, on the contrary, such general water rates as were thus established were put into effect as to all its consumers by the water company from and after March 1, 1917, and that such water rates were collected from, and paid by, all of said consumers, including the petitioners herein, for more than two years thereafter and so far as this record discloses are still being collected and paid. It is true that when, in the year 1919, the Cuyamaca Water Company again appeared before the Railroad Commission to apply for another general increase in its water rates, these petitioners responded to said application with their protest against such increase and undertook to reassert the existence and vitality of their several water rights agreements; but we think that at that time they had fully waived their right to stand upon said agreements or to longer claim that as to them the Cuyamaca Water Company was not a public utility and as such fully within the regulatory power of the Railroad Commission as to all of its consumers. This being so, the Railroad Commission must be held to have acquired full jurisdiction to make the orders which are sought to be assailed in the present proceeding.

The application for the writ is therefore denied.

We concur; SHAW, C. J.; WASTE, J.; LENNON, J.; WILBUR, J.; LAWLOR, J.

---

190 Cal. 85

## BREWER et al. v. RAILROAD COMMISSION OF CALIFORNIA. (L. A. 6739.)

(Supreme Court of California. Nov. 10, 1922. Rehearing Denied Dec. 8, 1922.)

**Estoppel ⇐68(1)—Waiver of right of user of water by acquiescence, in order of Commission to claim company was not public utility, held unaffected by judgment in prior action.**

Waiver of right of a user of water to claim, in proceedings before Railroad Commission to fix rates to be charged by a water company, that the company was not a public utility, by reason of having submitted himself and his water rights to jurisdiction of the Commission in a previous such proceeding, and having acquiesced in the rates then fixed on the theory of the company being a public utility, was unaffected by judgment in a prior action between him and the company in which the company's right to collect for water according to contract between them was sustained, without the question of the company being a public utility directly arising.

In Bank.

Petition by John C. Brewer and others for writ of certiorari to review order of the Railroad Commission of the State of California fixing water rates. Petition denied.

Jesse George and Clarence S. Preston, both of San Diego, for petitioners.

C. C. Crouch, of San Diego, Harry A. Encell, of San Francisco, and Sweet, Stearns &

Forward, of San Diego, for Cuyamaca Water Co.

Hugh Gordon and William W. Clary, both of San Francisco, for respondent.

RICHARDS, Justice pro tem. This proceeding is, in substance, identical with the proceeding entitled Brewer v. Railroad Commission (L. A. No. 6716), 210 Pac. 511, this day decided. The petition filed in the former proceeding on October 22, 1920, was refiled on November 15, 1920, for the purpose of obviating an objection based on the ground that the petition for rehearing in one of the proceedings before the Railroad Commission had not been finally acted on by the Commission at the time said former petition was filed. Said petition was later denied, and no point was made in the former proceeding that the application therein had been prematurely filed. Our decision, this day filed, in said former proceeding therefore disregarded that objection, and is applicable to all points presented in the instant proceeding, with the exception of the question raised by the separate petition of the petitioners Strobeck and Legge, who, while joining in the main petition, add thereto an additional claim for relief based upon averments peculiar to their alleged water right agreement. These averments are, in brief, that said petitioners Strobeck and Legge are successors in interest of certain contract holders named C. H. Souther and Souther & Crosby, who, in the year 1890, had acquired certain lands in the "S" subdivision of the El Cajon rancho, and who in that year had received said water rights agreements from the San Diego Flume Company for the service of water upon their said lands in specific amounts per acre and at a specified rate. These water rights agreements would be subject to the same conditions held in our former opinion, this day filed, to affect water rights agreements of all other petitioners, but for the added averments of said Strobeck and Legge to the effect that in the year 1901, in an action brought by said Souther & Crosby in the district court of the United States for the southern district of California against the San Diego Flume Company to cancel said contracts upon the ground that the said flume company had not lived up to their terms, the flume company had filed a cross-bill for the recovery of the contract price of the water to be furnished the plaintiffs under said contract, and that a judgment had been rendered in favor of the cross-complainants upholding said contracts, which judgment had been affirmed on appeal by the Circuit Court of Appeals in the case of San Diego Flume Co. v. Souther, 90 Fed. 164, 32 C. C. A. 548, and San Diego Flume Co. v. Souther, 104 Fed. 706, 44 C. C. A. 143, the latter being a decision of said court upon rehearing.

The said petitioners further allege that, after the rendition of these decisions in said cause, the parties thereto entered into a stipulation settling said controversy and agreeing that said contracts should remain and be in full force and effect. The foregoing decisions were rendered in the years 1898 and 1900, respectively, and said stipulation between the parties to said action was dated February 14, 1903. The said petitioners assert that the judgment in said cause constituted a final and conclusive adjudication as to the validity of said contracts and the vested rights of the parties thereto thereunder. A reference to the two decisions of the federal court, above referred to, will show, however, that the question as to whether or not the San Diego Flume Company was a public utility at the time of entering into said contracts did not directly arise and that all that said court in both of its said decisions decided was that a California corporation organized after the adoption of article 14, § 2, of the Constitution of 1879, providing that "the right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law," was not by said provision of the Constitution precluded from making contracts for the supplying of water and the payment of rentals therefor until such time as the Legislature had made statutory provision for the regulation of the rates to be charged by such corporation. The court further held that the fact that the board of supervisors of the county of San Diego, acting under the statute of 1885, empowering such boards to fix and regulate the water rates of corporations, had adopted an ordinance fixing the water rates to be charged by the San Diego Flume Company at a certain rate did not preclude said company from entering into contracts with water users for a less rate. We are unable to see how these particular petitioners are aided by these decisions or by the judgment rendered in said cause. The trial of said cause and the judgment therein and the stipulation of the parties thereto as to the effect of said judgment all antedated by several years the several proceedings before the Railroad Commission referred to and fully discussed in our opinion in the prior proceeding, this day filed. These special petitioners are in no better position as to the validity of the water right agreements held by their predecessors in interest in said tract of land than are all the other holders of such agreements who were parties to such proceedings and who are held to have submitted themselves and their alleged contract rights to the jurisdiction of said Commission in one or the other of such proceedings, and to have acquiesced in the prior orders of the Commission regulating water rates.

Upon the authority of our opinion in the former proceeding, this day filed, the petition herein is denied, both as to the general petitioners herein, and as to the special petitioners upon their separate application herein.

We concur: SHAW, C. J.; WASTE, J.; LENNON, J.; WILBUR, J.; LAWLOR, J.

---

190 Cal. 57

## PEOPLE v. DONNELLY. (Cr. 2462.)

(Supreme Court of California. Nov. 9, 1922.)

**1. Homicide ⊂=22(3) — No appreciable time for premeditation is essential to murder in first degree.**

The test as to what constitutes murder in the first degree is whether the act of killing is preceded by a concurrence of will, deliberation, and premeditation on the part of slayer, regardless of how rapidly these acts of the mind succeeded each other or how quickly they may be followed by the act of killing.

**2. Criminal law ⊂=829(3)—Not error to refuse instructions covered by charge as given.**

In a prosecution for homicide *held* there was no error in refusing instructions on the time between the intention to kill and the act of killing, where the matter was fully covered by the charge as given.

**3. Homicide ⊂=300(3, 7)—Requested instructions held not applicable to evidence and erroneous.**

Instructions on self-defense *held* properly refused as embracing matter not included in the testimony and because contrary to law.

In Bank.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

George Donnelly was convicted of murder in the first degree, a new trial was denied, and he appeals. Affirmed.

A. B. Reynolds, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., for the People.

WASTE, J. The defendant was charged with the crime of murder. Both he and the deceased were prisoners in the state prison at Folsom. The jury returned a verdict of guilty of murder in the first degree, without recommendation, and the defendant was sentenced to pay the extreme penalty. He made a motion for a new trial, which was denied, and he now appeals from the judgment of conviction and from the order denying his motion.

Defendant urges but two points: First, that the evidence does not show that degree of premeditation essential to constitute murder in the first degree; second, that the court erred in refusing certain instructions requested by him.

In support of his first contention defendant claims that there is no evidence showing any motive for the killing of Morse by himself, except a sudden quarrel that arose between Morse and a fellow prisoner, in which the defendant participated. He admits that the killing was accompanied with malice, but contends that the evidence does not show a deliberate and permeditated attempt to slay Morse, and, lacking in this intent, is not sufficient to sustain a conviction of murder in the first degree. We have carefully read the entire record, and are convinced that this contention cannot be sustained. The killing took place in the corridor of the prison on November 12, 1921, between 4 and 5 o'clock, at a time when the prisoners were assembling for the purpose of marching into the dining room to partake of their evening meal. They were not yet in line, but were "bunched up." Morse had taken a position near another prisoner, Edwin Silva, who was friendly with and a prison pal of the defendant. Morse and Silva became engaged in a bitter quarrel. The defendant, overhearing the remarks passing between the two quarreling prisoners, approached them, addressed a remark to Morse, and stabbed him twice in the neck, severing the spinal cord and penetrating the spine, from which injury he died a few hours later.

[1] It appears that there was no appreciable time between the remark addressed by the defendant to Morse and the fatal blow. But that fact, of itself, does not lessen the degree of the crime. "There need be no appreciable space of time between the intention to kill, and the act of killing. They may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation, on the part of the slayer, and, if such is the case, the killing is murder of the first degree, no matter how rapidly these acts of the mind succeeded each other, or how quickly they may be followed by the act of killing." People v. Cotta, 49 Cal. 166, 168; People v. Sanchez, 24 Cal. 17, 30.

[2] Appellant contends that the court erred in refusing to give an instruction, reading in part as follows:

"But while the fatal purpose or intent and its execution may follow thus rapidly upon each other, it is proper for you to take into consideration the shortness of such interval, if such be the fact, in considering whether such sudden and speedy execution may not be attributed to sudden passion and anger, rather than to the deliberation and premeditation, which must characterize the higher offense."

---

The court did not err in refusing the instruction. The subject-matter was fully covered by other portions of the charge. The court very carefully instructed the jury on every phase of murder, and gave special attention to the matter of the degree of deliberation and premeditation necessary to constitute murder in the first degree.

[3] The defendant requested the court to give the following instruction:

"The court instructs the jury that if you believe from the evidence that the deceased was a man of superior strength to the defendant, and that by reason of such superior strength he was regarded by defendant as able to do him serious bodily injury, and further believe from the evidence that said deceased assaulted defendant, or by his words or acts produced in the mind of defendant a reasonable apprehension or fear of assault, or if you believe from the evidence that defendant had been informed that deceased had threatened to kill him or do him serious bodily injury, and further believe from the evidence that said deceased assaulted defendant, or by his words or acts produced in the mind of defendant a reasonable apprehension or fear of assault, or if you believe from the evidence that defendant had been informed that deceased had threatened to kill him or do him serious bodily harm, and that at the time of the difficulty deceased did some act manifesting an intention to execute such threat, or threats, and that said act produced a reasonable apprehension in defendant's mind that deceased was about to execute said threat, defendant had the right to defend himself with all necessary force, viewing the matter from his standpoint in the light of all the surrounding facts and circumstances, including the character and reputation of deceased. 148 S. W. 746."

The court refused to give this instruction, indorsing thereon, "Refused. This proposed instruction covers much not included in the testimony, and hence is not applicable to the facts." This statement of the trial court is correct, and it was not error to refuse the instruction. The instruction was also against law in particulars which we do not now need to point out, for the law in relation to self-defense was correctly stated, and the subject was fully covered in other instructions given by the court.

No other points are urged by the appellant. However, in view of the fact that the judgment of conviction carries with it the infliction of the extreme penalty, we have carefully read the entire record, and find nothing therein indicating that the defendant did not have a fair and impartial trial, or that the evidence was insufficient to warrant his conviction.

The judgment and order appealed from are affirmed.

We concur: SHAW, C. J.; WILBUR, J.; LAWLOR, J.; LENNON, J.; RICHARDS, Justice pro tem.

59 Cal. App. 225

## CALIFORNIA NOTION & TOY CO. et al. v. INDUSTRIAL ACC. COMMISSION et al.
## (Civ. 4313.)

(District Court of Appeal, First District, Division 2, California. Sept. 28, 1922.)

**Master and servant ⟸405(4)—Compensable disability held not shown.**

Where there was no evidence that compensation applicant sustained, by reason of a fall, any physical injury contributing to his disability, and uncontradicted medical testimony showed that there was no serious injury, and that the disability was a vascular cortical lesion, caused by high blood pressure, which condition and resulting symptoms had no connection with his employment, applicant did not sustain burden of proving that his disability arose out of his employment.

Certiorari by the California Notion & Toy Company and another against the Industrial Accident Commission and others, to review an order awarding compensation for injuries. Award annulled.

Redman & Alexander, of San Francisco, for petitioners.

A. E. Graupner, of San Francisco, for respondents.

LANGDON, P. J. This matter comes to us upon a writ of review. It is contended by petitioner that an award of the Industrial Accident Commission, allowing compensation to Edward G. Fennig for a period from September 24, 1921, to February 28, 1922, the date of the award, is unwarranted, and should be annulled. The Commission found that, since the injury, the applicant has been suffering from a diseased condition of the blood vessels, and any disability existing after the date of the award is due to said diseased condition, and not to said injury.

Edward G. Fennig, at the time of the accident involved here, was a man of the age of about 63 years. He had been employed for 25 years as a salesman and stock clerk by the California Notion & Toy Company. He had worked continually and steadily in his employment, and had not had occasion to require the services of a physician except occasionally for a cold. On September 16, 1921, he was attempting to take down some stock from the shelves. He had a short, movable ladder which he had carried to the shelves. He stated at the hearing that his recollection of the matters immediately preceding the accident and of the accident itself was not clear, and that he thought he went up the ladder about four or five steps, but that he really did not remember whether he had mounted the ladder or not. He had no recollection of having fallen, and, indeed, recalled nothing from the time he started to mount the ladder until he was being taken downstairs by a fellow employee, who had found

him lying on the floor with the ladder on top of him.

The symptoms of which Fennig complained were nervousness and an inability to talk coherently and think correctly. The only physical injuries which were apparent after his fall were a bruise and small cut on his head and some bruises on his legs. He stated that he was unable to return to his work because of his inability to speak intelligibly and his tendency to become fatigued very easily.

At the request of petitioners an order was made by the Industrial Accident Commission for an examination of the applicant by a medical examiner to be appointed by the Commission. The record contains several medical reports, which is all the evidence in the record to explain the cause of the accident. One of these concludes with the statement:

"In arriving at a decision as to whether his cerebral lesion is intra or extra cerebral, and whether he may have had his cerebral accident and then fallen, or fallen and then had the development of cerebral picture, it will be necessary to have fundus findings, X-rays of head, urine examination, et al. The patient should be in a hospital. In any event, his arterial condition—and there has long been present arterial disease—is the fundamental basis of his picture."

The second report concludes with the opinion:

"No signs of head injury have been found. No evidence of fracture of the skull or of brain injury without fracture. The aphasia and neurological findings on the right side of body are due to an interference in cerebral circulation. Further study in hospital of cardiovascular system and X-rays of head were advised. The patient and family were opposed to his entering hospital, but subsequent X-rays were taken and no evidence of fracture found."

Another medical report stated:

"It would seem to me, basing this opinion more on clinical experience and also on the symptomatology in this case than on definite demonstrable pathological evidence, that the patient suffered a vascular cortical lesion rather on the basis of his high blood pressure and arteriosclerosis than as a result of his injury. In other words, I am inclined to the belief that he fell because of a vascular disorder and the fall did not produce it."

The applicant refused to go to a hospital and submit to a more thorough examination.

There was no other evidence offered upon the question before us for decision, i. e.: Was the applicant injured in the course of his employment and did his injury arise out of his employment? The Industrial Accident Commission has found in favor of the applicant upon these matters and in support of its findings urges upon our attention the case of Eastman Co. v. Industrial Accident Commission, 186 Cal. 587, 200 Pac. 17. The petitioners, with equal earnestness, contend that the present case is analogous to the case of Brooker v. Industrial Accident Commission, 176 Cal. 275, 168 Pac. 126, L. R. A. 1918F, 878.

An analysis of the cases relied upon by the respective parties hereto and of the cases cited therein would seem to establish:

(1) Where the proximate and immediate cause of the injury is disability arising solely from an idiopathic or subjective condition, the weight of authority, including the decisions of this state, are against recovery, though the injury clearly occurs in the course of employment. Eastman Co. v. Industrial Accident Commission, supra.

(2) The burden of proving that the injury arose out of the employment is upon the applicant. Casualty Co. v. Industrial Accident Commission, 176 Cal. at page 533, 169 Pac. 76. A failure to sustain a burden of proof cannot be remedied by a finding based upon guess, conjecture, or surmise. Glass on Workmen's Compensation Law, pp. 39, 40; Puckhaber v. Southern Pac. Co., 132 Cal. 363, 64 Pac. 480.

We are of the opinion that the instant case is clearly differentiated from the case of Eastman Co. v. Industrial Accident Commission, supra. It was pointed out therein, with much precision, that, even though the immediate cause of the fall of the driver from the truck was heart disease, it did not appear that the fall or the heart disease caused his death; that the death was caused, according to medical testimony appearing in the record, by the passage of the wheels of the truck over his body after he had fallen to the street. In other words, neither the constitutional weakness of the deceased nor his resulting fall caused his death, but his death was caused by the automobile operated in the course of his employment. In the case of Wicks v. Dowell, L. R. (1905) 2 K. B. Div. 225, cited by our Supreme Court in the Eastman Co. Case, supra, a man subject to epileptic fits was standing on a wooden stage in a ship close to the hatchway. By reason of fit, he fell into the hold and was injured by the fall. The court held that, while the cause of the fall was the fit, the cause of the injury was the fall, which was incident to the employment over the open hatchway.

The reasoning of the cases we have discussed herein, as well as the reasoning of other cases cited by the parties hereto, by analogy, has brought us to the conclusion that the applicant in the instant case has not sustained the burden of proving that his disability arose out of his employment. He offered no evidence to contradict the opinion of experts, who had made careful medical examinations, that the fall was occasioned by a vascular disorder. Nevertheless, had applicant, because of his fall, sustained a fracture of his skull or a broken limb or any other injury attributable to his fall, that in-

jury would have arisen out of his employment under the reasoning in the case of Eastman Co. v. Industrial Accident Commission, supra; and, had such injury resulted in disability, it would have formed the basis for an award by the Commission. But there is no evidence that applicant sustained, by reason of his fall, any physical injury which has resulted in or contributed to his disability. The medical testimony is that there is no evidence of any fracture of the skull or head injury, and the only injuries sustained by the fall, so far as the record discloses, were bruises on the legs and a bruise and a small cut on the head. The real disability from which the applicant was suffering at the time of the hearing, according to all the testimony, including his own, was inability to articulate his words, lapse of memory, confused thinking, and fatigue, and these symptoms were caused, according to the only testimony before us, by a vascular cortical lesion, caused by high blood pressure. This condition and the resulting symptoms had no possible connection with his employment. There is no evidence that, because of any thing or any duty incident to his employment, the consequences of this disorder were aggravated or its results in any way changed.

It is the duty and purpose of this court to construe liberally the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831) to effectuate its purposes and to charge to industry injuries to its employees properly chargeable thereto. But we can see neither reason nor justice in laying down a principle which would give to a man stricken with paralysis while at his place of business, the right to throw the financial burden of his disability upon his employer where the disability was in no measure increased or contributed to by the employment, and the physical conditions causing the same were in no measure due thereto. In such a case, the rights of the employee are no greater than they would have been had the attack occurred at his own home unless it is shown that his disability was in some way increased or affected by the incident of place.

The award of the Industrial Accident Commission is annulled.

We concur: NOURSE, J.; STURTEVANT, J.

---

59 Cal. App. 240

## PEOPLE v. SAVINOVICH et al. (Civ. 891.)

(District Court of Appeal, Second District, Division 1, California. Sept. 30, 1922.)

**1. Criminal law ⟸779—Evidence insufficient to warrant instruction as to acts of conspirators.**

In an arson prosecution of three defendants, evidence *held* insufficient to warrant an instruction as to admissibility of acts and declarations of conspirators.

**2. Criminal law ⟸814(1)—Charges restricted to law applicable to question within issues.**

Although, under Pen. Code, §§ 1093, 1127, the trial judge should charge on points pertinent to the issues when requested, and state all matters of law for the jury's information, such charge should be restricted to questions within the issues.

**3. Criminal law ⟸761(3), 1172(3)—Charge covering assumed issue not supported by evidence, is erroneous, and if prejudicial, calls for reversal.**

When a charge, even though a correct statement of abstract legal principles, is extended so as to cover an assumed issue finding no support in the evidence, it constitutes error which, if prejudicial, will warrant reversal of judgment of conviction.

**4. Criminal law ⟸779—Instruction as to evidence of acts of conspirators to commit arson error.**

In a prosecution of three defendants for arson, an instruction, that if evidence had been introduced establishing a conspiracy between either of defendants, then that act or declaration of either in furtherance of the object was competent evidence against the others, was erroneous as meaning that if two of them had entered into an agreement to burn the building and either one acted in furtherance of the object, their acts and declarations were competent against the third, although he was not a party to the conspiracy.

**5. Criminal law ⟸1172(6)—Instruction that lodgers in building burned need not be actual owners harmless, where not shown that there were any lodgers.**

In a prosecution for arson of a building occupied by human beings, in the nighttime, where there was no evidence that lodgers were in the building at the time of the fire, an instruction that if there were lodgers in the building at the time of the alleged fire, it was not necessary that they be the actual owners of the premises, was not prejudicial.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Charles Savinovich and others were convicted of arson and they appeal. Reversed.

Ernest R. Utley, of Calexico, Harry W. Horton, of El Centro, and O. V. Willson, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., Erwin W. Widney, Deputy Atty. Gen., and E. R. Simon, Dist. Atty., and Harry B. Ellison, Deputy Dist. Atty., both of El Centro, for the People.

SHAW, J. The above-named defendants were jointly charged by information with the crime of arson, in that they, on or about October 2, 1921, willfully, unlawfully, feloniously, and maliciously in the nighttime of said day, set fire to and caused to be burned a certain inhabited building with the felonious intent to destroy the same, which said building was then and there occupied by hu-

man beings. The jury found all of the defendants guilty of arson in the first degree. Judgment of imprisonment in the state prison was thereupon pronounced, and defendants have appealed therefrom and from an order denying their motion for a new trial.

It appears that the defendants owned and conducted a restaurant in the city of El Centro, known as the "San Francisco Grill." About July 1st defendant Savinovich left El Centro for Los Angeles, employing Nick Lettunich to act in his stead in the conduct of the business, and for which service he individually was to compensate him. About August 20th Lettunich severed his connection with the firm, after which it was conducted, in the absence of Savinovich, by defendants Markovich and Rapur, the former still holding his interest in the firm. The fire occurred in the kitchen of the restaurant about 9 o'clock p. m. on October 2, 1921, and a few days thereafter Savinovich, receiving information of the fire, returned to El Centro. Over the restaurant in the second story of the building was a lodging house, known as the "Panama Rooms," conducted by Douglas Doty and wife, with whom lived Harvey Buckley, a son of the latter. While there is no evidence that any persons other than the three named were at the time occupants of the building as lodgers, it does appear that, while Mrs. Doty was temporarily absent from the building, they were occupying the same as a home. Mr. Doty, it appears, was in one of the rooms occupied by his family, over the kitchen of the restaurant, when he discovered the fire by noticing smoke coming up through the floor, to which fact he called the attention of young Buckley, who at the time had returned to his room in the building from which he had a few minutes before absented himself.

A number of assignments of error are urged in support of a reversal of the judgment and order, chief among which is the fact that the court instructed the jury as follows:

"If any evidence has been introduced in this case tending to establish a confederation or conspiracy to commit the offense charged in the information, between either of the defendants, then I instruct you that any act or declaration of either confederate in furtherance of the object and purpose of the confederation, is competent evidence against the others, if you believe beyond a reasonable doubt that a conspiracy existed to commit the offense."

It is insisted, first, that there is no evidence, either direct or circumstantial, tending to establish a conspiracy between the defendants to commit the offense, and hence it was error to instruct the jury as to conspiracy; and, second, assuming the existence of such evidence, the instruction was erroneous in that the jury were told that if a conspiracy was formed between any two of the defendants and either of them acted in furtherance of the object and purpose of the conspiracy, such fact was competent evidence against all of the defendants.

The only evidence to which we are directed by the Attorney General touching the question of a conspiracy is the testimony of Lettunich, who stated that when he was employed about July 1st he had a conversation with Savinovich, wherein the latter said "it would be worth $150 if I burned the place up for him." That was all that was said by Savinovich or himself with reference to the matter, and no money was paid to him other than $15 for advance wages. He never repeated this statement to either of the other defendants or informed them in any way of what Savinovich said to him. He further says that about the 6th of August he was present in the kitchen with Markovich and Rapur, at which time one of them—though he could not remember which one—made the remark that the only way they could pay their bills would be to burn the place. "They did not know how they were going to pay their bills; that the business was getting rotten and the only way they could make any money was to burn it." And in answer to the question: "Which one of the defendants said that to the other, do you know?" he said, "No, sir; I could not testify to that." When asked as to the condition of the business, if he knew, he replied, "Well, I don't think it paid." He further stated that they owed several hundred dollars, fixing the amount at $250 or $300. Neither Markovich nor Rapur ever made any proposition to him to burn the building. There was some evidence tending to prove that the value of the equipment of the restaurant was five or six thousand dollars; but we are by the Attorney General directed to no testimony whatsoever showing that the property was insured, or that any motive existed for burning it.

[1, 2] Conceding it does not require direct evidence to prove the existence of a conspiracy to commit a crime (People v. Eldridge, 147 Cal. 782, 82 Pac. 442), and that it may be established by facts and circumstances from which the fact may be fairly inferred (People v. Donnolly, 143 Cal. 398, 77 Pac. 177), we are nevertheless of the opinion that the meager testimony quoted was insufficient to warrant the court in instructing the jury as to a conspiracy had between the defendants to burn the building. While it is true that the trial judge, under the provisions of sections 1093 and 1127 of the Penal Code, should charge the jury on points pertinent to the issues when requested by either party, and state to them all matters of law for their information, nevertheless such charge should be restricted to such matters of law applicable to questions which are fairly within the issues tried.

[3] When the charge, even though a correct statement of abstract legal principles, is extended beyond such limitations so as to

cover an assumed issue which finds no support in the evidence, it constitutes error which, if prejudicial, will warrant a reversal of a judgment of conviction. State v. De Wolfe, 29 Mont. 415, 74 Pac. 1084; Territory v. Claypool, 11 N. M. 568, 71 Pac. 463; Territory v. Leslie, 15 N. M. 240, 106 Pac. 378; Blashfield on Instructions to Juries (2d Ed.) § 82. Assuming it to be true that, as stated by the witness Lettunich, he was told by Savinovich three months prior to the fire that it would be worth $150 if he burned the place, it does not appear that either Rapur or Markovich had any knowledge of the making of the proposal, or that Savinovich entered into an unlawful agreement with his partners to burn the building. And assuming likewise that either Rapur or Markovich, in the presence of the witness Lettunich, made the statement that the only profit to be derived from the business was to burn the place, there is no evidence or circumstance established which would justify the inference that the other assented to it, or that Savinovich, absent from El Centro, was a party to such an agreement, if made.

[4] Conceding, however, that the evidence was sufficient to warrant the court in instructing the jury as to conspiracy, the instruction given upon the subject is not only erroneous but was well calculated to confuse and mislead the jury in considering the testimony. They were told that if there was a conspiracy (as to which no definition was given) to commit the offense charged between either of the defendants, which, since one person cannot conspire with himself (Carl Corper Brewing Co. v. Minwegen & Weiss Mfg. Co., 77 Ill. App. 213), must have been understood by the jury as referring to any two of them, then the act or declaration of either of such two so conspiring in furtherance of the object of the conspiracy was competent evidence against the others and each of them. The term "others" clearly has reference to the other defendants. Clearly, the meaning of the instruction, according to the plain import of the language employed, was that if Rapur and Markovich had entered into an agreement to burn the building, and either one acted in furtherance of the object of such agreement, his or their acts and declarations were competent evidence against Savinovich, although it might clearly appear that he was not a party to the conspiracy and wholly ignorant of its existence. In view of the meager and unsatisfactory evidence of the witness Lettunich, and the fact that the jury were not informed as to what constituted a confederation or conspiracy to commit the act, the instruction, under the circumstances shown, was highly prejudicial to the defendants. There is no direct evidence that either of them set fire to the building, and the verdict of guilty was undoubtedly based upon the belief that some one at least of the three was desirous of having the property destroyed by fire and, so believing, the jury found that a conspiracy existed and that the act of such one was competent evidence showing the guilt of the others.

[5] Another instruction complained of is as follows:

"You are instructed that if you believe there were lodgers in the building at the time of the alleged fire, it is not necessary that said lodgers be the actual owners of the premises."

While Doty and his wife conducted the lodging house, and while it sufficiently appears that at the time of the fire Mr. Doty was in his room when he discovered the fire, nevertheless there is no evidence whatever that the rooms were occupied by lodgers other than Doty's family at the time of the fire. Hence there was no evidence upon which the jury could believe there were lodgers in the building at the time of the fire. They might, from the fact that the upper rooms were devoted to the purposes of conducting a lodging house, have believed that lodgers were in the building, but there was no evidence upon which to base such belief. However, as to this instruction, since there was testimony showing that Doty, who made his home in the building, was in his room at the time of the fire, it cannot be deemed prejudicial to the defendants.

There are other alleged errors predicated upon the introduction and rejection of testimony, which, however, in view of our conclusion, it is unnecessary to consider.

The judgment and order are reversed.

We concur: CONREY, P. J.; JAMES, J.

---

59 Cal. App. 276

## In re COOK. (Civ. 4292.)

(District Court of Appeal, First District, Division 2, California. Oct. 2, 1922.)

**1. Evidence ⟸498½—Question of competency of witness to testify to competency of person to take care of herself and her property is within discretion of the court.**

In a proceeding to restore a person under guardianship to competency, the question of competency of witness to testify as to the competency of such person to take care of herself and her property is within the discretion of the court.

**2. Appeal and error ⟸971(2)—Ruling of trial court as to competency of witnesses not disturbed in absence of abuse of discretion.**

The appellate court will not disturb the ruling of the trial court as to the competency of witnesses to testify to the ability of a person under guardianship to take care of herself and of her property in the absence of an abuse of such a discretion.

---

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

In the matter of the estate and guardianship of Eliza Cook, incompetent. From an order restoring respondent to competency, certain of her sons appeal. Affirmed.

Gale & Gale and W. F. Cowan, all of Santa Rosa, for appellants.

F. A. Meyer, of Petaluma, for respondent.

NOURSE, J. This is an appeal from an order of the trial court restoring to competency the respondent Eliza Cook, who had been adjudged an incompetent by order of the superior court on October 25, 1917. The trial court found after a full and fair hearing that the respondent was of sound mind and capable of taking care of herself and of her property, and that she was not likely to be deceived or imposed upon by artful or designing persons.

Appellants, who are sons of the respondent, attack the order upon the ground that the evidence is insufficient to support this finding, and upon the further ground that the witnesses called by respondent to testify as to her competency were not intimate acquaintances of the respondent having sufficient knowledge of her business ability and affairs to qualify them as witnesses upon the subject-matter of respondent's competency.

As to the first point, respondent presented a mass of evidence of medical witnesses and others who had had business dealings with her for many years past, and the weight of all this testimony was to the effect that the respondent was of sound mind, able, and competent to take care of herself and of her property, and not likely to be deceived or imposed upon by artful or designing persons. The evidence is without conflict, and clearly supports the finding.

[1, 2] The second point urged by appellants is, in effect, that the witnesses called by respondent did not show sufficient intimacy with respondent's ability to transact her business or manage her property to qualify them as witnesses upon the subject of her competency. Appellants concede, as of course they must, that the question of the competency of the witnesses to testify is within the discretion of the trial court, and that the appellate court will not disturb the ruling of the trial court in the absence of an abuse of such discretion. In the case presented it would have been an abuse of discretion on the part of the trial court if it had refused to let these witnesses testify. There is no merit in the appeal.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

59 Cal. App. 324

**KHAN v. ZEMANSKY et al. (Civ. 2453.)**

(District Court of Appeal, Third District, California. Oct. 13, 1922.)

**1. Witnesses ⟸319—Cannot be impeached on immaterial matters.**

A witness cannot be impeached on immaterial matters.

**2. Witnesses ⟸383—Where place of marriage was immaterial, defendant's wife could not be impeached by showing her contradictory evidence.**

Where plaintiff's wife, on cross-examination by defendant, testified as to the place where she had married the plaintiff, evidence that in a trial between other parties she had testified that they had been married in another state, was not admissible for purpose of impeachment, the time or place of marriage being wholly immaterial to any issue in the case.

**3. Witnesses ⟸388(2)—Where witness was not asked whether she had made inconsistent statement, testimony as to such statement inadmissible for impeachment.**

Under Code Civ. Proc. § 2052, a witness could not be impeached by evidence of statement inconsistent with her testimony, where there was no foundation laid by asking her whether she had made such inconsistent statement.

**4. Witnesses ⟸406—Where witness accounted for his presence in store by evidence of sale of oil stock to employee, employee's testimony that sale was on another day admissible for impeachment.**

In action for conversion of diamond ring, in which a witness testified that he saw defendant deliver a diamond ring to plaintiff in defendant's stock, and accounted for his presence in the store by testimony that he had sold oil stock to one of defendant's employees, the employee's testimony that he had made but one purchase of oil stock from the witness and check dated on a day other than that on which the witness had testified he had seen defendant hand plaintiff the ring, *held* admissible to discredit the testimony of the witness that he was in the store on the date on which he had testified he had seen defendant hand the ring to the plaintiff under Code Civ. Proc. § 1868.

**5. Trial ⟸260(3) — Refusal of instructions covered by given instructions not error.**

Refusal of instructions as to burden of proof was not error, where instructions given fully and correctly stated the law as to the burden of proof.

**6. Witnesses ⟸343—Striking out evidence as to plaintiff's reputation held not abuse of discretion, where witnesses testified that they did not know where plaintiff lived.**

In action for conversion, where police officers testified for impeachment purposes, as to plaintiff's "reputation" and not his "general reputation," and further testified that they did not know where plaintiff lived but merely knew where he had been engaged in business, but the evidence did not show the length of time plain-

tiff was engaged in such business, or whether the officers' knowledge of his reputation was acquired from those with whom the plaintiff usually associated or came into contact, or whether it was a reputation among the police officers only, the court did not abuse its discretion in striking out such testimony as to his reputation.

Appeal from Superior Court, Sacramento County; C. O. Busick, Judge.

Action by K. Khan against Abe Zemansky and another. Judgment for plaintiff, and defendants appeal. Affirmed.

C. E. McLaughlin and C. P. McLaughlin, both of Sacramento, for appellants.

John R. Connelly and J. F. Gaffney, both of Sacramento, for respondent.

FINCH, P. J. Plaintiff was given judgment against both defendants for the possession of a diamond ring or the value thereof in case delivery could not be made.

It is contended "'that there is no basis for the judgment against defendant Perky. The evidence shows without dispute that he was a salesman in the store of defendant Zemansky." The complaint alleges that the defendants came into possession of the ring and retained possession thereof. The answer alleges:

"That on or about the 10th day of March, 1920, said plaintiff left with said defendants a diamond ring, which was the only diamond ring claimed, or in the possession of plaintiff, of which defendants or either of them ever had possession, to be sold by defendants * * * and said diamond ring was, on or about the 19th day of March, 1920, by said defendant Abe Zemansky given and returned to the possession of said plaintiff."

It is thus plain that the only issue to be tried was whether the ring had been returned. The evidence bearing on this issue was sharply conflicting. There was ample evidence, if believed, to support the implied finding of the jury that the ring had not been returned. Since the answer admits that both defendants received the ring, the judgment against Perky cannot be disturbed for want of evidence to support it.

[1-3] The plaintiff is a Hindu. His wife is a white woman. Both testified at the trial. Both testified that they were husband and wife. On cross-examination both testified that they were married in Helena, Mont. The court sustained objections to questions as to the time of the marriage and refused to permit the defendants to impeach Mrs. Khan by showing that, in a trial between other parties, she had testified that she and the plaintiff were married in California. The time or place of marriage was wholly immaterial to any issue in the case. It is settled that a witness cannot be impeached on immaterial matters. Further, Mrs. Khan was not asked whether she had made the alleged inconsistent statement, and hence, there was no foundation for the impeaching question. Code Civ. Proc. § 2052.

[4] E. C. Turney was sworn as a witness for defendants and testified that he was in Zemansky's store March 19, 1920, and there saw Zemansky deliver a diamond ring to plaintiff. He fixed the date by a sale of oil stock he made in the store on that day to one of Zemansky's employees. On cross-examination, Turney said he thought that he had sold some oil stock to W. W. McFall on the same day. In rebuttal, counsel for plaintiff called McFall as a witness, who testified that he made but one purchase of oil stock from Turney and produced the check given in payment therefor, dated May 10, 1920. He further stated that he thought the check was dated the day of the purchase, but could not say positively that such was the fact. Since Turney had fixed the time at which he saw the ring delivered to plaintiff by reference to a sale of oil stock made on that day, and stated on cross-examination that he thought he had made a sale of stock to McFall on the same day, the testimony given by McFall was admissible as tending in some degree to discredit Turney's statement that he was in Zemansky's store March 19th. Code Civ. Proc. § 1868; Davis v. California Powder-Works, 84 Cal. 617, 24 Pac. 387; Wigmore on Evidence, § 1005 (f). Even if the admission of such testimony were error, "an examination of the entire cause, including the evidence," does not show "that the error complained of has resulted in a miscarriage of justice." Const. art. 6, § 4½.

[5] The court refused to instruct the jury as follows:

"The burden is upon the plaintiff to prove his case to a moral certainty; that is, by that degree of proof which ordinarily produces conviction in an unprejudiced mind."

The court instructed the jury:

"That the burden of proof is upon the plaintiff to establish by a preponderance of the evidence each of the material allegations in the complaint not admitted by the answer. * * * That by a preponderance of evidence is meant that evidence which, after a consideration of all the evidence, is, in the judgment of the jury, entitled to the greatest weight; that testimony which points to a certain conclusion appears to be more credible and probable than the testimony to the contrary, that is more convincing. It does not mean necessarily a greater number of witnesses, but only such evidence that satisfies an unprejudiced mind of the truth of the allegations to be established by the party upon whom rests the burden of proof."

The instructions given fully and correctly state the law as to burden of proof, and it follows that the defendants were not prejudiced by the refusal to give the proposed instruction.

[6] The court struck out the testimony of two character witnesses produced by the defendants for the purpose of impeaching the plaintiff as a witness. T. N. Koenig, a police officer for 20 years, and having charge of the detective bureau at the time of the trial, testified that he knew plaintiff's "reputation in the community in which he lives for truth, honesty and integrity," and that it is bad. On cross-examination, the witness testified: "I know his business; I do not know where he lives, never did know where he lives." On motion of counsel for plaintiff, his testimony was stricken out. Manifestly this was not error. Martin A. Pennish, a retired police officer, who had retired 18 months before the trial, testified that he had known the plaintiff for several years around the lower end of town; that he did not know where plaintiff lived, but knew where he was doing business in November, 1919, "before he moved out"; that witness "knew he was here during that time." Counsel for defendants then propounded the following question: "I will ask you if you know his reputation for truth, honesty, and integrity in the City of Sacramento?" On objection by counsel for plaintiff, the witness was further interrogated and testified that plaintiff "was living here off and on during that time." He was then asked: "Do you know his reputation?" Counsel for plaintiff objected: "We renew the objection on the ground as irrelevant, immaterial and incompetent, he does not know where—." The witness then further testified that plaintiff's residence must have been in Sacramento "or he would not have been here." The court overruled the objection and the witness answered that plaintiff's reputation is bad. On cross-examination the witness testified that he did not know where plaintiff resided since November, 1919; that witness "never knew where he resided." The court thereupon struck out the testimony of the witness. The witness was not asked if he knew the general reputation of the plaintiff for truth, honesty, and integrity, the word "general" being omitted from all questions upon the subject. The objection that the testimony thus sought to be elicited was incompetent should have been sustained, and it was not error for the court to strike it out. People v. Markham, 64 Cal. 157, 163, 30 Pac. 620, 49 Am. Rep. 700; People v. Cord, 157 Cal. 562, 571, 108 Pac. 511; Teese v. Huntingdon, 23 How. 2, 16 L. Ed. 479. The evidence of the witness, considered alone or in connection with the other evidence in the case, was such as to justify the conclusion that he did not know the general reputation of the plaintiff in the neighborhood in which he resided. Some authorities hold that proof of general reputation is not necessarily limited to the neighborhood of the residence of the witness sought to be impeached. In Wigmore on Evidence, § 1616, it is said:

"The traditional phrase about 'neighborhood' reputation was appropriate to the conditions of the time; but it should not be taken as imposing arbitrary limitations not appropriate in other times. Alia tempora, allii mores. What the law then and now desired was a trustworthy reputation; if that is to be found among a circle of persons other than the circle of neighbors about a sleeping place, it should be received."

The evidence here does not show the length of time the plaintiff was engaged in the restaurant business, or whether the witness' knowledge of his reputation was acquired from those with whom the plaintiff usually associated or came in contact, or whether it was a reputation among the police officers only, as in the case of People v. Markham, supra. The reason for limiting such proof to the neighborhood of one's residence is that he there usually spends most of his time and most frequently comes into social and business contact with others. If the rule is to be extended to permit proof of one's reputation in business circles, the party offering such proof may reasonably be required to show the opportunities in such circles of forming a correct estimate of the character of the witness sought to be impeached. It is not an abuse of discretion to require something more than merely that the impeaching witness knows the other's place of business and his reputation in the vicinity of such place.

"The question as to whether a sufficient foundation has been laid to warrant a witness in expressing such an opinion is a matter especially committed to the judgment of the trial court, and unless that discretion is shown to have been clearly abused, there can be no prejudicial error." People v. Love, 29 Cal. App. 521, 525, 157 Pac. 9, 11.

It cannot be said that the court abused its discretion in striking out the testimony of the impeaching witnesses.

The judgment is affirmed.

We concur: ANDERSON, Justice pro tem.; BURNETT, J.

59 Cal. App. 234

## PRYOR v. McGUIRE. (Civ. 2463.)

(District Court of Appeal, Third District, California. Sept. 29, 1922.)

**1. Appeal and error ⟸1011(1)—Findings on conflicting evidence conclusive.**

Findings of facts on substantially conflicting evidence are removed from the consideration of the appellate court.

**2. Evidence ⟸78—Inferences against party last in possession failing to produce written contract justified.**

From the facts that defendant by fraud obtained possession from plaintiff of the written contract between them, that it was last known to be in his possession, that his explanation of his failure to produce it at the trial was not satisfactory, and that if its terms were as he claimed there was no reason for his diligence in obtaining possession of it, as its production would have defeated plaintiff's cause of action, the court was authorized to draw inferences against defendant's version of its contents.

**3. Brokers ⟸86(4)—Finding of broker being procuring cause of sale, consummated by owner and broker's customer, authorized.**

Finding that broker was the procuring cause of the sale, though it was consummated by the owner and the customer introduced by the broker, *held* justified by the evidence.

**4. Brokers ⟸43(3)—Broker's contract good, though reduced to writing after he produced the purchaser.**

The statute of frauds is satisfied rendering a broker's contract with his principal enforceable, though it was not reduced to writing till after the broker had produced the purchaser, the purpose of the statute being to compel the authentication of evidence.

Appeal from Superior Court, Sonoma County; Emmett Seawell, Judge.

Action by G. E. Pryor against M. McGuire. Judgment for plaintiff, and defendant appeals. Affirmed.

W. F. Cowan, of Santa Rosa, for appellant.

Fred W. McConnell, of Healdsburg, for respondent.

ANDERSON, Justice pro tem. Plaintiff brought the action to recover a commission as broker for the sale of defendant's land. The case was tried by the court without a jury, and plaintiff had judgment, from which defendant appeals.

The trial court found that "on or about the 3d day of March, 1921, the defendant, by the written agreement hereinafter referred to, employed the plaintiff to find a purchaser for and to sell for the defendant, certain real property, described as follows:

"Ten acres of land adjoining the 'Chisholm Ranch' near Windsor in Sonoma county, Cal., which said real property was at that time in the possession of defendant, and agreed to pay plaintiff for his services, and as his compensation for finding a purchaser for said land, and making a sale thereof, a commission of 5 per cent. for the purchase price accepted by the defendant for said real property from a purchaser found by said plaintiff."

The contract which was offered by plaintiff to support such finding was as follows:

"We, the undersigned, hereby authorize G. E. Pryor, real estate agent, to sell the following described property located in the county of Sonoma, state of California, and described as follows, to wit: 10 acres of land adjoining the Chisholm Ranch near Windsor. [List of Personal Property.] We agree to pay to the said agent $1,000 of the purchase price which is $10,000 or any other amount we may agree to take when the property is sold or a purchaser is found by the said agent. In case the place is sold for less than $10,000, the commission is to be 5 per cent. [Signed] M. McGuire."

The proof of the foregoing contract was established by parol evidence, the original contract having been lost, it having been returned to the defendant (seller), and he failing to produce the same at the trial when called for. This situation produced a conflict in the evidence as to the exact wording of the contract, but the trial court sustained the plaintiff's contention as to the correct wording of the contract.

A question of fraud was also injected into the case by reason of the return of the contract by the broker to the seller, the contention of the plaintiff (broker) being that the contract was returned solely by reason of the fraud and misrepresentation of the defendant. Upon this question the trial court also upheld the contention of the plaintiff (broker).

Appellant also raises some other points, one of which is, granting that the broker produced a purchaser ready, willing, and able to purchase, yet he claims no liability attached against the seller for the reason that said purchaser was produced before the written contract was executed. It was also contended that no liability attached for the reason that the sale was consummated between the buyer and the seller without the aid of the broker.

We will first address ourselves to the findings of the court: (1) That the broker produced a purchaser, able, ready, and willing, and who in fact did purchase the property described in the contract. (2) That the defendant practiced fraud and made false representations for the purpose of obtaining possession of the written contract theretofore executed and delivered to plaintiff.

[1] As to these two essential findings we may say admittedly that there is a substantial conflict in the evidence, and, this being so, the question as a matter of law is removed from the consideration of the appellate court; but in order to ascertain this fact

we have read the record, and we are constrained to say that a careful reading of the entire evidence convinces us that the trial court was well justified in making such findings. A comparison of the deposition of the defendant with his testimony given at the trial could not impress one with his frankness—there are evasions and contradictions which the trial court could not overlook.

[2] The learned counsel for appellant earnesty contends that the trial court should have followed the version of the defendant as to the terms contained in the contract, but it must be borne in mind that the original contract was last known to be in the possession of the defendant, and that it was taken from the possession of the plaintiff by the defendant, as the court found, through fraud; and the defendant's explanation of his failure to produce it at the trial could not be said to be entirely satisfactory, and moreover, if the written contract contained the clause which defendant claimed it did contain, there was no reason for the diligence exercised by the defendant in taking the contract out of the hands of the plaintiff.

If it contained the clause as claimed by the defendant, to the effect that plaintiff was to receive no commission whatsoever if the price obtained for the place did not exceed $9,000, then its very presentation would have defeated plaintiff's action. Why should defendant fear it, it being his very weapon of defense, as he claimed? According to defendant's version, for the plaintiff to present the written contract would mean his defeat in the action, and the trial court had a right to draw all reasonable inference from the fact that the defendant did not present the contract.

[3] Appellant makes a further attack upon the judgment for the reason, as he claims, that the broker did not consummate the sale, but that the sale was finally accomplished through the defendant's efforts. We do not deem it necessary to enter upon a recital of the evidence to show that there is sufficient evidence in the record to support the finding of the court that the plaintiff was the procuring cause of the sale, but it is sufficient to state that we are satisfied that the record contains sufficient evidence for such purpose.

Any one conversant with the history of real estate transactions will hardly venture to say which agent displays the greater wisdom, the one who talks much or the one who talks little; which would be the better course to pursue in each particular case becomes a matter of judgment to be exercised by the agent, and whether his judgment has been good or bad can only be determined by results, so if the sale is made, as it was in this case, this may be said to be proof of good judgment.

It may be that the purchaser would prefer to make his inquiries directly of the seller after having been introduced to the seller by the agent, and the agent after talking with the parties, or through any other information he might obtain, may come to the conclusion that it would be better for the owner of the property to do the talking. These are matters of policy with which the court has nothing to do. The only inquiry we are called upon to make is, did the agent perform some valuable service—Did he substantially assist in bringing about the object sought to be attained? To determine this we turn to the record and find that the contract was signed by the defendant, and the purchaser was produced on defendant's ranch by the plaintiff on the 3d day of March, the same day on which the contract was made. On the 17th day of the same month the defendant procured a return of the contract from the plaintiff, and on the 23d day of the same month the sale was consummated.

Considering the short space of time that elapsed between the time of the introduction of the purchaser and the consummation of the sale of the property, we find no cause to complain of lack of diligence on the part of the agent. There is some evidence that between the 3d day of March and the 17th day of the same month, the broker and purchaser discussed the prospective sale; and certainly no complaint can be made of the broker, if he became inactive on and after the 17th of the month, in view of the misleading conduct of the defendant.

As to the claim that the property was finally sold through the efforts of the seller and buyer alone, we must keep in view the fact that such efforts were made with full knowledge on the part of both seller and buyer of the agency of the broker.

This court, speaking through Chipman, P. J., in the case of Hill v. McCoy, 1 Cal. App. at page 166, 81 Pac. at page 1018, say:

"There is always a possibility that, had the broker not brought the seller and buyer together, some other broker might have done so, or the parties might have met by chance and through no agency of any broker, and hence it might be said the employed broker was not the procuring cause of the sale. But where it appears, as here, that the seller and buyer were for the first time brought together by the broker duly authorized to act for the seller, and the sale was subsequently consummated by the same seller and buyer, acting independently of the broker, the broker not having abandoned his agency, and the seller not having revoked the broker's authorization or done any act from which a revocation may be implied, we think the inference is a reasonable one, and may be drawn by the jury, that a sale under such circumstances is effected through the broker's agency as its procuring cause. Especially may this inference be drawn where both seller and buyer have negotiated with knowledge of the broker's previous employment."

There are many cases supporting the doctrine announced in this case, some of which

are Roth v. Thomson, 40 Cal. App. 208, 180 Pac. 656; Phelps v. Prusch, 83 Cal. 627, 23 Pac. 1111; Dolan v. Scanlan, 57 Cal. 261; Justy v. Erro, 16 Cal. App. 519, 117 Pac. 575; Shepherd-Teague Co. v. Herman, 12 Cal. App. 394, 107 Pac. 622; Briggs v. Hall, 24 Cal. App. 586, 141 Pac. 1067.

[4] Appellant also contends that the contract is not enforceable for the reason it was not executed until after the plaintiff produced the purchaser. It appears from the record that plaintiff came to the ranch of defendant in company with the purchaser in the forenoon of March 3d, and that late in the afternoon of the same day defendant executed the contract in question.

This question involves the consideration of the purposes for which the statute of frauds was enacted. Mr. Justice Hart exhaustively reviews the authorities in the case In re Balfour & Garrette, 14 Cal. App. 261, 111 Pac. 615, and clearly points out that the better reason and great weight of authority treats the statute of frauds as a means merely of compelling the authenticating of evidence, to the end that certainty may be more readily attained and the door to perjury and misunderstanding closed. The statute is always satisfied when these purposes are subserved. The history of the English statute and the reasons for its enactment fully support this view and explain the reason for the rule.

The following language, contained in a decision from the Supreme Court of the state of Maine, and quoted approvingly by the court In re Balfour, supra, tersely and clearly states the construction to be placed upon the statute of this state: "In other words, is the writing the contract, or only evidence of it? We incline to the latter view."

The judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

---

59 Cal. App. 246

## GARCIA v. SAINZ. (Civ. 3925.)

(District Court of Appeal, Second District, Division 1, California. Sept. 30, 1922. Hearing Denied by Supreme Court Nov. 27, 1922.)

**1. Limitation of actions ⟸27—Action on oral promise barred by two-year statute.**

Where a complaint stated a cause of action based on an oral promise made more than five years prior to commencement, it was barred by Code Civ. Proc. § 339, which limits actions on contracts, obligation, or liability not founded on an instrument in writing to two years.

**2. Money lent ⟸7(3)—Evidence insufficient to support finding for plaintiff.**

In an action for money lent, evidence *held* insufficient to support finding for plaintiff.

**3. Evidence ⟸80(1)—Law of foreign state presumed to be same as law of forum.**

In an action for money lent, where plaintiff urged that as the transaction wherein the loan was made occurred in Arizona, and since defendant was not shown to have been in California prior to the filing of the complaint, a different rule as to limitation should apply, in the absence of proof to the contrary, the law of Arizona applicable to the facts must be deemed to be the same as that of California.

**4. Account stated ⟸1—Defined.**

An account stated is a document—a writing—which exhibits the state of account between parties and the balance owing from one to the other, and, when assented to, either expressly or impliedly, it becomes a new contract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Account Stated.]

**5. Account stated ⟸19(3)—Evidence failed to show an account stated.**

Where the only evidence in support of an action on account stated was that plaintiff stated, when defendant paid him the last $12, he would soon have some means whereby he would be able to pay, and there was no exhibition or inspection of the alleged book account, and nothing was said as to what the balance was, the evidence was insufficient to show an agreement, based on an open mutual current book account, showing a specific balance due, which defendant agreed to pay.

**6. Limitation of actions ⟸53(1) — Account stated barred by four-year statute.**

The time within which an action on account stated should be brought, as provided by Code Civ. Proc. § 337, is within four years from the date of the last item of account.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Action by J. A. Garcia against Federico A. Sainz. Judgment for plaintiff, and defendant appeals. Reversed.

M. C. Atchison, of Calexico, for appellant.

Alfred Blaisdell, of Calexico, for respondent.

SHAW, J. The complaint herein contains three counts, by the first of which it is alleged that on August 15, 1915, plaintiff, at the special instance and request of defendant, loaned to him the sum of $1,000, upon which defendant, on November 15, 1915, paid $60, and on December 1, 1916, paid $12, and the further sum of $12 on March 1, 1919. By the second count it is alleged that plaintiff, on August 15, 1915, gave to defendant a check for $1,000, upon which the latter obtained said sum of money and promised to return the same, but has refused and failed to do so, save and except as to the payments thereon set out in the first count of the complaint. The third count alleges that in March, 1919, an account was stated between

plaintiff and defendant, whereby it was found that defendant was indebted to plaintiff in the sum of $916, which defendant agreed to pay. In his answer defendant denies that plaintiff loaned him $1,000 as alleged, or that he made the payments thereon so alleged in the first count of the complaint; and likewise denies the delivery to him of the check for $1,000, or that he received payment thereof, and likewise denies that an account was stated between plaintiff and defendant, or that he ever agreed to pay said sum of $916 as alleged in the third count of the complaint. In addition to other affirmative defenses set up in his answer, defendant alleged that each of the causes of action stated in the complaint was barred by the statute of limitations. The court made findings in favor of plaintiff, upon which judgment was entered as prayed for, and from which defendant has appealed.

Appellant, for want of sufficient evidence, attacks the findings to the effect: First, "that there is a balance due plaintiff by defendant upon a mutual, open, and current account by and between the said parties, and based upon a book account"; second, "that on or about the 1st day of March, 1919, an account was stated between the said parties, and upon such statement a balance of $916 was found due said plaintiff from said defendant, and which amount the defendant then and there promised to pay plaintiff"; and, third, that neither of the three causes of action so alleged in the complaint is barred by the statute of limitations.

Accepting plaintiff's meager testimony in the most favorable light, it appears therefrom that on August 15, 1915, he advanced to defendant, in Arizona, the sum of $1,000 as a loan, upon the latter's oral promise to repay the same; that defendant made three payments thereon, as alleged in the complaint; that plaintiff, either at the time of making the loan or some time thereafter, entered in a pocketbook which he carried a memorandum of the $1,000 so loaned to defendant, and thereafter, upon defendant making the payment of $60 and the first $12 payment on account of the loan, on December 1, 1916, he entered the same in his book, but that prior to the making of the second payment of $12 on March 1, 1919, he had lost the book, and no entry thereof was made therein; that at about the time of the making of this last payment he had a conversation with defendant wherein the latter said he would soon have some means whereby he would be enabled to pay the balance of the $1,000 so loaned. The so-called book of account was never exhibited to nor inspected by defendant, and at the time of the alleged statement of account, the balance of which plaintiff claims that defendant agreed to pay, the book had been lost. The action was commenced on April 4, 1921.

[1-3] It thus appears that the first count of the complaint states a cause of action based upon an oral promise made more than five years prior to the commencement of the action, and hence was, as alleged in the answer, barred by section 339, Code of Civil Procedure, which limits the time within which an action may be brought "upon a contract, obligation or liability not founded upon an instrument of writing," except as provided in section 337, Code of Civil Procedure, to two years. The evidence is insufficient to support the finding complained of. Respondent, for some reason not disclosed in his brief, insists that, as the transaction wherein the loan was made occurred in Arizona, and since defendant is not shown to have been in this state prior to the filing of the complaint, a different rule should apply. In the absence of proof to the contrary, the law of Arizona applicable to the facts in the case must be deemed to be the same as that of this state. O'Sullivan v. Griffith, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323; Fox v. Mick, 20 Cal. App. 599, 129 Pac. 972. Assuming that upon the uncertain allegations of the complaint testimony might have been offered tolling the statute and thus extending the time within which plaintiff might enforce his claim, no evidence of such character was presented.

What we have said as to the first cause of action is likewise applicable to the second cause of action.

[4, 5] The third cause of action is based upon an alleged account stated, wherein it was found that defendant was indebted to plaintiff, as shown by the latter's books, in the sum of $916, which sum the defendant agreed to pay. Conceding, but not holding, that the testimony is sufficient to show that the transaction had between plaintiff and defendant with reference to the loan constituted a book account, we are clearly of the opinion that the evidence fails to show that an account was stated between them. "An account stated is a document—a writing—which exhibits the state of account between parties and the balance owing from one to the other, and when assented to, either expressly or impliedly, it becomes a new contract." Coffee v. Williams, 103 Cal. 550, 556, 37 Pac. 504, 506; Gardner v. Watson, 170 Cal. 570, 574, 150 Pac. 994. Since it was lost, the alleged account book was not produced in evidence, and there is no testimony as to the character of the entries relating to the transaction. The last payment of $12, made about March 1, 1919, was not entered therein. An account stated constitutes a new agreement whereby the parties between whom there are reciprocal debits and credits fix and determine the amount due from one to the other. Outwaters v. Brownlee, 22 Cal. App. 535, 135 Pac. 300. The only testimony in support of respondent's contention is that of plaintiff, wherein he says that when defendant paid

him the last $12 he stated that he would soon have some means whereby he would be able to pay plaintiff. There was no exhibition or inspection of the alleged book account, and nothing was said as to what such balance was. The plaintiff says:

"I told him [defendant] I needed money, and he told me he was soon going to have business where he could get some money and he would pay me."

The effect of plaintiff's testimony is that some five years prior to the commencement of the action he loaned defendant $1,000 upon his oral promise to repay it, and in some form, undisclosed, he made an entry with reference to it in a pocketbook which he carried, and thereafter, upon defendant making two cash payments on the loan, likewise made note of them, and that later, upon importuning defendant for payment, the latter declared his inability to pay the same, but hoped to get into some business that would enable him to liquidate the indebtedness. The testimony is insufficient to show an agreement between plaintiff and defendant based upon an open, mutual, and current book account that a specific balance was due from one to the other, and which the defendant agreed to pay. Merchants' Nat. Bank v. Carmichael, 178 Cal. 446, 173 Pac. 999.

[6] Moreover, conceding the testimony sufficient to show an account stated, as found by the court, the time within which an action thereon should be brought, as provided in section 337, Code of Civil Procedure, is four years, running from the date of the last item of account so entered, which, according to plaintiff's testimony, was the payment of $12 made on December 1, 1916, more than four years prior to the institution of the action. Hence the cause of action was, as alleged in the answer, barred by the statute of limitations.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

---

59 Cal. App. 200

## FEDERAL CONST. CO. v. ENSIGN, Superintendent of Streets. (Civ. 3984.)

(District of Court of Appeal, Second District, Division 2, California. Sept. 27, 1922. Hearing Denied by Supreme Court Nov. 23, 1922.)

**1. Evidence ⟹21—Matter of common knowledge that appurtenances for flow of sewage are seldom constructed in street.**

It is a matter of common knowledge that, though sewers are usually laid in streets, the outlets, flush tanks, septic tanks, and other similar appurtenances which take care of the sewage flowing through and from sewers are seldom, if ever, constructed in the streets.

**2. Municipal corporations ⟹277—Improvement Act held to authorize construction of sewage disposal plant outside city limits.**

Improvement Act of 1911 (St. 1911, p. 730), empowering city councils to construct sewers in streets or in, over, or through property or rights of way owned by the city, with outlets, flush tanks, septic tanks, and other appurtenances, authorizes a city to construct a sewage disposal plant on property owned by it two miles outside of the city limits connecting with the city sewer system through a line over a right of way owned by it.

**3. Municipal corporations ⟹438—Local assessments rest upon special benefits to property assessed.**

Special benefits to the property to be assessed—that is, benefits received by it in addition to those received by the public at large—is the equitable and just foundation upon which local assessments rest, and no assessment can be made upon any land on any principle other than that of special benefits actually or presumptively received.

**4. Municipal corporations ⟹412—Improvement by local assessment must be public and permanent.**

To justify a local assessment under the theory of benefits to property, the improvement must be a public one and permanent.

**5. Municipal corporations ⟹439—Effect on market value of property assessed fairest test of special benefit by local improvement.**

There is no fairer test of special benefit received to an improvement constructed by local assessments than that which determines the existence and amount of such benefit by the effect of the improvement upon the market value of the property to be assessed.

**6. Municipal corporations ⟹495—Courts will not inquire into quantum of special benefits where all property so benefited.**

Where, in a local improvement district, each and every parcel of land enjoys a special benefit when shared by the general public, the courts will not inquire into the quantum of special benefit which will accrue to the property owners.

**7. Municipal corporations ⟹495—Extent of benefits received by local assessments peculiarly within province of assessing authorities.**

If, from the nature of the improvement, it can be seen that the lots to be assessed are susceptible of some substantial benefit from it, the question of the extent of the benefit received is one which, in the absence of fraud, gross, injustice, or demonstrable mistake, rests peculiarly in the determination of the assessing authorities, and their action will not be interfered with by the courts.

**8. Municipal corporations ⟹417(1)—Construction of sewage disposal plant held local improvement, although local assessment district included entire city.**

Where a city, in order to construct a sewage disposal plant outside of the city limits, constituted one district for local assessments,

and it appeared that every lot within the city was specially benefited, the enterprise did not thereby cease to be a local improvement, so that the work could not be paid for by special assessment.

**9. Municipal corporations ⟸406(1)—Limitation on power of local assessment enumerated.**

The only limitation upon the power of local assessments is that the improvement shall be a public one, that it shall confer a special benefit upon the property to be asessed, and that the apportionment of the assessments shall be made upon some basis that is uniform and free from unjust discrimination.

Application by the Federal Construction Company for a writ of mandate to be directed to H. W. Ensign, as Superintendent of Streets of the City of Dinuba, to compel him to formally execute a contract for sewer work. Writ granted.

W. E. Simpson and Gallaher, Simpson & Hays, all of Fresno, for petitioner.

Arthur M. Ellis, of Los Angeles, for defendant.

FINLAYSON, P. J. Petitioner, to whom the board of trustees of the city of Dinuba awarded a contract for the performance of certain public work, brings this proceeding in mandamus to compel respondent, as the city superintendent of streets, to execute the contract.

The city of Dinuba, a municipal corporation of the sixth class, is provided with a complete sewer system. It owns a parcel of land outside of and distant about two miles from its corporate limits, on which it has constructed a sewage disposal plant, consisting of a septic tank and its appurtenances, constructed some years ago for the disposal of the city sewage. That part of the municipal sewer system which lies within the corporate limits of the city is connected with the septic tank by a main sewer line, owned and maintained by the city, and extended to the outside parcel of land on which the septic tank is situated.

So greatly has the population of the municipality increased since the construction of the present septic tank, that the existing sewage disposal plant, of which the tank is the principal constituent, is now wholly inadequate—so much so that the sewage from the city overflows the septic tank, and the effluent therefrom flows into and contaminates the water in certain irrigating ditches which are being used to irrigate nearby farms, orchards and vineyards, thus creating a nuisance which menaces the health of the surrounding community. So serious is the situation that the farmers and others whose irrigating systems are now being polluted by the effluent from the city's present insufficient sewage disposal plant threaten to and will enjoin the city from using the existing inadequate septic tank unless new and adequate tanks be immediately constructed by the city. Should the city be thus restrained, it will be practically impossible for any of its inhabitants to make use of any part of the city's sewer system. To meet so grave a situation the city board of trustees proposes to construct on the parcel of land two miles distant from the city limits—the land on which is now located the present inadequate septic tank—a complete sewage disposal plant, consisting of reinforced hydraulic concrete settling tanks, with outlets, connecting sewers, conduits, and appurtenances. In other words, the proposed work is, as stated in petitioner's brief, "the reconstruction of the present sewage disposal plant, in order that adequate provision may be made for meeting the requirements of the city." With this purpose in view, the city officials inaugurated proceedings under the Improvement Act of 1911 (Stats. 1911, p. 730). That act makes the cost of the work authorized thereby payable by special assessments, assessed either upon the lots and lands fronting the improvement, in proportion to frontage, or, in proportion to benefits received, upon the lots and lands within an assessment district to be described in the resolution of intention. In the instant case, the board of trustees, deeming the contemplated improvement of more than local or ordinary public benefit, established an assessment district coextensive with the area of the municipality, and sought to make the expense of the improvement chargeable upon substantially all of the lots and lands within the city, excepting the streets and other public highways in the city and such lands as are owned by the county, the city, or the school board.

The proceedings thus inaugurated by the city trustees progressed through the various legal stages provided by the Improvement Act of 1911, to and including the award of the contract to petitioner as the successful bidder. Respondent, upon whom, as the superintendent of streets, the statute imposes the duty of entering into a formal written contract with every successful bidder, refuses to enter into any contract with petitioner, placing his refusal on the ground that the Improvement Act of 1911 does not contemplate work of the character here proposed. Hence this mandamus proceeding.

Respondent's first point is that work to be done on property lying outside of a municipality's corporate limits, even though such outside property be owned by the city, is within neither the letter nor the spirit of the act.

Section 2 of the Improvement Act of 1911 (omitting parts not essential to the question in controversy) reads:

"Whenever the public interest or convenience may require, the city council is hereby au-

thorized and empowered to order the whole or any portion or portions, either in length or width of any one or more of the streets, avenues, lanes, alleys, courts, places or public ways of any such city graded or regraded to the official grade, * * * and to order the construction or reconstruction therein of sidewalks * * * sewers * * * conduits and channels for sanitary and drainage purposes, * * * with outlets, cesspools, manholes, catch basins, flush tanks, septic tanks, connecting sewers * * * and other appurtenances; * * * and the construction or reconstruction in, over or through property or rights of way owned by such city, of * * * sewers * * * for sanitary and drainage purposes, * * * with necessary outlets, cesspools, manholes, catch basins, flush tanks, septic tanks, connecting sewers * * * and other appurtenances, * * * and to order any work to be done which shall be deemed necessary to improve the whole or any portion of such streets, avenues, sidewalks, lanes, alleys, courts, places, or public ways or property or rights of way of such city."

As will be noticed, the act declares that the legislative body of any city is authorized to order "the whole or any portion * * * of any one or more streets * * * graded * * * and to order the construction or reconstruction therein [i. e., in such streets] of * * * sewers * * * with outlets, * * * flush tanks, septic tanks, connecting sewers * * * and other appurtenances." The act does not say that the "outlets, flush tanks, connecting sewers * * * and other appurtenances" which may be constructed or reconstructed with the sewers shall be constructed or reconstructed in the streets, nor even that they shall be constructed within the city's corporate limits. On the contrary, the Legislature, in seeming recognition of the fact that every municipality may be confronted with its own peculiar engineering problems respecting the disposal of its sewage, has wisely refrained from saying that the outlets, flush tanks, etc., which are authorized to be constructed "with" the sewers shall be constructed in any particular place or locality. Indeed, the Legislature, recognizing, apparently, that it often is necessary to leave to the local authorities a wide latitude of discretion respecting the place or places where the outlets, flush tanks, etc., and even the sewers themselves, may be constructed, has specifically declared in this same section of the act that the city authorities shall have the power to order the construction or reconstruction of sewers, with necessary outlets, flush tanks, etc., "in, over or through property or rights of way owned by such city," without in any wise attempting to place any restriction upon the place or places where such city-owned property or rights of way shall be located.

[1, 2] It is a matter of common knowledge that, though the sewers are usually laid in streets, the outlets, flush tanks, septic tanks and other similar appurtenances which take care of the sewage flowing through and from sewers are seldom, if ever, constructed in the streets. Indeed, we cannot imagine a case where scientific engineering would sanction the construction of a settling tank or a septic tank in a street of such a municipality as the city of Dinuba, for the purpose of taking care of the sewage flowing from the city's entire sewer system, The construction of such outlets, flush tanks, septic tanks, etc., on lands lying outside of the city limits is not at all uncommon in this state. And when the act declares that city councils may construct sewers in streets, or in, over, or through property or rights of way owned by the city, with outlets, flush tanks, septic tanks, and other appurtenances, it undoubtedly contemplates the possible, if not probable, construction of such adjuncts to the city's sewer system as flush tanks, etc., upon any convenient and appropriate parcel of land or right of way owned by the city, even though such land or right of way be located without the city's corporate limits.

Counsel for defendant says that the Improvement Act of 1911 is essentially a "street improvement act," and that therefore no improvement may be made of property situated outside the city's corporate limits. The object and true scope of such work as that under consideration here is not the improvement of the land upon which the proposed settling tanks, etc., are to be constructed. The proposed improvement is for the benefit of the inhabitants of the city and their lots and lands. Existing conditions are such that it is absolutely necessary that the present sewer system shall have a larger and a more adequate sewage disposal plant. To make the present sewer system of any real benefit to the lot owners and other inhabitants of the city of Dinuba, a larger sewage disposal plant must be constructed No natural outlet for the city's sewage can be found within the city's corporate limits. Nor does it appear that the municipality owns any property within its corporate limits that is suitable for the erection thereon of an adequate sewage disposal plant; and if the city does not own any such property within its boundaries, then obviously it is absolutely requisite that its sewer system be extended some distance beyond the city limits, and there be connected with suitable flush tanks, etc., in order properly to dispose of the city's sewage. But it does not follow, because that is the case, that the assessments which may be made to pay for this work will be made for an improvement outside of the city. The construction of larger and more suitable flush tanks on the city's outside property is not an improvement for that property, but is one for the benefit of the inhabitants of the city and the lots and lands therein—an improvement rendered necessary by reason of the geographical condi-

tion of the land upon which the city is located. The power given by the Improvement Act of 1911 to construct sewers within the incorporated limits of the city would be a useless one indeed if the system of sewers within the city could not be connected with some outlet or with some sewage disposal plant; and, should we hold that this act does not give the city power to extend any part of the municipal sewer system beyond the city's corporate limits, when it is necessary to do so in order to obtain an outlet or to connect with a suitable sewage disposal plant, such a narrow interpretation would defeat the obvious intention of the Legislature in passing the statute. In Shreve v. Town of Cicero, 129 Ill. 226, 21 N. E. 815; Cochran v. Village of Park Ridge, 138 Ill. 295, 27 N. E. 939, and Maywood Co. v. Village of Maywood, 140 Ill. 216, 29 N. E. 704, cases arising under local improvement acts the Illinois Supreme Court, having occasion to consider a similar question, held that, where no suitable outlet for a sewer can be found within the municipality, its extension to land beyond the city's corporate limits is for the benefit of the sewers within the city, and for the exclusive use and benefit of the municipality and its inhabitants, and is therefore within the purview of the statute. To the same effect is Mullins v. City of Little Rock, 131 Ark. 59, 198 S. W. 262, L. R. A. 1915B, 262.

Respondent cites us to Thompson v. Hance, 174 Cal. 572, 163 Pac. 1021, a case arising under the Vrooman Act (St. 1885, p. 147, as amended), and involving a city's power under that statute to construct tunnels for the use of pedestrians and vehicular travel. In that case the court held that, when the Vrooman Act speaks of such instrumentalities as tunnels, etc., it means such as are "used in connection with the improvement of streets," and that such tunnels as are intended to be independent subterranean avenues for travel, and not mere auxiliaries for the proper drainage of surface streets, are not such street improvements as are provided for by the Vrooman Act. There is nothing in that case which conflicts with the views expressed herein respecting the construction of the Improvement Act of 1911. In the first place, as was pointed out by the court in the Thompson Case, 174 Cal. 576, 163 Pac. 1021, there is a material difference between the punctuation which divides the clauses of the Vrooman Act and that which separates the corresponding clauses of the act under consideration here. In the next place, the purpose of the Vrooman Act, as declared in its title, is to provide for work done upon "streets, lanes, alleys, courts, places and sidewalks and for the construction of sewers within municipalities," whereas, according to the title of the act here under consideration, its purpose is not alone to provide for work "in and upon streets, avenues, lanes, alleys, courts, places and sidewalks within municipalities," but also to provide for work "upon property and rights of way owned by municipalities," and, as we have pointed out, the act places no limitation upon the location of such city-owned property or rights of way. Finally, there is a vast difference between separate and independent structures, such, for example, as subterranean tunnels for travel, and auxiliary plants or other appurtenances, such as settling tanks intended for the disposal of a city's sewage. Such sewage disposal plants are not independent structures, but are necessary and essential ancillary adjuncts—accessories used in connection with and as an indispensable constituent of the entire municipal sewer system, of which only the sewers, as a general rule, are laid in the city's streets. And, though such sewage disposal plants be situated outside of the city's corporate limits, they still are but adjuncts of, or, as the act says, "appurtenances" to, the sewers which are laid in the streets.

By subdivision 10 of section 20 of the act under consideration it is provided that the assessment diagram "shall show each separate lot, piece or parcel of land, the area in square feet of each of such lots, pieces or parcels of land, and the relative location of the same to the work proposed to be done, all within the limits of the assessment district." Because of this provision it is claimed that, since the work in the instant case is to be done outside of the assessment district, the statute cannot be followed, and that therefore it was not intended to cover such a case as this. The argument is based upon the assumption that the language just quoted requires the assessment diagram to show that the work is "within the limits of the assessment district." We do not so construe this provision of the act. As we understand it, it means that all the lots and parcels of land within the assessment district, and their relative location to the work to be done, shall be shown on the assessment diagram. In order to show the relation of the work to the lots to be assessed, it is not necessary that the work to be done, as well as the lots, shall be within the assessment district.

For the foregoing reasons, we are of the opinion that respondent has shown no basis for his contention that the Improvement Act of 1911 does not embrace such work as is contemplated by these improvement proceedings.

This brings us to a consideration of respondent's second point, which is that, by reason of certain constitutional limitations upon the power to levy special assessments to pay for local improvements, the reconstruction and enlargement of a sewage disposal plant, intended to take care of all the

sewage flowing through and from a city's entire system of sewers, cannot be made the subject of a local improvement, to be paid for by special assessments on all the privately owned lots and parcels of land situated within the municipality.

It is not claimed that special assessments may not be levied to pay the cost of reconstruction work as such. Nor could such claim be maintained if made. The Legislature, in the act under consideration, has expressly authorized the construction or reconstruction of sewers, septic tanks, etc. That the Legislature possesses the power to authorize reconstruction work is no longer a debatable question in most of the jurisdictions of this country. Power to make local improvements is a continuing one, which may be exercised from time to time as the needs of the municipality may require, and the city authorities, not the courts, are to judge of the necessity therefor. According to the clear weight of authority, if such an improvement combines the requirements of benefit to the public at large and exceptional local benefit to the property which is sought to be assessed, the same considerations which make it proper to levy local assessments for the original improvement make it equally proper to levy such assessments for any improvements to take the place of the original one. 25 R. C. L. p. 103; 1 Page and Jones on Taxation by Assessment, §§ 380 and 381. What we understand respondent to claim is that in this case the reconstruction work is of such a character that it is not of special benefit to the lots or lands within the city of Dinuba, but is of general benefit to the community at large, and therefore should be paid for by general taxation, and not by special assessments.

[3, 4] Special benefits to the property to be assessed, that is, benefits received by it in addition to those received by the public at large, is the equitable and just foundation upon which local assessments rest; and, under our system of government, no assessment can be made upon any land on any principle other than that of special benefits actually or presumptively received. The elements which an improvement must possess in order to justify a local assessment based on the theory of benefits are certainly two in number, and possibly three. The first is that the improvement must be a public one; that is, it must be one which confers a general benefit upon the public at large, and which, therefore, the public, acting through its government, may construct without the consent of the particular individuals affected. An improvement which lacks this element is essentially a private improvement; and, no matter how useful or advantageous it may be to the owners of private property, the public cannot compel its construction, nor can it pay for it by funds raised by the exercise of the sovereign power of taxation. Spring Street Co. v. City of Los Angeles, 170 Cal. 30, 148 Pac. 217, L. R. A. 1918E, 197; 1 Page and Jones on Taxation by Assessment, § 283. The second element essential to a valid local assessment is that the improvement must confer an especial and local benefit upon the property which is to be assessed It is possible that it will suffice if, from the nature of the work, the property can be presumed to have received an especial benefit. See 4 Dillon on Municipal Corporations (5th Ed.) § 1440. Unless, however, there be some local benefit, actually or presumptively received, the improvement may be public in character, so that the expense thereof may be borne by general taxation, but a local assessment, levied on the basis of benefits, cannot be made therefor, since the underlying principle of such assessments is that the improvement, aside from the mere general advantage resulting to the community at large, will result in some special benefit to the particular lot owners whose lands are assessed—a special benefit to the assessed lands in which the general public does not participate. 1 Page and Jones on Taxation by Assessment, § 284. It is, however, no objection to the validity of an assessment that the improvement benefits the public, provided it also confers an especial local benefit upon the property to be assessed. Improvements of this sort necessarily must have a dual aspect—an aspect of general benefit to the public as well as one of peculiar local benefit to the lot owners. To invalidate the assessment the general public benefit must be the only result of the improvement. A third element, which is insisted upon in some jurisdictions is that of permanency. 1 Page and Jones on Taxation by Assessment, § 285. In the instant case we are concerned only with the second element—that which demands that the improvement shall confer on the assessed property an actual, or at least a presumptive, local and especial benefit.

Whether all of the privately owned lots in the city of Dinuba will be specially benefited by the proposed improvement, and whether it is a "local improvement" as that term is generally understood when considered in connection with special assessments, are questions which, it must be confessed, are of serious concern; for, so far as we are advised, the appellate courts of this state never have had occasion to deal with an improvement of the nature of that which confronts us here. However, the guiding principles are few and well established, and we are convinced that their proper application to the facts of this case must lead to a decision favorable to the exercise of the power to levy special assessments to pay for the proposed reconstruction of this sewer disposal plant.

As we view the problem, it presents two aspects: (1) Is the nature of the work such that we can see that it is possible for it to especially benefit all the privately owned

lots and parcels of land within the confines of the city, in addition to any general benefit which may result to the public? (2) Does the fact that the assessment district embraces all of the privately owned real property within the city necessarily deprive the enterprise of the character of a "local improvement"?

Addressing ourselves now to the first question: We think it clear that not only will the lot owners be specially benefited by the proposed improvement, but that the benefits to be derived by them as lot owners will exceed any that the general public will receive —much more so, in fact, than in the case of the improvement of a public street or other highway. Where a street is paved or otherwise improved, the beneficial use thereof may be enjoyed, not only by the owners of lands within the city, but by the nonowners of real property in the city, and likewise by the citizenry of the state generally. It is evident, therefore, that, where a street or other highway is paved or otherwise improved, the benefits accruing to the lot owners are much less, in proportion to the advantages accruing to the general public, than is the case here. Practically all of the benefits to be derived from the enlargement of a city's sewage disposal plant will redound to the lot owners of the city, as lot owners, and little, if any, will be received by the general public. With but few exceptions it is the inhabitants of a municipality who enjoy the benefits which are derivable from a city sewer system designed to carry off the sewage from the various residences, factories, buildings, and other structures within the municipality. Practically every inhabitant of a city either is the owner of the land on which he resides or on which he pursues his vocation, or he is the tenant of the owner, or is the agent or servant of such owner or of such tenant. And, since it is the inhabitants who make by far the greater use of a city's sewer system, it is to them, as lot owners or as tenants, or as the servants or agents of such lot owners or tenants, that the advantages of actual use will redound. But this advantage of use means that, in the final analysis, it is the lot owners themselves who will be especially benefited in a financial sense. If the inhabitant who makes use of the city's sewer system happens to own the lot which he occupies, then, manifestly, he will be directly and immediately benefited as a lot owner. He will be benefited as an inhabitant, in that he will enjoy the use of the sewer, and, as a lot owner, he will be benefited in a financial sense, in that the value of his lot will be enhanced by reason of the sewer facilities. And the lot owners who, instead of occupying their lots, rent them to others, will also, as lot owners, be directly and immediately benefited financially by a municipal sewer system. For, if the inhabitants using the city sewer system be tenants, or the agents or servants of tenants, then the landlords to whom the tenants pay the rent will be benefited financially as landowners. It seems clear that the market value of each and every parcel of real estate within a city's confines would be much less without than with a municipal sewer system, and that the market value of each and every parcel of land within the city must be substantially enhanced if there be a complete sewer system adequate to care for all of the city sewage.

[5] There is no fairer test of special benefit received than that which determines the existence and amount of such benefit by the effect of the improvement upon the market value of the property to be assessed. 2 Page and Jones on Taxation by Assessment, § 653. See, also, Doyle v. Austin, 47 Cal. 359. If, then, the farmers whose lands are now being polluted by the effluent from the present sewer system shall carry out their threat to enjoin the use of that system on the ground that its present use constitutes a nuisance, thus making it impossible for the inhabitants of the municipality to make any substantial use of any of the sewers within the city's confines, the result will be that the whole existing sewer system will become useless. Should such a calamity befall the inhabitants of the city of Dinuba, the market value of all the real properties within the city necessarily would be considerably reduced. On the other hand, should the city's sewage disposal plant be reconstructed and enlarged in the manner contemplated by the proposed improvement, the market values of all the lands within the city, barring extraneous causes, must necessarily be kept at their present level, if not actually and substantially enhanced. But, whether the improvement shall tend to enhance the land values or merely to keep them at their present level, the lot owners, as lot owners will necessarily receive direct and immediate special benefits in which the other members of the community do not and cannot participate.

[6] In view of these considerations, it is manifest that the nature of the work is such that we cannot say that it is impossible to confer any special or peculiar benefit on the lots to be assessed. On the contrary, it is obvious that each and every lot within the confines of the municipality will enjoy a special benefit not shared by the general public. This being so, the courts, in the absence of glaring injustice, or of fraud or mistake on the part of the city trustees, will not inquire into the quantum of special benefit which will accrue to the lot owners.

[7] The established rule in this state is that, if, from the nature of the improvement, it can be seen that the lots to be assessed are susceptible of some substantial benefit from it, the question of the extent of the benefit

received is one which, in the absence of fraud, gross injustice, or demonstrable mistake, rests peculiarly in the determination of the assessing authorities, and their action will not be interfered with by the courts. The right to make assessments of this character is referable, in a general way, to the sovereign power of taxation. But it would be inconsistent with the proper exercise of that power, and would tend to a manifest embarrassment of the public in the prosecution of these public improvements, if, on each assessment, the lot owner were entitled to have the question judicially determined whether or not he would be benefited by the proposed improvement in an amount commensurate with the assessment on his lot. This doctrine is forcefully stated by the Oregon Supreme Court as follows:

"It is asserted with substantial unanimity and great clearness by the courts in this country, as well as by text-writers of erudition and learning, that, unless the nature of the case precludes it, the power to determine the confines of a taxing district for any particular burden is purely one of legislative discretion, and that the question of benefits accruing by reason of improvements contemplated is regarded as one of fact, which the Legislature is always presumed to have considered and settled by the enactment. * * * As has been indicated by some of the foregoing references to the authorities, the Legislature may, instead of fixing and prescribing the taxing district itself, refer the matter to commissioners or local boards or bodies for their ascertainment and determination; and in such case the substituted bodies possess and exercise legislative functions, and their action must be deemed as conclusive upon the subject as if the Legislature had exercised the authority directly. Cooley, Taxation (2d Ed.) 640." King v. Portland, 38 Or. 402, 63 Pac. 2, 55 L. R. A. 812.

The same doctrine is announced by the United States Supreme Court in Spencer v. Merchant, 125 U. S. 356, 8 Sup. Ct. 921, 31 L. Ed. 763, Parsons v. District of Columbia, 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943, and Williams v. Eggleston, 170 U. S. 311, 18 Sup. Ct. 617, 42 L. Ed. 1047, and has been repeatedly enunciated by our own Supreme Court. Thus, in Hadley v. Dague, 130 Cal. 220, 62 Pac. 504, Mr. Justice Harrison, speaking for the court, said:

"The principle upon which the expense is charged on the property in that district is that that property has received a particular benefit. But, as was said by Mr. Justice Temple in Lent v. Tillson, 72 Cal. 428: 'The benefit is not the source of the power.' Nor does the validity of the assessment depend upon the ability to show that the property assessed was specifically benefited by the amount of the assessment or received that particular amount of benefit. Courts will uphold an assessment made upon such legislative authority, even though the benefits are not shown to be identical with the burden."

See, also, Larsen v. San Francisco, 182 Cal. 8, 9, 186 Pac. 757.

[8] It only remains to consider whether the fact that all the lands within the city will be benefited deprives the enterprise of the character of a "local improvement," so that the work may not be paid for by special assessment. By establishing an assessment district coextensive with the city, the city's board of trustees must be deemed to have proceeded upon the theory that practically all of the privately owned lands within the municipality will be specially benefited by the proposed improvement. The question which presents itself, therefore, is this: Does an improvement cease to be "local" when its benefits extend to all the lands within the confines of the municipality? This question has been variously answered. In some states, notably in Illinois, it is held that, if the benefit be shared by all the lands in the municipality, the improvement cannot be regarded as local. Thus, in Village of Morgan Park v. Wiswall, 155 Ill. 262, 40 N. E. 611, it was held that an improvement which is of general benefit to all the real property in the city is not a "local improvement" within the meaning of the Illinois Constitution. Other states, adopting what we may appropriately term the Arkansas doctrine, hold that the fact that the benefits of the improvement extend to all the lots and lands throughout the city does not of itself deprive the enterprise of the character of a "local improvement," and that, therefore, an assessment district may be made of the entire city, and all the privately owned lots therein may be assessed to pay for the improvement. Crane v. City of Siloam Springs, 67 Ark. 36, 55 S. W. 955; Matthews v. Kimball, 70 Ark. 451, 66 S. W. 651, 69 S. W. 547. See, also, in this connection, Shibley v. Ft. Smith, etc., District, 96 Ark. 410, 132 S. W. 444; Mullins v. Little Rock, supra; Johns v. Road Improvement District, 142 Ark. 73, 218 S. W. 389; Solomon v. Wharf Improvement District, 145 Ark. 126, 223 S. W. 385; Bennett v. Johnson, 130 Ark. 507, 197 S. W. 1148; Minnesota, etc., Improvement Co. v. Billings, 111 Fed. 972, 50 C. C. A. 70; Kane v. Wedell (Cal. App.) 202 Pac. 340, and McGarry v. Ellis (Cal. App.) 202 Pac. 463.

Though it may be difficult to lay down a test which shall have an unvarying application to every state of facts, it seems clear that there can be no sound reason why the magnitude of the project or the extensiveness of the area to be assessed should have any decisive bearing on the question, provided the included area will derive a special benefit apart from that enjoyed by the public as a whole. In other words, the size of the assessment district presents only a question of degree in the enjoyment of the special benefits, and is not necessarily decisive that the benefit is general in its results Bennett v. Johnson, supra. In Johns v. Road

Improvement District, supra, the Arkansas Supreme Court says:

"We have never decided that the mere inclusion of the whole of a county in a district is void. On the contrary, we have held that the whole of a county may be included if the improvement is a single one and affects all the lands of the county. * * * The test is not the extent of the area included in the district, but the singleness of the authorized improvement and the relationship to it of the included territory as to benefits to accrue from the improvement."

[9] Aside from such general inhibitory provisions as, for example, are to be found in the Bill of Rights, the California Constitution contains no direct and express limitation upon the power to levy special assessments for local improvements. The legislative will in this state is therefore supreme, so far as any direct constitutional limitation is concerned. In this respect our Constitution differs from that of Illinois. In the Illinois Constitution of 1870 it is expressly declared that the Legislature may vest the corporate authorities of cities, towns, and villages with power "to make local improvements by special assessment." Article 9, § 9. This provision of the Illinois Constitution has been held by the courts of that state not only to be a grant of the power to authorize special assessments as therein set forth, but also to be an inhibition prohibiting the Legislature from conferring the power in any way other than as therein set forth. In California the only limitations upon the power, or, more accurately speaking, the rules which the municipal authorities must observe, are that the improvement shall be a public one, that it shall confer an especial benefit upon the property to be assessed, and that the apportionment of the assessments shall be made upon some basis that is uniform and free from unjust discrimination.

A definition of a "local improvement" which seems to have commended itself to the courts of many jurisdictions, and which meets with our unqualified approval, is that given by the Arkansas Supreme Court in Crane v. City of Siloam Springs, supra:

"If we look for the technical or legal meaning of the phrase 'local improvement,' we find it to be a public improvement, which, although it may incidentally benefit the public at large, is made primarily for the accommodation and convenience of the inhabitants of a particular locality, and which is of such a nature as to confer a special benefit upon the real property adjoining, or near the locality of the improvement."

There is nothing in this definition to exclude the idea of an improvement district embracing the entire city; and we can perceive no sound reason for holding that the fact that the rise in value is common to all the real estate within a municipality should prevent the benefit from being sufficiently peculiar for local assessment purposes. It would be a matter for regret if the law as worked out by the courts respecting the constitutional power of the Legislature should be found to have taken so scholastic a form, when dealing with the definition of the term "local improvement," that an assessment for an improvement which benefited 99 per cent. of the real property within a city might be upheld, whilst one which benefited 100 per cent. of the urban real estate could be paid for only by general taxation. The Arkansas Supreme Court, in the Crane Case, makes a forceful presentation against any such narrow limitation upon the legislative power, saying:

"No express limitation is found in the Constitution forbidding the Legislature from authorizing such an equitable apportionment of the assessment in case of an improvement affecting all the real estate of the city, and none should be adduced by implication through a narrow and technical line of reasoning; for this would not only be contrary to the usual rule of allowing the largest liberty in matters of local concern, but, if we should find such a limitation, it would puzzle us to say at what point the power of the Legislature would stop. Could it authorize an assessment for an improvement affecting nine-tenths or ninety-nine hundredths of the real property of the city, but not for one affecting the whole city? If a city has a hundred streets, may the Legislature authorize the council to place 99 of them in an improvement district for the purpose of laying water pipes along them or for improving them, and yet not authorize such a district covering all the streets for such a purpose? What could be the object in making such a limitation, and why make such a distinction? We do not see any reason, nor do we believe that the constitution contains any such limitation upon the power of the legislature."

In Matthews v. Kimball, supra, the court says:

"The only limitation as to the character of the improvement is that it must be a local improvement and of a public nature; that is *local to the city and the inhabitants thereof* [italics ours], and public to the extent that it shall be free to the public under such proper regulations as may be adopted for its control, management and preservation, by the city council."

Although not giving direct consideration to this question, one of the District Courts of Appeal of this state (Division 1, First Appellate District), as well as the United States Circuit Court of Appeals, has indirectly passed upon it by holding that the legislative body of a municipality may create an assessment district coextensive with the boundaries of the city and assess all of the privately owned real property situated therein. Kane v. Wedell, supra; McGarry v. Ellis, supra; and Minnesota, etc., Improvement Co. v. Billings, supra. Since such an assessment district may be upheld only upon the theory that all of the privately owned lands within the city are especially benefited by the im-

provement, the cases last cited become authority for the proposition that an improvement is none the less a "local improvement," and the benefits accruing therefrom are none the less "special" merely because the improvement benefits all the lands within the confines of the municipality.

Our views upon this branch of the case may be summarized thus: It is demonstrable that the proposed improvement will tend to increase, or at least to stabilize, the market values of all the real properties within the city, thus conferring a financial benefit upon every lot owner, so that the lot owners of the city, as lot owners, will be benefited by the improvement. Such benefits are "special," since the benefits which landowners receive from a public improvement by virtue of their ownership of real properties may be regarded as special, even though the improvement be constructed in part for the benefit of a greater number of persons, all of whom, including the lot owners, are in fact benefited thereby. 2 Page and Jones on Taxation by Assessment, p. 1118. Since the receipt of special benefits, actual or presumptive, by the property to be assessed, is the sole underlying principle of, and the one fundamental justification for, special assessments, there can be no sound reason why all of the lots within a municipality may not be assessed if all of them are specially benefited. The fact that the benefit is common to all of the lots within the city is not a determining factor; it is, indeed, a false quantity in the problem.

This disposes of the questions raised in opposition to the issuance of the writ.

It is ordered that respondent, H. W. Ensign, as superintendent of streets of the city of Dinuba, forthwith execute with the Federal Construction Company the contract referred to in the petition herein, that he approve the bonds referred to in the petition, and that he fix a time for the commencement and completion of the work to be done under that contract; also that petitioner recover its costs.

We concur: WORKS, J.; CRAIG, J.

---

59 Cal. App. 283

## PEOPLE v. PASSAFIUME. (Cr. 883.)

(District Court of Appeal, Second District, Division 1, California. Oct. 5, 1922.)

**1. Criminal law ⟸775(6)—Instruction as to defense of alibi held not prejudicial.**

An instruction regarding the defense of alibi, that, "while you are not to hesitate at giving this as a defense full weight, * * * still you are to scrutinize the testimony offered in support of an alibi with care, that you may be satisfied that a fabricated defense is not being imposed upon you," *held* not erroneous, since it contains no statement of distrust of the defense, or any warning that it should not be fairly and properly considered.

**2. Criminal law ⟸786(2)—Instruction as to accused's testimony held not reversible error.**

An instruction that testimony of the accused was to be weighed and measured according to the same standard as any other witness, *held* not reversible error.

**3. Criminal law ⟸1172(6)—Inapplicable instructions harmless when guilt clearly established.**

Where defendant's guilt was clearly established, the giving of instructions not applicable to the evidence will not be held prejudicial error.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Joseph Passafiume was convicted of assault with a deadly weapon. From judgment of conviction and order denying new trial he appeals. Affirmed.

Guy Eddie, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CONREY, P. J. Defendant was charged with the crime of assault with a deadly weapon with intent to commit murder. He was convicted of assault with a deadly weapon. He appeals from the judgment and from an order denying his motion for a new trial.

That the victim of the assault—a police officer named Delaney—was shot by some person at the time and place described in the evidence is a fact established beyond dispute. The defendant was positively identified by witnesses as the man who did the shooting. His defense was that of an alibi by introducing testimony tending to prove that he was at another place at the time of the assault, and therefore could not have been guilty of this crime.

[1] It is conceded that the evidence is sufficient to sustain the verdict. But it is contended that the defendant was seriously prejudiced by erroneous instructions of the court to the jury. In the questioned instruction concerning the defense of alibi, the court said:

"While you are not to hesitate at giving this as a defense full weight—that conclusive effect to which, when established, it is justly entitled, either as entirely satisfying you of the innocence of the defendant or as creating the reasonable doubt which entitles the defendant to an acquittal—still, you are to scrutinize the testimony offered in the support of an alibi with care, that you may be satisfied that a fabricated defense is not being imposed upon you."

It is claimed that this instruction is similar to that criticized by the Supreme Court in People v. Levine, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631. It differs substantially from

the instruction considered in that case, and also from the instruction condemned by the Supreme Court in People v. Smith, 207 Pac. 518. The instruction given in the present case does not contain the language which was disapproved in those two decisions. It does not contain any statement expressing distrust of the defense in question, or any warning that it should not be fairly and properly considered by the jury, so far as justified by the evidence. The objection urged by appellant is without merit.

[2] The defendant testified as a witness in his own behalf. The court gave an instruction stating the manner in which the testimony of a defendant is to be weighed and measured, viz. according to the same standard as the testimony of any other witness. This instruction is almost precisely in the same words as that considered by the Court of Appeal in People v. Fritz, 201 Pac. 348. In that decision, and in others there cited, it was declared to be bad practice for a trial judge to single out the testimony of any witness, especially if the witness be the defendant, and instruct with particular reference to his testimony. But it was further pointed out that the giving of an instruction in that form which nevertheless correctly states the law is not a ground for reversal of the judgment. Appellant has not here contended that the instruction did not correctly state the law.

[3] The only other points made by appellant relate to two instructions which he claims should not have been given because there was no evidence sufficient to warrant the giving of such instructions. In view of the record, which clearly and satisfactorily establishes the guilt of the defendant, we think that the giving of these instructions, even if they were not applicable to any evidence in the case, cannot be said to constitute prejudicial error.

The judgment and order are affirmed.

We concur: SHAW, J.; JAMES, J.

---

59 Cal. App. 219

## McGOWAN v. BURG BROS. (Civ. 4270.)

(District Court of Appeal, First District, Division One, California. Sept. 28, 1922. Modification Filed Oct. 16, 1922. Hearing Denied by Supreme Court Nov. 27, 1922.)

**1. Vendor and purchaser ⟸116—Purchaser not required to tender performance where vendor fails to perform.**

Under a contract whereby defendant agreed to convey four lots to plaintiff in consideration of plaintiff erecting an apartment house of a certain value within a certain time, plaintiff to execute and deliver in escrow a deed reconveying the property, where defendant actually conveyed only three lots, and agreed to convey the other within 30 days, but failed to do so, tender of performance by plaintiff was unnecessary before suing to rescind the contract.

**2. Appeal and error ⟸1051(1)—Where evidence conclusively showed agency, admission of agent in testimony as to agency was harmless.**

Where, in an action to recover the value of certain property conveyed to defendant on account of the purchase price of certain lots, the evidence conclusively showed that the person negotiating the contract was an agent of defendant, admission of the agent in testimony as to the agency was harmless.

**3. Principal and agent ⟸158—That corporation received no proceeds of agent's fraud held no defense to liability for such fraud.**

That a corporation received no proceeds from fraud committed by its agent is no defense to an action for such fraud.

**4. Exchange of property ⟸8(4)—Evidence held to prove value of property traded to defendant.**

In an action to recover the value of certain real property conveyed to defendant on account of the purchase price of certain lots, evidence *held* to prove the value of the property.

**5. Evidence ⟸474(18)—Evidence by owner as to value of land without qualifying as an expert held admissible.**

In an action to recover the value of certain property conveyed to defendant on account of the purchase price of certain lots, evidence by plaintiff that the market value of the property was $5,000 was admissible, though she did not qualify as an expert, where she testified on cross-examination that the property had cost $3,250 six years prior to the trial, that she had expended further sums for street work, which brought the cost up to $4,300, and that she had been offered $4,500 for the property.

**6. Evidence ⟸474(18) — Qualifications of owner of property to testify as to its value not as strict as those of a stranger.**

An owner of property is not required to prove his qualifications, in order to testify as to the value of property, in the same degree as a stranger.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Katharine McGowan against Burg Bros. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

William T. Kearney, of Richmond, and Edward C. Harrison, of San Francisco, for appellant.

Greene & Sinclair, of Berkeley, and Thos. H. Reed, of Ann Arbor, Mich., for respondent.

TYLER, P. J. This action was brought to recover the sum of $2,000 alleged to have been paid to defendant, together with the

value of certain real property conveyed to it on account of the purchase price of certain real property conveyed to it on account of the purchase price of certain lots. Plaintiff recovered judgment for the sum of $7,000, and defendant appeals.

The case presents the situation of plaintiff being stripped of her possessions, the evidence disclosing the fact that the whole transaction here involved amounted to nothing more than a scheme of actual fraud and deceit, though not so charged; plaintiff contenting herself with merely alleging a failure of consideration for her payment and transfer.

The facts as disclosed by the record show that an unconscionable advantage was taken of plaintiff incompatible with the idea of honesty and fair dealing. They are as follows:

Defendant, Burg Bros., is a corporation engaged in the real estate business; E. J. and C. H. Burg are brothers, and practically control the corporation. In the conduct of such business defendant corporation acquired a tract of land in Richmond, Contra Costa county, for sale and subdivision. The corporation had in its employ for a number of years as a salesman one O. W. H. Pratt. To further the sale of this particular subdivision it instructed Pratt and its other agents, to offer three lots free of charge to any person who would at his or her own expense construct an apartment house thereon at a cost of not less than $18,000. To carry out this scheme defendant secured title from the owner of the tract of three designated lots. A person willing to take advantage of the offer was found, but after installing a foundation he abandoned the project. Thereupon defendant concluded to offer four lots for the same purpose and upon the same terms.

On or about the 16th day of November, 1916, Pratt approached Katharine McGowan, the plaintiff herein, and proposed to her that she take such lots, but misrepresented to her the terms upon which the property could be acquired. He failed to disclose to her that defendant was willing to convey the lots to any one without charge who would make the required improvement, but on the contrary informed plaintiff that the corporation wanted the sum of $7,000 for the property. Pratt had, previous to this time, sold for plaintiff a lot owned by her in Berkeley, for the sum of $1,200, and had received the further sum of $450 from her, which, together with the sale price of the Berkeley lot, he reinvested in two lots situated in Richmond. Pratt informed plaintiff that he had sold these Richmond lots for her, and had in his possession the sum of $2,000, the proceeds received therefrom. Plaintiff was advised by Pratt that defendant would accept this sum, together with a conveyance by her of a piece of property she owned in Los Angeles, and which she valued at the sum of $5,000, in exchange for the four lots. In the form given by Pratt plaintiff accepted the offer, and she thereupon, in pursuance thereof, conveyed to one W. F. Faulkner, sales agent of defendant, this real property in Los Angeles.

In further consummation of the transaction the parties entered into and executed an agreement, reciting that Burg Bros. had conveyed to plaintiff the four lots in question, and that she had executed and delivered to one A. Sutter in escrow her deed reconveying said lots to Burg Bros. upon the understanding that, if she did not, within 120 days from date of the agreement, erect an apartment house of the value of $18,000 upon the property, Sutter, the escrow agent, was to surrender the deed to Burg Bros.

Another condition of the agreement provided that, in the event of a violation by plaintiff of any of its provisions, Burg Bros. was entitled, upon 5 days' notice to Miss McGowan, to take possession of the premises, and the lots were thereupon to revert to them.

Concurrently with the execution of this agreement another contract was entered into between the same parties, which recited that Burg Bros. had actually only deeded to plaintiff three of the four lots specified, and they agreed, within 30 days from January 5, 1917, to deed to her the fourth lot. Thereafter plaintiff made repeated demands upon defendant to make such conveyance in conformity with this agreement. Burg Bros., however, never tendered to Miss McGowan a deed to this lot within the time limited in the agreement, and in fact never tendered the same to her at all, in consequence of which plaintiff refused to go on with her contract.

Thereafter, and on or about the 15th day of May, 1917, notwithstanding its failure to tender this deed, and ignoring the demands therefor by plaintiff, Burg Bros. took down from the escrow agent the deed to the three lots left in escrow by plaintiff, without giving her the 5 days', or any, notice required by the agreement.

Prior thereto, and shortly after the agreements above recited were entered into between the parties, Pratt hurried to Los Angeles and made a quick sale of the property conveyed by plaintiff to Faulkner, defendant's sales agent, for the sum of $3,500, but which he claimed after paying certain expenses netted him but $3,295. At the same time he acquired title to another lot owned by plaintiff in Los Angeles, but which is not involved in this controversy.

[1] Counsel for defendant, while admitting that plaintiff has been defrauded, assigns various grounds for reversal of the judgment. It is first contended that the findings are insufficient to support the judgment for the reason that there is no determination of tender of performance on the part of the plaintiff. A complete answer to this contention is that no tender was required to be made by

her to the escrow agent until the deed to the fourth lot was tendered by defendant. Plaintiff was unable to make a tender of such deed to that agent until she herself had received one from defendant.

[2] Insufficiency of the evidence to sustain the findings is also alleged. It is claimed that the evidence falls far short of proving that Pratt was acting as the agent of Burg Bros. in the transaction of his business with Miss McGowan. At the time of the oral argument of the case it was conceded by respondent that there might be some merit in this contention in so far as it related to the sale of the lot in Berkeley and the lots in Richmond which Pratt had disposed of for plaintiff's account, and in order to prevent further delay counsel for respondent consented to a modification of the judgment in the sum of $2,000, the amount covering these transactions. With reference to the sale of the Los Angeles property, however, the evidence is sufficient to show that Pratt was the agent of defendant. Aside from his testimony upon the subject, even assuming it to have been inadmissible, the sales agent Faulkner and E. J. Burg, the secretary and manager, both testified that Pratt was the agent of the corporation, and the evidence of the entire transaction shows conclusively that he was acting as such in making the sale. The alleged error in admitting Pratt's testimony to this effect was therefore harmless.

[3] Complaint is also made that the evidence also fails to show that any of the money or property here claimed was received by defendant. It is true that E. J. Burg so testified, but, even assuming his testimony to be true, it avails defendant nothing, for, as above recited, both Pratt and Faulkner were the agents of the corporation in the transaction, and the corporation was liable for their acts. Aside from this the evidence shows that Burg was familiar at all times with the entire transaction, and that the corporation did receive at least a portion of the proceeds derived from the sale of the Los Angeles property. There is therefore no merit in this claim.

[4] The same may be said of the further contention that the evidence is insufficient to prove the value of this property. Proof was made of the price which the parties put upon the property in making the exchange. The amount for which the property was sold at forced sale was shown, as was also the estimate of the market value put upon it by plaintiff. It is true that in actions of this character a plaintiff is not entitled to treat the amount for which the property was taken in exchange as a payment, as its value, but is limited in his recovery to the actual market value of the property at the time of the transaction. Blahnik v. Small Farms, etc., 181 Cal. 379, 184 Pac. 661. Nor does the price obtained at a forced sale as here determine such value. Montgomery v. Sayre, 100 Cal. 182, 34 Pac. 646, 38 Am. St. Rep. 271.

[5] We have, however, remaining the testimony of plaintiff herself that the market value of the property was $5,000. While this testimony was objected to and should have been rejected for the reason that the witness had not qualified, no proper foundation having been made to show knowledge on her part upon this subject, counsel for defendant himself cured the error. On cross-examination he brought out the facts upon which plaintiff based her opinion. She testified, in response to his questions, that the property had cost her $3,250 some six years prior to the trial, that she had expended further sums for street work, which brought this cost up to about $4,300, and that she had been offered $4,500 for the same. This testimony on her part as owner shows that she was familiar with its value and qualified to testify upon the subject.

[6] An owner of property is not required to prove his qualifications in the same degree as a stranger. Port Townsend Southern Railway Co. v. Nolan, 48 Wash. 382, 93 Pac. 528.

And, finally, it is contended that the evidence shows that plaintiff repudiated her contract. We do not so understand it. On the contrary it does show beyond question that she at all times during the life of the contract demanded a deed to the fourth lot, which was never tendered to her. We do not deem further discussion of the case necessary.

Other questions have been raised for the first time upon oral argument, a discussion of which would answer no useful purpose. It is plain that defendant breached its contract in not tendering its deed to the lot as it was required under its contract to do, and withdrew its reconveyance from the escrow agent without giving plaintiff the 5 days' notice required to be given her, notwithstanding that she was not in default. A forfeiture cannot be enforced in this manner.

For the reasons given, the judgment is modified by striking therefrom the sum of $2,000, together with the interest on such sum. As so modified, it will stand affirmed.

We concur: ST. SURE, Justice pro tem.; KERRIGAN, J.

59 Cal. App. 259

## PEOPLE v. JO FONG et al. (Cr. 601.)

(District Court of Appeal, Third District, California. Sept. 30, 1922. Hearing Denied by Supreme Court Nov. 27, 1922.)

**1. Criminal law ⟸1159(3) — Conviction on conflicting evidence will not be disturbed.**

Where the evidence was conflicting, and the jury returned a verdict of conviction, it was not within the power of the reviewing court to declare that the jury should have accepted defendants' testimony in preference to that of the people.

**2. Homicide ⟸253(1)—Conviction of murder of Chinaman in conspiracy forming part of tong war sustained.**

In a prosecution for first degree murder of a Chinaman, evidence *held* to support a conviction based upon a finding that the killing was the culmination of a conspiracy previously formed between all the defendants, and which was part of a program mapped out by a Chinese tong in a war with another tong.

**3. Criminal law ⟸372(4)—Evidence of shooting of another held proper to show conspiracy of defendants.**

In a prosecution for murder of a Chinaman by members of a rival tong as part of a tong war, evidence that, at the time of the killing, another member of the tong to which deceased belonged was shot at, *held* proper as tending to show a preconceived and prearranged design on the part of defendants to act in concert in destruction of members of decedent's tong.

**4. Homicide ⟸163(1)—Evidence in tong war killing that defendants were active members of a tong held proper.**

In a prosecution for murder of a Chinese member of the Suey Sing tong by members of the Hop Sing tong, in a conspiracy forming part of a tong war, the district attorney was properly permitted to show that defendants were active members of the Hop Sing tong and occupied official positions therein.

**5. Homicide ⟸163(1) — Whether defendants were highbinders, properly shown in Chinese tong war killing.**

In a prosecution for murder of a Chinaman through a conspiracy forming part of a tong war, where the prosecution had shown that defendants were members of the Hop Sing tong and deceased a member of the Suey Sing tong, and that hostilities existed between the two tongs, it was proper for the district attorney to go fully into the question whether defendants were gunmen or members of the highbinders branch of the Hop Sing tong.

**6. Witnesses ⟸337(4), 372(2)—Cross-examination of defendant held proper as showing interest and to impeach denial of participation in shooting.**

In a prosecution for murder of a member of the Chinese Suey Sing tong by members of the Hop Sing tong, as part of a tong war, it was proper cross-examination for the district attorney to ask one of the defendants as to his connection with the Hop Sing tong, and the highbinders branch of that organization, since, he having denied complicity in the commission of the crime, and the existence of a feud between the tongs having been shown, such cross-examination tended to show interest and also to impeach the statement of defendant that he did not participate in the shooting.

**7. Criminal law ⟸656(3)—Remarks of court reciting evidence already received held not error.**

In prosecution for murder of a member of the Chinese Suey Sing tong by members of the Hop Sing tong, it was not error for the court, in ruling on an objection to a question by the district attorney to defendant whether he belonged to the "binders" society of the Hop Sing tong, to state that the word "binders" is an abbreviation of the word "highbinders" and that evidence had been introduced tending to establish the existence of a tong war, but that it was for the jury to say whether such fact had been proven, the court having the right, in ruling upon objections, to state the evidence already received.

**8. Criminal law ⟸720(9)—Remarks of prosecutor that existence of tong war had been established held supported by evidence.**

In a prosecution for murder occurring in a Chinese tong war, remarks by the district attorney that the existence of a tong war had been established *held* not error, the remarks being warranted by the evidence.

**9. Criminal law ⟸722(3)—District attorney's reference to defendants as gunmen held justified by evidence.**

In a prosecution for the murder of a member of a Chinese tong by members of another tong, a reference by the district attorney, in argument, to defendants as gunmen *held* justified by the evidence, and by the theory of the case advanced by the prosecution.

**10. Criminal law ⟸404(3)—Empty cartridge shells found a week after killing held admissible.**

In a prosecution for the murder of a member of a Chinese tong by members of another tong during a tong war, it was not error to receive in evidence cartridge shells found a week after the homicide in the stove of a gambling house wherein defendant had placed them on the night of the killing, the objection that another might since have placed the shells in the stove going to the weight, rather than to the competency, of the evidence.

**11. Homicide ⟸169(2) — Legitimate reasons for presence of defendants at place of killing properly shown.**

In a prosecution for murder of a member of a Chinese tong by members of a rival tong, who interposed an alibi in defense, evidence by witnesses other than defendants tending to show that they went to the town of the killing on legitimate business *held* admissible.

**12. Criminal law ⟸400(10)—Testimony explaining presence of defendant on scene of crime held not best evidence.**

In a prosecution for murder of a member of a Chinese tong by members of a rival tong,

it was not error to exclude evidence of one of the defendants that he came to the city where the crime was committed in response to a letter requesting him to come and take employment, the letter itself being the best evidence, and no showing being made that it was not in possession of defendant.

**13. Homicide ⟸339 — Exclusion of evidence explaining defendant's presence at scene of shooting, if error, held harmless.**

In a prosecution for the murder of a member of a Chinese tong by members of another tong, where defendants interposed an alibi and sought to explain their presence in the city of the killing, the exclusion of such evidence, if error, *held* not prejudicial, a showing having been made that defendants were upon the scene of the crime.

**14. Criminal law ⟸1156(3) — New trial on newly discovered cumulative evidence discretionary.**

Where a motion for new trial is merely based on the ground of newly discovered evidence which is cumulative of evidence presented, it is within the discretion of the trial court to say whether the motion shall be granted, and such discretion will not be interfered with on review unless clearly abused.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Jo Fong, Gin Wah, Tom Yu, Wong Ai, and Lee Ping were convicted of murder in the first degree, and, from the judgment and a denial of a new trial, each appeals. Affirmed.

Le Compte Davis and A. F. MacDonald, both of Los Angeles, W. E. Davies, of Marysville, and Bond & Deirup, of Chico, for appellants.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The appellants and one Fred Fong were jointly informed against by the district attorney of Yuba county, in the superior court of said county, for the crime of murder, alleged to have been committed on the 30th day of July, 1921, and were jointly tried under said information. At the conclusion of the taking of the testimony on behalf of the people, the information, in so far as it concerned Fred Fong, was dismissed, and said defendant discharged. The jury found each of the other defendants guilty of murder of the first degree, but in each case fixed the punishment at imprisonment in the state prison for life. Section 190, Pen. Code.

Each of the defendants appeals to this court from the judgment of conviction and the order denying him a new trial. All the appeals are based upon the same record, which appears here according to the alternative method.

The party whose life is alleged to have been unlawfully taken by the defendants was a Chinese by the name of Ng Shea Wah, also known as Sing Binney. The homicide occurred at the Chong Wo Company store on the northwest corner of First and C streets in the city of Marysville, near the hour of 10 o'clock p. m. of July 30, 1921. The building in which the tragedy occurred is in the Chinese quarters of said city.

The defendants set up an alibi, claiming that they were not present at the scene of the shooting at the time that it occurred. A vast amount of evidence was received both against and for the defendants. It would subserve no useful purpose to enter into a detailed recapitulation herein of the testimony received. It will be sufficient to state generally the facts which the jury could well have drawn from the testimony as produced by the people and upon which, obviously, they founded their verdicts against the accused. In this connection, it may be stated that counsel for defendants in their opening brief, at the outset thereof, virtually admit that the testimony upon the question of the guilt of the defendants is in pronounced conflict, but declare that the jury would have been equally justified upon the evidence as a whole in finding the defendants not guilty, as they were in reaching the conclusion which is responsible for these appeals, and that for this reason certain rulings of the court, in admitting certain testimony and certain alleged misconduct by the district attorney in his argument to the jury, must be held to have been so prejudicial to the substantial rights of the accused as to require this court to declare that but for such errors a different result would have been reached as to each of the defendants. In the concluding part of their brief, however, said counsel declare, with much emphasis, that "the evidence of the plaintiff [meaning the people], taken at its best, is absolutely insufficient upon which to base verdicts of guilty against certain if not all of the defendants." And this is the point first urged and discussed in their briefs. We may as well at this place express the opinion that, after a careful examination of the testimony, as it is presented here, there is sufficient evidence supporting the verdicts as returned, albeit it is to be conceded there is a positive and direct conflict upon this proposition between the testimony given in behalf of the people and that presented by the defendants in support of their asserted alibi.

The facts as revealed by the testimony of witnesses introduced by the people may thus be stated: The deceased and the defendants were members of rival tongs or Chinese societies, the former of the Suey Sing tong and the latter of the Hop Sing tong. The headquarters of the Marysville branch of the Hop Sing tong were in a building adjoining the store in which the deceased was killed. On the night of the 30th of July, 1921, between the hours of 9 and 10 o'clock, the sher-

iff of Yuba county had occasion to visit the Chinese quarters of the city of Marysville on official business. He took his seat on a bench, with two Chinese who were acquaintances of his, in front of the Hop Sing building. He remained there for about 20 or 25 minutes, engaged in conversation with the Chinese sitting beside him. During that time Jo Fong, one of the defendants, was seen to come from the Hop Sing tong building to the sidewalk and stand and look about for a short time and then return to the building. Jo Fong repeated this conduct some three or four different times while the sheriff was sitting on the bench in front of said building. Shortly before 10 o'clock, whether prior to or after the sheriff left the place where he had been sitting and engaged in conversation with the Chinese does not clearly appear, the deceased stepped into the store of Chong Wo, which, as we have seen, adjoins the Hop Sing building. After the sheriff had left Chinatown, Jo Fong stepped out of the Hop Sing building and went to the store of Chong Wo and looked in and thereupon retraced his steps to the Hop Sing building, went inside and immediately returned to the sidewalk, followed by the other defendants. Tom Yu, Wong Ai, and Lee Ping took a position on the sidewalk near said store and Jo Fong and Gin Wah stepped to the door of the store and immediately began shooting at the deceased. At the time this occurred there were in the store Chin Yook, the manager, Mrs. Wy Lung, Wong Shea, and the deceased, Ng Shea Wah, who, when attacked, was engaged in counting some money which he desired and intended to deposit with Chin Yook. Some four or five shots were fired, three of which entered the body of the deceased, one passing through the upper lobe of the right lung and another entering at the juncture of the clavicle and the breast bone and shattering "the inner end of the clavicle, the carotid and jugular vessels, and piercing the right lung and making its exit to the right three inches from the tenth dorsal vertebræ. The death of Ng Shea Wah followed almost instantly. The wounds were inflicted by Luger bullets from 9 mm. Luger shells. Wong Shea received a bullet wound in the neck and also one in the leg, but these wounds were not fatal. Chin Yook positively identified Jo Fong and Gin Wah as two persons who entered the store together, with weapons in their hands. He testified, though, that as soon as the shooting began he dropped down under the counter and that he saw Jo Fong firing his weapon but did not see Gin Wah do any shooting. Mrs. Wy Lung witnessed the shooting and testified that Jo Fong and Gin Wah did it. Immediately after the shooting ceased, Jo Fong and Gin Wah hurriedly left the store and with the revolvers still in their hands ran toward the door of the Hop Sing tong building at 113½ C street. Gin Wah was in the lead and got inside the door first. Jo Fong ran a few doors further on and then ran back to the Hop Sing building and attempted to open the door through which Gin Wah had just previously passed, but found it locked. He thereupon, so a witness testified, ran to No. 115 C street to the door of Hong On Wo and went in, thus disappearing from the street.

One Wah Poon, a member of the Suey Sing tong, just before Jo Fong and Gin Wah made their appearance in the store of Chong Wo, left said store, where he had been for some minutes, and started east on C street. Just as he was about to pass Tom Yu, Lee Ping, and Wong Ai, who were standing on the sidewalk near the Chong Wo store, the sound of the shooting was heard. Wah Poon started to run, when he was shot at, according to his own testimony, by Wong Ai. He ran down C street toward the levee, and, according to the testimony of Wah Poon and other witnesses, he was pursued by Tom Yu and Lee Ping, who shot at him several times, wounding him in one of his legs. Wah Poon fell to the ground and the pursuing Chinese fled in another direction. It is in evidence that immediately after the shooting Wong Ai ran into a gambling house on C street near the Hop Sing building and took the empty cartridges from his revolver and threw them into a stove; that he reloaded his revolver and said he was going to kill "those Suey Sing s—n of b—ches." It should here be stated that the objection of the defendants to this testimony was sustained as to all the defendants except Wong Ai and that the objection to the testimony relating to the pursuit of Wah Poon was sustained as to all the defendants except Tom Yu, Wong Ai, and Lee Ping.

Shortly after the shooting, the officers found Jo Fong sitting between some barrels and the wall of a building in an alley back of the Quong Hop Wo store, between First and Second, C and D streets. The barrels shielded Jo Fong from observation, but a careful search revealed his presence to the officers, and he was then placed under arrest. The officers also found on top of one of the barrels a .38 Smith & Wesson special blue seal revolver, which was introduced in evidence and identified by the officer making the arrest as having been the weapon he found at that time. The weapon was fully loaded. That same night and a short while after the shooting Wong Ai was arrested in the store of Sing Fat, near the corner of Third and C streets. The officers then went to the Hop Sing building and found the door at the head of the stairway locked. A Mr. Wallace was with the officers and opened the door with a pass key. The officers then passed through several rooms in the building and finally came to a room the door leading into which was locked. They knocked, but no response was made, and the officers then "kicked in"

the door and found the room in darkness. Searching the room, however, they found Gin Wah and Lee Ping, fully dressed, sitting on a "board arrangement" made for a couch, and placed them under arrest. They found no weapons on these defendants or in the room. The officers went to the Quong Hop Wo Company store about 12 o'clock at night. They knocked at the back door but received no response. Then one of the officers unlocked the door with a pass key. They passed through the kitchen to another room and knocked on the door but received no response. It was a small room used for sleeping purposes. In that room they found Ah Lee with three or four other Chinese. In the adjoining room they found the defendant Tom Yu with two other Chinese, and Tom Yu was placed under arrest. A search was made of the room and they found a grip containing a 7 millimeter Luger revolver, a .32 automatic Colts revolver and a package of 9 millimeter cartridges, which, however, cannot be used in a 7 millimeter revolver. Just outside of the door of the room in which Tom Yu was found the officers picked up a .32 caliber Smith & Wesson special revolver.

The above statement of the facts is, as before suggested, taken from the testimony of witnesses, several of whom testified to having been eyewitnesses to the tragedy and other circumstances immediately connected therewith. There were in addition to these facts a number of corroborating circumstances brought out by evidence produced by the people. Among these reference may be made to the testimony of a Chinese witness that, about a week after the homicide occurred, he went to the gambling house and examined the stove into which witnesses had testified Wong Ai had thrown some empty cartridges, and therein found several empty shells, which were introduced in evidence.

As already stated, the defendants each claimed and testified that, although in the city of Marysville on the night of the homicide, he was not present at the Chong Wo store when the shooting took place, but was at some other place in said city. Wong Ai stated that, at the time of the shooting, he was not at the store of Chong Wo, but was in the building at First and C streets in which he at that time resided. He said there were five other Chinese in the room with him and that they heard the shots fired and that one of the Chinese immediately closed the front and the rear doors to the building. After that all of them went back to the room in which they were sitting when the shots were fired and sat down. He stated that one of the Chinese present with him at the time telephoned for an automobile and that the machine drove up to the building and he with the other Chinese were driven to the Sing Fat store. He admitted having a revolver on him at the time of his arrest, but stated that, having heard the shots and not knowing what the shooting meant, he put the revolver on his person just before getting into the automobile.

Jo Fong stated that he was a resident of Colusa, but went to Marysville on the 28th day of July, 1921, in response to a letter from a Chinese residing in Sacramento, Lee Gnin by name, requesting Fong to meet him (Lee Gnin) in Marysville on that day. He admitted having been in Marysville on the night of the 30th of July, 1921; that early in the evening of the 30th he went to the electric railway station near the Western Hotel, Second and D streets, in the city of Marysville, to see if his friend had arrived from Sacramento, and that upon going to the station he learned that the train had already passed through. He then, so he stated, started back towards Chinatown on Second street, and walked as far down as C street, when he observed a personal acquaintance by the name of Jo Tuck standing in front of a Japanese store on the opposite side of Second street; that he hailed Jo Tuck and at the same time crossed Second street and stood talking with Tuck until the shots were heard and the firing had ceased; that he thereupon walked up as far as Fourth street and returned "home by way of an alley"; that he attempted to get into his place of abode by way of a back door, but the door was locked; that he thought he heard some noise at the door and "did not know whether they were Americans or Chinese coming through the door," so then "I took the gun out of my pocket and put it in a barrel and put a brick on it. Then it happened two policemen came out of that door, and I ducked behind the barrel." He denied ever owning or using a Luger revolver, and declared that he carried the weapon that he attempted to hide in the barrel because he had money and valuables on his person and was apprehensive that some one might try to rob him.

Gin Wah testified that he had been a resident of Colusa about three months before the time of the trial, and that he went to Marysville on the 27th of July, 1921, and that he was there on the night of the homicide; that his object in going to Marysville was to be present at the election of a president of the Hop Sing tong. At the time the shooting took place, he said, he was in the Hop Sing tong building, sitting out on the upper porch with several other Chinese. When the firing began he and the other Chinese stood up and looked over the porch toward the direction from which the sound of the shots proceeded. He said he saw two men run out of the Chong Wo store but that he did not know who they were.

The defendant Lee Ping stated that he resided at San Jose, and in the month of July, 1921, went to San Francisco, and from there to Marysville, arriving at the latter place

about 1 o'clock p. m. on the day of the homicide. On arriving in Marysville he went to a butcher shop conducted by a Chinese named Wong and a relative of Tom Yu. He and Tom Yu were together at the butcher shop for a while and then went to the Hop Sing tong headquarters, and that he was with Tom Yu, Gin Wah, and other Chinese sitting on the upper porch of the Hop Sing building when the shooting occurred. He stated that he never was in Chong Wo's store and that he did not have a weapon on him that night.

Tom Yu testified that his home was at 140 Waverly place, San Francisco, that he was a cook by occupation, and that he, in company with Lee Ping, left San Francisco on the 30th of July, 1921, and went to Marysville, arriving there a little after the noon hour. He stated that he went to Marysville in response to a letter from one Wong York asking him to go to that city to work for him. He stated that he and Lee Ping early in the afternoon went to the Hop Sing tong building and were out on the upper porch with other Chinese for a short while; that thereafter he went to Quong Hop Wo's place, leaving Lee Ping, Gin Wah, and another Chinese on the porch of the Hop Sing tong building. He had a drink of tea at Quong Hop Wo's, and, being tired from the long ride that he had had that day, retired to bed a few minutes before 10 o'clock; that after he had lain in bed for a few minutes he arose and stood by a table smoking, when he heard a number of shots fired; that one Toy Din, who was also in the building, closed the door and he with other Chinese remained in there for about half an hour, after which he left the building and went to see his friend and cousin, Wong York, at Fong On's. He found Fong On's place closed, and he finally returned with some other Chinese acquaintances, whom he had met on the street, to the Quong Hop Wo building, where he was arrested.

The testimony of each of the defendants was corroborated by the testimony of other witnesses. As to the circumstance of the pursuit and shooting of Wah Poon, there was testimony introduced by the defendants to the effect that the parties who assaulted said Wah Poon, after the assault was committed, ran to an automobile stationed near First and D streets, jumped into it, and that the machine was driven rapidly across the bridge spanning the Yuba river.

[1] It will thus be noticed that there is a decided conflict in the evidence upon the ultimate question in the case. It was, of course, a matter entirely with the jury to decide upon which side the truth prevailed. It was within the exclusive province of the jury to determine the question of the truth or the falsity of any testimony brought to their attention, and the verdicts returned stand as indubitable evidence that the jury believed the witnesses for the prosecution and disbelieved the testimony offered in support of the alibi set up by each of the defendants. Obviously, this court cannot say that the jury reached an erroneous conclusion from the testimony. In other words, it is not within either the province or power of this court to declare that the jury should have accepted the testimony presented by the defendants in support of their claim of an alibi in preference to the testimony presented by the people tending to establish their guilt. But it is argued that the testimony fails to show that Tom Yu, Wong Ai, and Lee Ping were in any way connected with the commission of the crime. It is true that it is not shown by the testimony that the defendants named took part in the actual act of killing the deceased. But, as shown, there is testimony that Jo Fong, after having looked into the store of Chong Wo, immediately went into the Hop Sing building and returned to the sidewalk, followed by the other defendants, one of whom accompanied him to the door and took part in the shooting and the other three, armed with weapons, stood on the sidewalk near the door leading into the store, as if on guard.

[2] From this testimony, and the further testimony that a Suey Sing man who had just left the Chong Wo store was pursued and shot at by Tom Yu, Wong Ai, and Lee Ping, and wounded by a bullet from a pistol in the hands of some one of the three, the jury could have justly inferred, as undoubtedly they did infer, that the killing of Ng Shea Wah was the culmination of a conspiracy previously formed between all the defendants. Indeed, no one could read the entire testimony in this case without coming to the conclusion that there was on in the city of Marysville what is commonly known as a tong war between the Hop Sing society and the Suey Sing society, and that the killing of Ng Shea Wah and perhaps the intention to kill other members of the Suey Sing tong were part of the program mapped out by the Hop Sing tong men. The jury could have regarded as a circumstance of singular importance as in proof of a conspiracy between the defendants to take the life of Ng Shea Wah the conduct of Jo Fong, during the time that Sheriff McCoy was sitting on a bench in front of the Hop Sing building, in stepping out several different times from said building to the sidewalk, remaining in front but a second or so and then returning to the inside of said building, and then, after the sheriff had left the bench, going to Chong Wo's store, looking in and thereupon returning into the Hop Sing building and immediately going back to the sidewalk and thence to the Chong Wo store, followed by the other defendants.

[3] Of course, none of the defendants was on trial in this case for the assault upon Wah Poon, but the fact that said assault was

made upon a member of the Suey Sing society by three of the men who immediately followed Jo Fong from the Hop Sing building after the latter looked into the Chong Wo store, and that it occurred almost simultaneously with the shooting of Ng Shea Wah, was important and proper in that it tended in some measure to show a preconceived and prearranged design on the part of the defendants to act in concert in the destruction of the life of the deceased or any other member of the Suey Sing tong with whom they might come in contact. The fact is emphasized, however, that while a number of weapons of a different make were found either in the possession of the defendants or in the rooms in which they were apprehended after the homicide, no 9 mm. Luger revolver, by means of which the killing was accomplished, was found in the possession of the defendants or in the rooms in which they were arrested. But this was a matter for the jury to consider and account for in their deliberations upon the evidence. The jury had the right to and probably did conclude that the weapon with which the homicide was committed was disposed of by the party using it after he had fled from the scene of the tragedy.

The remaining assignments involve attacks upon certain rulings whereby certain evidence was allowed to go before the jury. These will now be considered.

[4] 1. Upon the theory that the shooting of the deceased was the outcome of a feud existing between the Hop Sing tong and the Suey Sing tong, the district attorney sought and was permitted to show that the defendants were members of the first-named tong and were active in the prosecution of its general purposes, it having been shown that the deceased was a member of the Suey Sing society. As before observed, there was received into the case some testimony which afforded the inference that the two tongs were previously to, and at the time of, the homicide hostile to each other to a fighting point. The very fact of the killing of a member of the Suey Sing tong by members of the Hop Sing tong, and the further fact that Wah Poon, also a member of the Suey Sing tong, was pursued and shot by members of the Hop Sing tong at the very time the homicide occurred in Chong Wo's store, themselves constitute very strong circumstances as in proof of the existence of a feud between the two tongs. Furthermore, the statement by Wong Ai that they would kill all Suey Sing men, referring to them by an opprobrious epithet, while not evidence as against the other defendants in so far as the proof of the crime charged in the indictment was concerned, was, nevertheless, some evidence of the fact that a general war was on at the city of Marysville between the two Chinese societies named. And there was other testimony further tending to show that a very bitter hostile feeling existed between the two tongs. It was therefore proper that the district attorney should have been permitted to show that the defendants were active members of the Hop Sing tong and occupied official positions therein, as was true at least as to one of them. But it is objected that the district attorney was allowed to go so far as to question witnesses as to whether the defendants were gunmen or members of the highbinders branch of the Hop Sing tong. One of the witnesses for the prosecution, a member of the police force of San Francisco, testified that he had seen one or two of the defendants quite often, one being the defendant Jo Fong, at the meeting of the "binders" organization of the Hop Sing tong in San Franscisco, by which undoubtedly he meant "highbinders" organization. It is now and has been for many years a matter of such common notoriety that there are what are known as Chinese highbinders that the definition of the term "highbinder" has been given in Webster's New International Dictionary in part as follows:

"A more or less loosely organized band of Chinese criminals in the Chinese quarter of an American city, who are frequently hired as bravos to commit assassinations or other outrages."

It is also equally a matter of common knowledge that the Chinese tongs generally maintain in connection with their organizations "highbinder branches" thereof composed of Chinese who are willing to execute orders made by the tongs for the killing of members of hostile tongs whenever differences arise between them, and such extreme measures are conceived to be necssary by the tongs to accomplish in full their purposes.

[5, 6] We can, therefore, perceive no good reason why the prosecution in this case, having shown that the defendants were members of one of these Chinese tongs and the deceased a member of another, and that hostilities existed between the two tongs, should not have been permitted to go fully into the question whether the defendants were or were not professional highbinders or men who were professionally engaged in the business of carrying out such infamies of the tong to which they belonged as they were required or employed to do by such tong. A specific objection is made, however, that the questioning of Jo Fong by the district attorney as to whether he was a member of the Hop Sing tong and of the highbinders branch of that organization, was not cross-examination. The defendant testified in chief that he was not present at the scene of the homicide at the time it occurred and declared that he had no connection whatever with the commission of that act. This amounted to an explicit denial of his guilt

of the crime with which he was charged. We think that, in view of the testimony as to the existence of a feud between the tongs here in question, as above explained, and in view of the further fact that the defendant denied his complicity in the commission of the crime charged, it was proper cross-examination for the district attorney to ask said defendant as to his connections with the Hop Sing tong and whether he was a member of and active in the "binders" branch of that organization. The cross-examination was pertinent as tending to show interest and also as tending to impeach the statement of Jo Fong that he was not present at and participated in the shooting. People v. Rozelle, 78 Cal. 84, 20 Pac. 36; People v. Fong Ching, 78 Cal. 169, 20 Pac. 396; McGarry v. People, 2 Lans. 227, 19 Am. Rep. (footnotes) 348; State v. Bartmess, 33 Or. 110, 54 Pac. 167, 171; State v. Gallo, 18 Or. 423, 23 Pac. 264; People v. Fealy, 33 Cal. App. 605, 165 Pac. 1034.

2. It is next contended that the court and the district attorney were guilty of misconduct in the presence of the jury because of certain remarks made by those officers, the former in ruling upon the objection by counsel for the defendants to the testimony last above referred to and the latter in his argument before the jury. The court in ruling upon the objection by counsel for the defendants to the question propounded on cross-examination by the district attorney to Jo Fong whether he (said Fong) belonged to the "binders society of the Hop Sing tong on the 30th of July, 1921," stated that "the word 'binders' is an abbreviation of the word 'highbinders,' which is the word in common use and which is commonly understood." The court further said that there had been evidence introduced tending to establish the proposition that a so-called tong war existed in Marysville on the night of the homicide, but that it was for the jury to say whether that fact had or had not been proved. Counsel excepted to this statement by the court and the latter proceeded:

"I could base the claim upon the statements and admission of counsel themselves in court, as to one circumstance, if I desired to argue the matter with counsel, but I am not passing upon the ultimate fact as to whether or not it has been proven. That is for the jury to say. I say there has been evidence, circumstantial evidence as well as some other evidence, to establish the fact that at the time of the shooting there was an outbreak which has been described as a tong war between the Hop Sing and the Suey Sing societies in the City of Marysville. Whether it was or not, that is a matter for the jury to determine."

[7] First taking up this particular assignment, we have to say that we see nothing in the remarks of the court which were improper or which were calculated wrongfully to prejudice the rights of the accused. A trial court has the right—indeed, it is often necessary to do so, when ruling upon objections to proffered evidence—to state the evidence which has already been received. And this is all that the court in this instance did, taking the pains, however, to repeatedly declare that whether the fact to which the evidence stated by him related was or was not proved was a matter for determination by the jury. The remarks by the district attorney objected to by counsel for the defendants were made while that officer was arguing the case to the jury, and were to the effect that "the first great fact in this evidence is that the gunmen from other towns came to the local headquarters." The prosecutor went on to say that it had been proved conclusively that there was a tong war and "that a tong war did break out on that night," referring to the night of July 30, 1921; that that fact was established by the circumstance of the shooting by Hop Sing tong men of a Suey Sing tong man on the street at about the time of the killing of Ng Shea Wah, referring to the shooting of Wah Poon. He then proceeded to say that, if the jury desired to say "now and forever there shall be no more tong wars in the city of Marysville, God knows this evidence is overwhelming and you can put a stop to tong wars," etc.

[8, 9] We shall not attempt to follow the argument of counsel against the propriety of the remarks of the district attorney as above indicated. It is sufficient to say that we are of the opinion that the district attorney in making the criticised remarks was well within his rights as the prosecutor of the case. The evidence, as has been shown, clearly warranted the theory that a tong war existed in Marysville on the night of the 30th of July, 1921, and that the tragedy herein involved was the direct result thereof, and the prosecuting attorney was authorized to descant upon that theory, amplify it, and present it to the attention of the jury as fully as he thought it necessary to do so, so long as he did not transcend the record or lug thereinto any fact or facts which were not shown or reasonably inferable from the testimony. His reference to the defendants as "gunmen" was undoubtedly justified by the fact as it was established by the evidence. And the theory advanced by him that they were professional "gunmen" of the Hop Sing tong was and is clearly deducible from the evidence as a whole, and it was therefore not improper for him to advance that theory in his argument to the jury.

[10] 3. It is objected that the court erred in receiving in evidence the cartridge shells which were, about a week after the homicide, found in the stove in the gambling house and which, it was shown, were placed therein by the defendant Wong Ai on the night of the killing of Ng Shea Wah. The argument presented here against the legal

propriety of the ruling admitting in evidence said shells is that it was not shown that the circumstance of finding the shells in the stove was in any way connected with the defendant Wong Ai; that so long a time elapsed from the time that Wong Ai was seen to have put shells in said stove and the time of finding the same therein, that other persons, who were shown to have had access to the place where the shells were found, might have placed them in the stove. We think the circumstance constituted competent evidence and that the objection thereto goes to the weight rather than to the competency thereof. It was for the jury to determine, upon all the other circumstances connected with the circumstance of the placing of the shells in the stove and the finding of them therein one week after Wong Ai had placed shells in said stove, whether he did place said shells in said stove, and if they so found, to pass upon the weight or significance of the fact as one among such others as in their judgment tended to connect Wong Ai with the commission of the crime. It may here be stated that the court allowed the testimony of this circumstance as to Wong Ai, but sustained an objection to it as to the other defendants.

[11-13] 4. It was sought to be shown through the witness Wong York, the owner of a butcher shop at the city of Marysville, that some days prior to the homicide he addressed a letter to Tom Yu, at San Francisco, where the latter resided, and requested him to come to Marysville and take employment in his (Wong York's) butcher shop, and that, in response to that letter, said defendant went to Marysville on the day of the homicide, arriving there early in the afternoon of said day. The court sustained the objections of the district attorney to that testimony. The theory of the prosecution seems to be that the defendants, who resided elsewhere than in Marysville, went to that city for the express purpose of committing the crime charged in the information, and we think that testimony by witnesses other than the defendants themselves tending to show that the defendants went to Marysville on legitimate business at about the time of the homicide would have been proper, but in this particular instance the purported letter would have been the best evidence of the fact which Wong York was asked to testify to, and there is no showing that the letter was not in the possession of the defendant Tom Yu at the time of the trial and at the time this proof was sought to be made. Nor is there any evidence of the contents of the letter, and it is therefore impossible for us to say whether the letter really contained the request claimed for it by the defendants or was a letter upon some other subject. At any rate, it appearing that the defendant was in Marysville that day, and there being testimony that he was one of the parties who went with Jo Fong and Gin Wah to the place where the homicide occurred, we think the ruling of the court, even if erroneous, was without prejudice.

5. We have in effect disposed of the point that the court erred in allowing testimony describing the pursuit and shooting of Wah Poon. The contention of the defendants is that the testimony related to an independent and different crime from that with which the accused were charged. As before stated, the two transactions occurred almost at the same instant of time and were participated in by the persons who followed Jo Fong from the Hop Sing building to the place where the shooting occurred, the three defendants who attacked Wah Poon being stationed on the sidewalk near the store, from which circumstance the jury were entitled to draw the inference that the two occurrences were a part of the same general scheme of the Hop Sing defendants to attack Suey Sing men.

6. The point under this subdivision relates to the alleged misconduct of the district attorney in his argument to the jury. It is not necessary to specifically consider this point, inasmuch as what we have had to say above, relative to the charge that the district attorney was guilty of misconduct in his argument, is equally applicable to the point now under consideration.

7. The last point is that the court erred in not granting the motion of the defendants for a new trial on the ground of newly discovered evidence. The motion was made upon the affidavit of one of the attorneys for the defendants, and therein it was stated that one Edward Oscar Heinrichs of Berkeley, a firearm expert, had been, prior to the commencement of the trial of this case, called to the city of Marysville by the district attorney of Yuba county for the purpose of having him examine the Smith & Wesson revolver found in the possession of Jo Fong at the time of his arrest and which was introduced in evidence at the trial, and determine whether the same, at the time of the homicide, bore any evidence of having recently been discharged; that, notwithstanding that said Heinrichs did go to Marysville and make the examination requested by the district attorney, the latter officer did not subpœna and introduce him as a witness in the case; that the affiant learned after the trial of this action that said Heinrichs, upon examining the said Smith & Wesson revolver, informed the district attorney that if he were called as a witness in the case he would be compelled to testify that said weapon had never at any time been fired since it was cleaned; that said Heinrichs told affiant that when he learned that the case had been tried he was surprised that the district attorney did not call him as a witness; that affiant requested said Heinrichs to make an

affidavit involving the facts here set forth, but that Heinrichs refused to do so on the ground that he did not feel it would be ethical for him to make such affidavit; that if a new trial be granted in this case the defendants will upon a retrial subpœna and have present in court and so produce the testimony of said Heinrichs.

[14] The defendants introduced certain expert witnesses who testified that the said Smith & Wesson revolver bore no evidence of having been recently fired at the time it was taken possession of by the officers on the night of the homicide. The evidence of Heinrichs would have been merely cumulative, and it is well settled that, where a motion for a new trial is merely based upon the ground of newly discovered evidence which is cumulative of evidence which was presented at the trial, it is entirely within the discretion of the trial court to say whether such motion shall or shall not be granted, and, where in such case such court has refused to grant it, the reviewing courts will not interfere with the order, unless it clearly appears that there has been an abuse of discretion. We have examined carefully all the points urged for a reversal, and our conclusion is that the verdicts should not be disturbed.

Accordingly, the judgments and the orders appealed from are affirmed.

We concur: FINCH, P. J.; BURNETT, J.

190 Cal. 88

## WATTERSON v. OWENS RIVER CANAL CO. (L. A. 6700.)

(Supreme Court of California. Nov. 10, 1922. Rehearing Denied Dec. 7, 1922.)

**1. Appeal and error ⊂=1210(1)—Reversal of judgment remands cause for new trial.**

The effect of the reversal of a judgment on appeal was to remand the cause for a new trial.

**2. Limitation of actions ⊂=130(2)—New action cannot be begun after reversal where limitations have run, where plaintiff by amending complaint had been granted substantially same right.**

After reversal of a judgment on appeal on return for retrial, where plaintiff was permitted to amend his complaint and was thus granted the same rights which he could have obtained by commencing a new action under Code Civ. Proc. § 355, which provides that a new action may be begun within one year after reversal, and having been granted the right and relief and proceeded to trial on his amended complaint, and having failed to establish cause of action asserted by it, he cannot, after the statute of limitations has run on his cause of action, avail himself of section 355, by commencing a new action on the identical cause of action embraced in his former suit.

**3. Judgment ⊂=345—Judgment of abatement of action set aside only on motion for new trial or on application under statute.**

A judgment of abatement is a final judgment and terminates an action, and the trial court has no authority to set it aside, or to revive action, except on motion for new trial or on application for relief under Code Civ. Proc. § 473.

In Bank.

Appeal from Superior Court, Inyo County; William D. Dehy, Judge.

Action by T. G. Watterson against the Owens River Canal Company. From judgment for defendant, and an order denying motion to set aside judgment and permit plaintiff to file an amended complaint, plaintiff appeals. Affirmed.

See, also, 42 Cal. App. 372, 183 Pac. 816.

Richard S. Miner and P. W. Forbes, both of Independence, for appellant.

L. C. Hall, of Bishop (A. H. Swallow, of Bishop, of counsel), for respondent.

RICHARDS, Justice pro tem. There are two appeals presented for our consideration in this case: One an appeal from the judgment; the other appeal from an order refusing to set aside the said judgment and permit the plaintiff to file an amended complaint. A review of the history of the litigation is essential to the proper determination of both appeals. The litigation arose out of the construction, alteration, and repair of the Owens river canal in the county of Inyo. A written contract had been entered into between the defendant herein and one Snyder, for the performance of said work for the stipulated price of $19,000; said Snyder was required by the terms and conditions of said contract to furnish an undertaking for the due performance of said work, and the plaintiff herein became his surety upon such undertaking. The contract with Snyder was not recorded. Snyder, having failed to perform, the plaintiff took over the work remaining to be done under said contract and completed the same. Having done so, he undertook to assert a lien for the amount due for his said work under the provisions of section 1183 of the Code of Civil Procedure, providing that, in the absence of the recordation of such a contract it—

"shall be wholly void, and no recovery shall be had thereon by either party thereto; * * * and in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof."

In his complaint for the foreclosure of said lien, the plaintiff alleged that, after the failure of said Snyder to perform said contract, an agreement had been entered into between the plaintiff and the defendant, by the terms of which the former was to proceed to complete the work done under said contract, and said plaintiff demanded a personal judgment against the defendant for the amount expended by him in completing said work under said new agreement between himself and the defendant and for the foreclosure of his lien under said section of the Code. The plaintiff recovered a judgment in his favor in said action. The defendant took an appeal from such judgment, which appeal came before the District Court of Appeal for the Second district for hearing and was, on July 29, 1914, determined by said court, at which time said judgment was reversed (Watterson v. Owens River Canal Company, 25 Cal. App. 247, 143 Pac. 90); the court holding that the plaintiff as the surety of said Snyder, and standing in his place in the performance of said contract was not entitled to claim or assert a lien under the provisions of section 1183 of the Code of Civil Procedure any more than his principal, Snyder, would have been. The court further stated that the plaintiff's right of recovery, if any, for the value of the labor and materials furnished by him in the completion of said work, was merely a right to recover a personal judgment therefor under like limitations as would have been binding upon his principal, Snyder, and that he would be limited in such recovery by the contract price named in the written contract, after

adjustment of all additions and deductions due to changes in the work as it progressed, and also after allowing the proper credits for payments made by the owner.

A petition for rehearing was denied by this court September 26, 1914, and the remittitur upon said appeal was filed in the superior court on October 1, 1914. Thereafter, and on March 13, 1915, the plaintiff moved the trial court for leave to file an amended complaint in said action, setting forth with much of detail therein in several counts the alleged agreement between the plaintiff and the defendant for the completion of said work after the abandonment by Snyder of the said contract. The motion of the plaintiff for leave to file this amended complaint was denied on March 16, 1915. On the 24th day of April, 1915, the plaintiff again moved to amend his former complaint by striking out those portions thereof which referred to his appeals and foreclosure of a lien under the provisions of section 1183 of the Code of Civil Procedure. His complaint as thus amended consisted in the plaintiff's asserted right to recover a personal judgment upon the basis of his alleged agreement with the defendant, by the terms of which he was to complete said work. It was upon the complaint as thus amended that the action was brought to trial a second time, before a jury, in the course of which the plaintiff presented certain evidence as to the existence of said subsequent agreement between himself and said defendant for the completion of said work. At the conclusion of the plaintiff's case the defendant moved for a nonsuit upon several grounds, among which was the ground that the evidence introduced by plaintiff in support of his alleged cause of action wholly failed to prove the existence or making of any contract by and between the plaintiff and the defendant, as alleged in the plaintiff's complaint and upon which his cause of action was based. The trial court granted the defendant's said motion for nonsuit, and in addition thereto instructed the jury to return a directed verdict in the defendant's favor, and, in accordance with such instruction, the jury returned such verdict, and a judgment in favor of the defendant was entered thereon. An appeal was taken by the plaintiff from this judgment to the District Court of Appeal for the Second district, and upon hearing therein said judgment was affirmed on July 24, 1919. Watterson v. Owens River Canal Co., 42 Cal. App. 372, 183 Pac. 816.

On June 18, 1915, within one year after the filing of the remittitur upon his first appeal, above noted, reversing the original judgment in the case, and a few days before the taking of his second appeal, the plaintiff herein commenced the present action by the filing of a complaint containing several counts, for work and labor alleged to have been performed for the defendant and for materials furnished at its special instance and request. In order to avoid the plea of the statute of limitations and to attempt to bring the case within the provisions of section 355 of the Code of Civil Procedure, the plaintiff set forth in his complaint herein the fact of the commencement of the prior action and in general terms the nature of said action and the history of the proceedings therein up to the time of the commencement of this action, including the fact of the reversal of the said former action upon the first appeal therein. He then proceeded to aver that said first action—

"involved and still involves the same identical work, labor, materials, and money which are mentioned and involved in the present action and that the same identical cause of action set out in the complaint in said first action is also set out in the complaint in this action."

To this complaint the defendant interposed a demurrer upon the general ground, and also upon the ground that there was another action pending between the same parties for the same cause of action. The trial court sustained this demurrer on the special ground, with leave to amend, whereupon an amended complaint was filed embracing substantially the same allegations concerned in the prior action as those contained in the original complaint, and particularly the averment that said first action involved the same identical work, etc., which are mentioned and involved in the present action, and that the same identical cause of action set out in the complaint in said first action is also set out in the amended complaint in this action. To this amended complaint the defendant again interposed a demurrer upon the same grounds, which the trial court again sustained. Thereafter the plaintiff moved the court for leave to file a second amended complaint embracing practically the same allegations as those contained in the two former complaints, and the same averment as to the identical nature of the present action in relation to the former action. The motion to file this second amended complaint was denied by the court, which at the time of doing so made a minute order "that the action abate and that a proper judgment be entered thereafter." The above order was made on July 3, 1919. On August 26, 1919, the court entered a judgment of dismissal of the present action. On October 22, 1919, on motion of the plaintiff, the court set aside said judgment of dismissal and in place thereof ordered a judgment of abatement of the present action, and such judgment was entered in accordance with said order on January 31, 1920. It is from said judgment of abatement that the first of these appeals has been taken. On March 11, 1920, and prior to taking said appeal, the plaintiff herein moved to set aside the judgment of abatement thus entered, upon the ground

that the former action, which had been pending at the time of the commencement of this action and the time of filing or proposed filing of the several complaints herein, had been terminated by the filing of the remittitur in the second appeal therein on September 24, 1919, showing the affirmance of the judgment of nonsuit therein. The plaintiff also at the same time made a motion for leave to file a further amended complaint in the present action. The trial court denied both of said motions, and it is from its order in that regard that the second of these appeals has been taken.

Upon his appeal from the judgment of abatement, based, as it was, upon the pendency of the former action, the appellant insists that under the express provisions of section 355 of the Code of Civil Procedure he was entitled to commence and maintain the present action, notwithstanding the pendency of the former action. Said section provides:

"If an action is commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal."

This, the plaintiff contends, is precisely what he has done, and having done so, the plea of another action pending should not have failed to abate the action, which, under this section of the Code, he was expressly authorized to institute. We are of the opinion that the plaintiff, if he was ever in a position to avail himself of the provisions of the section of the Code of Civil Procedure last above quoted, for the purpose of commencing and maintaining the present action, is no longer in a position so to do.

[1, 2] The effect of the reversal of the judgment in the plaintiff's favor upon the first appeal was that of remanding the cause to the trial court for a new trial. Stein v. Leeman, 161 Cal. 505, 119 Pac. 663; Davis v. Le Mesnager, 155 Cal. 520, 101 Pac. 910; Glassell v. Hansen, 149 Cal. 511, 87 Pac. 200; Falkner v. Hendy, 107 Cal. 54, 40 Pac. 21, 386; Hayne, New Trial and Appeal, vol. 2, p. 1716. Upon the return of the said cause for retrial, the plaintiff moved the court for leave to amend his former complaint therein so as to eliminate therefrom all reference to his assertion and foreclosure of a lien and to leave said action one for the recovery of a personal judgment based upon the plaintiff's alleged later agreement with the defendant for the completion of the work to be done under the Snyder contract. Being thus permitted upon his motion to amend his former complaint in this regard, he was granted thereby substantially the same rights and the same relief which he might otherwise have obtained by the commencement of a new action under the provisions of section 355 of the Code of Civil Procedure, and, having been granted that right and that relief, and having proceeded to trial upon his said amended complaint in said former action, and having presented his proofs therein, and having failed thereby to establish his cause of action as asserted in his said amended complaint, and having suffered a judgment of nonsuit therein, he cannot now be permitted, after the statute of limitations has run upon his said cause of action, to avail himself of the provisions of section 355 of the Code of Civil Procedure by commencing a new action based, as he repeatedly alleges in his various complaints filed therein, upon the same identical cause of action as that embraced in his former suit.

A brief history of the origin and application of section 355 of the Code of Civil Procedure will serve to show that it can be given no application to the facts of this case. Section 355 of said Code was originally enacted as section 26 of an act defining the time for commencing civil actions, passed April 22, 1850, in which it appears in substantially its present form. It was evidently taken from the commissioner's Code of Civil Procedure, reported in that year to the Legislature of the state of New York, wherein it appears as section 588 thereof, but which upon its adoption was numbered section 104 of the New York Code of Civil Procedure. The provision had its origin in the English statute of 21 James I, c. 16, wherein, although more quaintly phrased, it appears in substance as later ingrafted upon the New York Code. Subsequently to its insertion in the Code of Civil Procedure in New York as section 104 thereof, it was amended so as to have application only to cases wherein a judgment was reversed on appeal without awarding a new trial, or where the action was terminated in any other manner, either by a voluntary discontinuance or a dismissal of the complaint for neglect to prosecute the action, or a final judgment on the merits. In most of the states of the Union, similar provisions, evidently derived from the same original source, are to be found. Some of these are general in terms, as is our statute, and others contain various limitations; as, for example, in the state of Vermont it is provided that, if an action commenced within the time limited is abated, or fails through an insufficient service of process, or by unavoidable accident, the plaintiff may commence a new action within a year after the termination of the former one. So, also, in the state of Kansas the statute provides that if in an action commenced within due time the judgment for the plaintiff should be reversed, or, if the plaintiff fail in said action otherwise than upon the merits, a new action may be begun within a year after such reversal or failure. There is a similar provision in the state of Oklahoma, while in the state of Michigan the statute is in substantially the

same form as that in the state of Vermont. Provisions similar in form to that contained in our own Code are to be found in the statutes of Alabama and Mississippi. In fact, the statutes of most of the states contain the like provision in one form or another, and there have been many decisions construing these various statutory enactments. It is not necessary to review these various statutes or the decisions construing them, since it has never been held, so far as our investigation has gone nor so far as we are referred by counsel to any case, that this provision, however varying its form, has been given application to a case wherein the judgment in favor of the plaintiff is reversed upon appeal, and the cause remanded for a new trial, and where, after such reversal, the plaintiff has sought and obtained leave to amend his complaint so as to set forth the same cause of action which he seeks later to assert through a new action commenced after the statutory time; and in which former action and after such amendment the plaintiff has proceeded to trial and has been permitted to present all of his available evidence and has there been nonsuited through the failure of his proofs. To permit thereafter the institution of a new action based upon the same identical cause of action would be to permit a violation of those other provisions of the statute which enable a defendant to defeat such an action by a plea in bar or by the plea of another action pending in the event such former action has not already been terminated. We are satisfied that section 355 of the Code of Civil Procedure was not available to enable plaintiff to avoid the plea of the statute of limitations or the plea of another action pending in the instant case.

[3] The plaintiff upon his second appeal insists that the trial court was in error in denying his motion to set aside the judgment of abatement therein, after it appeared that the former action had been terminated by the affirmance of the judgment upon the second appeal, and was further in error in refusing to allow him leave to file a third amended complaint. There is no merit in either of these contentions. The judgment of abatement was a final judgment and terminated the action. 1 C. J. 26, 27; Klamath Lumber Co. v. Bamber, 74 Or. 287, 142 Pac. 359, 145 Pac. 650; Brown v. Fletcher's Estate, 146 Mich. 401, 109 N. W. 686, 15 L. R. A. (N. S.) 632, 123 Am. St. Rep. 233; Crane v. French, Adm'r, 38 Miss. 503; Emry v. Chappell, 148 N. C. 327, 330, 62 S. E. 411. The trial court had, therefore, no authority to set said judgment aside or to revive said action, except upon motion for a new trial or upon application for relief under section 473 of the Code of Civil Procedure. Having, therefore, properly denied the plaintiff's motion to set aside said judgment of abatement upon the grounds stated, it follows that the court was not in error in refusing the plaintiff's application for leave to file a third amended complaint; and it is not, therefore, necessary for us to consider whether or not the plaintiff's proffered third amended complaint stated a cause of action. All other points discussed are without merit.

The judgment and order are affirmed.

We concur: SHAW, C. J.; LENNON, J.; WASTE, J.; WILBUR, J.; LAWLOR, J.

---

190 Cal. 97

## FEDERAL MUT. LIABILITY INS. CO. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (S. F. 10147.)

(Supreme Court of California. Nov. 15, 1922.)

**1. Master and servant ⟸417(1)—Compensation award reviewable without second rehearing.**

Under Workmen's Compensation, Insurance and Safety Act, a party affected by a decision of the Industrial Commission on a rehearing may apply for a writ of review without applying for a second rehearing, though the decision on the rehearing is based on additional testimony.

**2. Master and servant ⟸361—Compensation award against general employer's insurer authorized.**

Where a stevedore company, a corporation organized by lumber companies, furnished lumber handlers to one of the lumber companies under an arrangement by which the stevedore company retained the right to hire and discharge the men, carried them on its pay roll, and paid their wages with money paid by the lumber company, furnishing a sum equal to the wages, plus a percentage as a recompense to the stevedore company and an additional sum equal to the estimated premium for workmen's compensation insurance of the men carried on the stevedore company's pay roll and working in the lumber company's yards, subject to its entire direction, *held*, that the men were general employees of the stevedore company and special employees of the lumber company, and that the stevedore company's compensation insurance carrier was liable for injuries to one of the men while in the course of employment.

Shaw, C. J., dissenting.

In Bank.

Application for certiorari by the Federal Mutual Liability Insurance Company to review an award of the Industrial Accident Commission awarding compensation to Sarah W. Simmonds for the death of her husband, Richard E. Simmonds. Award affirmed.

Cooley, Crowley & Lachmund, of San Francisco, for petitioner.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

Walter H. Linforth and Carroll S. Bucher, both of San Francisco, for Pope & Talbot and London Guarantee & Accident Co.

LAWLOR, J. This is a proceeding in certiorari instituted by petitioner, Federal Mutual Liability Insurance Company, a corporation, to review an award of the Industrial Accident Commission in favor of respondent Sarah W. Simmonds, allowed as compensation for the death of Richard E. Simmonds, said respondent's husband.

Decedent had, for a number of years prior to 1916, been employed as a lumber handler for Pope & Talbot, a corporation, one of the respondents herein. From June 1 to July 26, and from August 15 to November 21, 1916, stevedore strikes occurred, during which strike periods decedent left his employment. Because of these strikes certain lumber dealers, including Pope & Talbot, on July 26, 1916, organized the "American Stevedore Company," a corporation. Together with the other lumber companies, Pope & Talbot entered into an agreement with the stevedore company whereby Pope & Talbot agreed to hire all the stevedores used by it "from and through the said American Stevedore Company," and the stevedore company agreed to do all in its power to furnish and supply all the men required by Pope & Talbot to do its work. The term "stevedore," as used in the agreement, was intended to include, and did include, lumber handlers such as decedent, and decedent resumed work under the agreement a few days before the second strike ended. The stevedore company carried the men hired under the agreement upon its pay rolls, paid their wages, and billed Pope & Talbot at regular intervals. Pope & Talbot paid to the stevedore company a sum of money equal to the wages paid the stevedores used by them, plus 10 per cent. on their wages as a recompense to the stevedore company; also a sum of money estimated to be the amount of the premium upon the workmen's compensation insurance of the stevedores carried on the stevedore company's pay roll and working in Pope & Talbot's yard. The latter amount was paid by the stevedore company to petitioner, who was its compensation insurance carrier. Pope & Talbot paid a separate premium to respondent London Guarantee & Accident Company for workmen's compensation insurance covering its regular employees carried on its own pay roll, not including the men covered by the agreement with the stevedore company. The agreement between the stevedore company and Pope & Talbot was not formally renewed subsequent to May 18, 1918, but the parties to it by mutual understanding continued to operate under its provisions.

For the first few months of operation under the agreement, during and after the second strike, the stevedore company exercised immediate direction and control over the hiring and discharging of the stevedores carried on its payrolls, requiring the foreman of any of the lumber companies to procure its consent to the hiring of individual stevedores. When labor conditions became normal, the stevedore company ceased to exercise immediate direction and control over such hiring and discharging, leaving it to the discretion of the foremen, but it retained the right to resume such direction and control whenever it elected to do so. In practical operation, a lumber company's foreman could hire additional men and place them upon the pay roll of the stevedore company, or a lumber company might request the stevedore company to furnish it more men, in which case the stevedore company hired the men, placed them on its pay roll, and sent them to the lumber yard. The stevedore company could transfer the men from one yard to another, but decedent was never taken from the yard of Pope & Talbot. Stevedores were also furnished by it to lumber yards which had not participated in its organization, and to work on ships as well as in the yards.

When decedent returned to work after the second strike, he applied at the yard of Pope & Talbot and was put to work by its foreman. His name was placed and carried on the pay roll of the stevedore company and was not carried on that of Pope & Talbot. His time, together with that of the other stevedores, was kept by Pope & Talbot's foreman, turned into its office, and by it sent to the office of the stevedore company. The stevedore company furnished Pope & Talbot blank pay roll sheets for this purpose. Decedent's work was done solely in Pope & Talbot's yard, under the direction of its foreman and in the course of its business. On August 9, 1919, he was instantly killed in a collision between the booms of two cranes in Pope & Talbot's yard; there being no question but that his death occurred in the course of and arose out of his employment.

In addition to finding the acts substantially as we have given them, the Industrial Accident Commission found that decedent was in the joint employ of the stevedore company and Pope & Talbot; that the former was his general and the latter his special employer; that, as both companies carried workmen's compensation insurance, both should be discharged; that, as the premium upon the insurance for stevedores working under the agreement was paid by Pope & Talbot to the stevedore company and paid by the latter to its own insurance carrier, who had received the premium in full, and no portion of the premium was paid by Pope & Talbot to its own insurance carrier, respondent London Guarantee & Accident Company, or claimed by it, the death benefit of $4,900 should be paid by petitioner. Pursuant to such findings the award of that amount was

allowed, petitioner being given credit for $1,062.33 it had paid before it declined to make further payments upon the ground that decedent was not an employee of the stevedore company.

[1] Respondent urges preliminarily that petitioner should have applied for a second rehearing of the cause before the Industrial Accident Commission before seeking a writ of review from this court. This contention is based on the fact that after the first hearing and the allowance of the award the Commission granted a rehearing, where the award was affirmed but at which further testimony was received. It is insisted the Commission should have been given an opportunity to reconsider its decision based upon this additional testimony. This point is without merit. That the Workmen's Compensation, Insurance, and Safety Act (Stats. 1917, p. 831) contemplates that additional testimony may be given upon a rehearing is shown by the statement that (page 874, § 64 [e]):

"If at the time of granting such rehearing it shall appear to the satisfaction of the Commission that no sufficient reason exists for taking further testimony, the Commission may reconsider and redetermine the original cause without setting a time and place for such further rehearing. * * *

"(f) If after such rehearing and a consideration of all the facts, including those arising since the making of the order, decision or award involved, the Commission shall be of the opinion that the original order, decision or award * * * is * * * unwarranted, or should be changed, the Commission may abrogate, change or modify the same."

It is further provided that any party affected thereby may apply for a writ of review within 30 days after the rendition of the decision on the rehearing. Such a course was followed in the case at bar, which is therefore properly before this court.

[2] Petitioner's first contention is that decedent was not shown to be an employee of the stevedore company. With reference to this claim it is asserted that, as it was found decedent was working under the sole direction and control of Pope & Talbot's foreman and for its benefit, he was solely its employee. Several authorities are cited in support of this claim, and petitioner contends the case at bar is distinguishable from Employers' Liability Assurance Co. v. Industrial Accident Commission, 179 Cal. 432, 177 Pac. 273, cited by respondents, which case also involved the relation of general and special employment, and in which several of the authorities cited by petitioner were discussed. In considering this question it is necessary to review the evidence herein to some extent.

William O'Callaghan, yard foreman for Pope & Talbot, testified as follows:

"Q. Did you hire Richard Simmonds? A. Yes, sir. * * * Q. Who did you hire him for? A. For the American Stevedore Company. I hire all the men that come there. First when I went to work I hired for Pope & Talbot. * * * Q. Who did you hire them for? A. To work in the yard. It is understood they all have to work for the American Stevedore Company. They all know that."

He further stated that since 1916 all the men hired under the agreement are carried on the pay roll of the stevedore company; that at the time decedent went back to work after the strike there was a crowd of men hired; that "I told the lot of them—I guess he was in the same crowd—that they had to go there [to the stevedore company] before they went to work at all," and that "they could go to work, but they had to go to the American Stevedore Company for their money when pay day came"; that, when any one was hurt, the accident reports were made out and sent to the stevedore company; "they ain't our employees."

H. J. McPhee, manager of the stevedore company, testified the function of that company was to furnish labor rather than direct the performance of the work; that one of the stevedore company's foremen must have consented to decedent's going to work; that all men had to be approved by the stevedore company before they were hired; that there were a number of instances where the stevedore company vetoed the return of men to the yards, although the yards were willing to take the men on again; that the stevedore company had such a right, but did not exercise it unless special circumstances were presented; that the actual authority to hire and discharge was in the stevedore company, although, as the yards began to run more smoothly after the labor troubles, it let the yard foreman "have most of the say." He, as well as C. E. Helms, secretary of Pope & Talbot, stated he regarded the stevedore company as an independent concern, and not a dummy of Pope & Talbot.

Keeping in view the contract between Pope & Talbot and the stevedore company, already referred to, it cannot be held the finding that decedent was a general employee of the stevedore company was erroneous. Nor can it be questioned that he was a special employee of Pope & Talbot. The evidence shows he worked in its yard exclusively, subject to its entire direction and control in the performance of his duties.

Petitioner contends that as to the stevedores in the lumber yards the stevedore company was but a paying agency, and points out that the record shows it did not move the men from yard to yard, or interfere with the selection of men by the various foremen, whereas, with respect to the men working on ships, it hired, discharged, and moved them about from ship to ship and exerted such control over them as would constitute it their employer. But, as already indicated, the evidence shows the stevedore company had the

same power to regulate the employment of men in the lumber yards and merely by its acquiescence allowed the yards to exercise it. It was held in Tucker v. Cooper, 172 Cal. 663, 667, 158 Pac. 181, 182, that, "where the defendant [employer] has the right of control, it is not necessary that he actually exercise such control." Petitioner argues that, if decedent be held to be an employee of the stevedore company, "then employment agencies may be held to be building the railroads and running the sawmills and logging camps of their patrons to whom they send employees." We do not apprehend that any such result would follow. The stevedore company was organized to furnish stevedores, under the terms of the agreement. It paid them, it had the right to move them from one yard to another, and it had ultimate control over both their hiring and discharge. Such an organization is entirely different from an employment agency, and it is apparent from the record that it was intended to be so.

In this respect the case is similar to Employers' Liability Assurance Company v. Industrial Accident Commission, supra, save that there the foreman who directed the work was hired by the general employer. That fact cannot distinguish the case, for there it was found the foreman was also under the direction and control of the special employer. It is insisted that in that case the general employer participated in the labor performed by the special employer, but the findings show that this participation was "by virtue of the contract existing between it [the general employer] and defendant [the special employer]." Such a finding would be equally true of the instant case, for the contracts between the respective employers were practically the same in both cases.

In that case the authorities bearing on the liability of such employers were carefully considered, and, while an award against insurance carriers of both employers was there affirmed, the court said:

"If we follow our own action in Ayer v. Industrial Accident Commission, supra [S. F. No. 8106, in which a petition for a writ of review was denied], and the decision in the District Court of Appeal (Second District) in Kirkpatrick v. Industrial Accident Commission, 31 Cal. App. 668 [161 Pac. 274], holding the general employer liable, and the Massachusetts court in the Scribner Case [231 Mass. 132, 120 N. E. 350], holding the special employer, we reach the same conclusion as the New York court did in De Noyer v. Cavanaugh, supra [221 N. Y. 273, 116 N. E. 992], holding both or either liable."

We consider the reasoning of that case sound, and, although petitioner insists that, if decedent was a joint employee, the award should be against both insurance carriers, the case at bar is one where it is proper to hold one employer only.

It is apparent the parties to the agreement intended that the stevedore company should be liable for injuries resulting to employees hired under the agreement, and that the stevedore company recognized it was under such a liability. This clearly appears from the fact that it included such employees, together with decedent, in the pay roll which it sent to petitioner, upon which its premium was based, and that these men were not intended to be included in the compensation insurance carried by Pope & Talbot. The accident reports concerning such men were sent to the stevedore company, and McPhee testified that, as far as he knew, petitioner paid the compensation for them. In answer to the question, "Did you intend that insurance as a protection to the American Stevedore Company or as a protection to Pope & Talbot, or both?" he replied, "Well, to the American Stevedore Company I figured it, and of course we protected Pope & Talbot when they employed them through us."

It is contended the Commission had no power to make an award against petitioner solely upon the ground that it received a premium, based, in part, upon decedent's earnings, and that "petitioner, unwittingly, was paid premiums on persons not employees of the stevedore company," and Employer's Liability Assurance Co. v. Industrial Accident Commission, 187 Cal. 615, 203 Pac. 95, is cited in support of the proposition that "a surety company is not estopped to deny liability upon a void obligation by reason of the fact that it has executed the same and received the benefits thereof." However, decedent was shown to be in fact an employee of the stevedore company, and it is not claimed the policy issued by petitioner was not intended to cover decedent, but only that he should not have been included on the ground that he was not an employee of the stevedore company.

This being so, petitioner, as insurance carrier for the stevedore company, should pay the award. It was said in Employer's Liability Assurance Company v. Industrial Accident Co., 177 Cal. 771, 171 Pac. 935, that—

"The right of the commission to make an award against the insurer, where the validity of the policy was conceded, has never been questioned. If the Commission may, in any case, make an award against one who has agreed to stand in the employer's place and protect him against claims by his employees, it must have the power to determine all questions of law and fact upon which the liability of the alleged insurance carrier depends."

It follows there was no error in the action of the Industrial Accident Commission in releasing respondent London Guarantee and Accident Company.

The award is affirmed.

We concur: LENNON, J.; WILBUR, J.; WASTE, J.; RICHARDS, Justice pro tem.

I dissent: SHAW, C. J.

59 Cal. App. 305

## CHRISMAN v. SUPERIOR COURT OF CALIFORNIA IN AND FOR FRESNO COUNTY. (Civ. 4322.)

(District Court of Appeal, First District, Division 2, California. Oct. 10, 1922. Hearing Denied by Supreme Court Dec. 7, 1922.)

**1. Indictment and information ⟹159(1)—Indictment may be amended without resubmission to grand jury.**

Under Pen. Code, § 1008, the district attorney may, with leave of court, amend an indictment after the defendant has pleaded, without submitting it to the grand jury, if indictment can be amended without prejudice to the substantial rights of the defendant, notwithstanding sections 940 and 944, requiring an indictment to be found by a grand jury and prescribing the methods by which an indictment must be found.

**2. Indictment and information ⟹159(2)—Amendment of indictment without resubmission to grand jury held not to impair defendant's substantial rights.**

Where indictment charged that the defendant, with intent to cheat and defraud named person, falsely represented to him that he (the defendant) was the owner of a certain order for the payment of money drawn by such person, and that he would cancel the order if such person gave him a specified amount of money, that by means of such representations defendant obtained such sum, though he had assigned the order to third party, the amendment of the indictment by adding other allegations that defendant at no time after assignment to third party was the owner of the order and that he did not cancel it or deliver it to named person without resubmission of indictment to grand jury, proper.

Application for writ of prohibition by F. M. Chrisman against the Superior Court of the State of California, in and for the County of Fresno. Writ denied.

C. K. Bonestell, of Fresno, for petitioner.

B. W. Gearhart, Dist. Atty., and H. J. Carling, Deputy Dist. Atty., both of Fresno, for respondent.

NOURSE, J. Petitioner has asked this court for a writ of prohibition restraining the superior court from proceeding with his trial upon an amended indictment charging him with grand larceny, embezzlement, and obtaining money by false pretenses. When the original indictment was filed the defendant interposed a demurrer. This indictment was in nine separate counts, the first three charging grand larceny, embezzlement, and obtaining money by false pretenses, and all relating to the same transaction, alleged to have occurred on November 1, 1921. The fourth, fifth, and sixth counts charged a commission of the same crimes in connection with a transaction alleged to have occurred on November 21, 1921. The seventh, eighth, and ninth counts charged the commission of the same crimes in relation to a transaction alleged to have occurred on December 5, 1922. The demurrer was sustained as to the third, sixth, and ninth counts—the three counts charging obtaining money by false pretenses. It was overruled as to all other counts. In the same order, allowing the demurrer to these three counts, the trial court directed the district attorney to file an amended indictment. Within the time allowed such an amended indictment was filed by the district attorney without submission to the grand jury, and after the disposition of the pleas and motions interposed thereto the cause was set for trial upon the indictment as amended.

In this proceeding for a writ of prohibition the question is whether the trial court has jurisdiction to proceed with the trial of the defendant upon the amended indictment. The position of petitioner is that the trial court is without jurisdiction to proceed because the amended indictment was not resubmitted to the same or any grand jury, nor was it presented by the foreman of any grand jury to the court, but was filed by the district attorney with the county clerk. The argument in support of the petition is that all indictments must be found by the grand jury, must be presented by their foreman in their presence to the court, and filed by the clerk; also that indictments cannot be amended in matters of substance by the district attorney, but that the cause must be resubmitted to the grand jury and a new indictment found by them.

[1] The Code requires that an indictment must be found by a grand jury. Pen. Code, § 940. Section 944 of the Penal Code prescribes the method by which an indictment must be found by the grand jury. It is to be presented to the court by the foreman and filed *with* the clerk. These provisions relate to an original indictment or to one that has been amended in matters of substance after resubmission to a grand jury. But section 1008 of the Penal Code authorizes the district attorney to amend an indictment without leave of court before the defendant pleads and provides:

"Such amendment may be made at any time thereafter, in the discretion of the court where it can be done without prejudice to the substantial rights of the defendant."

The clear purpose of the quoted portion of the section is that the district attorney may with leave of court amend an indictment after the defendant has pleaded without submitting the same to the grand jury. The formalities of presentation and filing contained in section 944, Penal Code, do not apply to an indictment amended in this manner.

Section 1008 of the Penal Code confirms the right of the district attorney upon leave

of court to file an amended indictment without resubmission to the grand jury. This he may do if it can be done without prejudice to the substantial rights of the defendant, provided that the amendment has not changed the offense charged. Now the amendments complained of did not come within the inhibitions of the statute. In the first place, in each of the three counts, the demurrer to which was sustained, it is alleged that they describe the same offense alleged in the two preceding counts charging grand larceny and embezzlement. The demurrers to those counts having been overruled, the defendant was required to go to trial upon them, and the district attorney might, if he so desired, have dismissed the counts of obtaining money under false pretenses without amendment. It is thus apparent that when the trial court directed the district attorney to amend that did not prejudice the substantial rights of the defendant.

[2] The original indictment alleged that the defendant with intent to cheat and defraud one Adriani falsely represented to him that he (the defendant) was the owner of a certain order for the payment of money drawn by Adriani upon the California Associated Raisin Company, in favor of the Clovis Box Company, and that he (the said defendant) could and would cancel the order and deliver the same to Adriani if the said Adriani would deliver to him the sum of $470.72; that through said false representations and fraudulent pretenses the defendant obtained the said sum from Adriani, though at the time he had sold and assigned by indorsement said order to the California Pine Box Distributors of Fresno; that the said Adriani believed said false and fraudulent representations; that defendant knew them to be false and fraudulent; and that by means thereof, with the intent to cheat and defraud said Adriani, the defendant obtained from Adriani the sum mentioned. The amendment consists in the addition of the words, that at no time after defendant had sold and assigned said order was he the owner, nor did he have the same in his possession, and that he did not cancel same or deliver it to said Adriani. Though it may be that the failure of the defendant to fulfill his promise to cancel the order and deliver the same to Adriani was an essential allegation to the charge of obtaining money by false pretenses, it is apparent that the addition of such allegation by amendment to the indictment did not change the offense charged. People v. Rippe, 32 Cal. App. 514, 163 Pac. 506.

The petition is denied, and the writ discharged.

We concur: LANGDON, P. J.; STURTEVANT, J.

59 Cal. App. 302

## PEOPLE v. PARISH. (Cr. 853.)

(District Court of Appeal, Second District, Division 2, California. Oct. 9, 1922.)

**1. Physicians and surgeons ⟸6(1)—"Diagnosis," within Medical Practice Act, may be established by acts and conduct as well as by representations to patients; "practice of medicine."**

While one who does not diagnose does not practice medicine within the meaning of the Medical Practice Act, prohibiting the practice thereof without a certificate from the State Board of Medical Examiners, diagnosis may be established by acts and conduct, as well as by representations to patients as to the nature of their ailments.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Diagnosis; First and Second Series, Practice of Medicine.]

**2. Physicians and surgeons ⟸6(10)—Evidence of use of physical means in adjusting vertebræ held sufficient from which to infer "diagnosis."**

In a prosecution for practicing medicine without a license, evidence that defendant used physical means in adjusting the vertebræ of witnesses *held* sufficient from which to infer that he made a diagnosis in connection with his treatment of prosecuting witness, it being impossible to dissociate diagnosis from the practice of the art of healing by any physical, medical, mechanical, hygienic, or surgical means.

**3. Criminal law ⟸814(1), 1172(6)—Abstract instructions inapplicable to issues are erroneous, but not ground for reversal unless prejudicial.**

Instructions containing abstract propositions of law inapplicable to the issues are erroneous, but not ground for reversal, unless the party complaining may reasonably be regarded as having been prejudiced thereby.

**4. Criminal law ⟸761(3) — Instruction, in prosecution for practicing without license, to disregard suggestions that chiropractors cannot procure license held to assume that defendant made such claims.**

In a prosecution for practicing a system of treating the sick without a certificate from the State Board of Medical Examiners, where defendant's only defense was that he was not guilty of practicing any system requiring a certificate, an instruction to disregard any statement or suggestions that chiropractors or practitioners of any other system of healing cannot procure a license to practice it, and argument that the Board of Medical Examiners had discriminated against defendant *held* reversible error, as assuming, without support in the evidence, that defendant had tried to convince the jury that he had attempted to secure a license and had claimed discrimination against him.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

A. H. Parish was convicted of practicing medicine without a license, and he appeals. Reversed.

Ray E. Nimmo, of Los Angeles, and Frank D. Parent, of Inglewood, for appellant.

U. S. Webb. Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Charles D. Ballard, of Los Angeles, for the People.

CRAIG, J. The defendant was convicted of "practicing a system and mode of treating the sick and afflicted without a valid, unrevoked certificate from the State Board of Medical Examiners." He appeals from the judgment pronounced and order denying his motion for a new trial.

[1, 2] Appellant first claims as a ground for reversal that the evidence fails to disclose any diagnosis of disease by the defendant and that one who does not diagnose does not practice medicine, within the meaning of the Medical Practice Act (St. 1913, p. 722). Appellant is entirely correct as to this abstract proposition of law. People v. Jordan, 172 Cal. 399, 156 Pac. 451. Appellant stresses the point that defendant at no time made representations to those seeking treatment as to the nature of their various ailments or that he would cure them. This is offered to show an entire lack of diagnosis. But diagnosis may be established by acts and conduct as well as by any representations which might be made to a patient. People v. Jordan, supra, has decided that it is impossible to dissociate diagnosis from the practice of the art of healing by any physical, medical, mechanical, hygienic, or surgical means. There is evidence in this record that the defendant used physical means in adjusting the vertebræ of witnesses. Hence, under the Jordan decision, the jury might lawfully have drawn the inference that defendant made a diagnosis in connection with the treatment of this witness Stewart.

[3, 4] The following instruction is assigned as reversible error:

"You are instructed to disregard any statement or suggestions of counsel that chiropractors, or the practitioners of any other system of healing the sick, cannot procure a license to practice their system of healing in this state. And you are further instructed that it is no defense in this case for the defendant to argue or attempt to argue to you that the Board of Medical Examiners of this state has discriminated against him. And in this connection you are instructed that the law of the state, besides other forms of license, provides for the issuance of a certificate which entitles the holder thereof to practice the chiropractic system of healing the sick. All that is required of the applicant for such a license is that he present to said Board proof that he is possessed of the education required by the law.

"If the practitioner of any system or mode of the healing art, including chiropractic, has been by the Board of Medical Examiners of this state denied any right, he has his proper and adequate remedy therefor in another forum, and the jury in this case may not pass upon the same."

There is nothing in the record to show that defendant had ever attempted to secure a license to practice chiropractic or any other system of healing, or that his counsel had ever attempted to suggest that such a license could not be procured, or that the Board of Medical Examiners had ever discriminated against him. Instructions containing abstract propositions of law inapplicable to the issues involved are erroneous. 12 R. C. L. 782; People v. Tapia, 131 Cal. 647, 63 Pac. 1001; People v. Thompson, 115 Cal. 160, 46 Pac. 912. They are not ground for reversal unless it appears that the defendant may reasonably be regarded as having been prejudiced. However, such is clearly the result of the instruction of which complaint is here made. It injects a false issue into the case. The only issue presented by the defendant's evidence was the defense that he had not been guilty of practicing any system or mode of healing requiring him to have secured a certificate. A fair interpretation of this instruction requires the construction that it assumed that the defendant had tried to convince the jury that he had attempted to secure a license to heal the sick. It is apparent that the jury may have considered it their duty to assume this to have been the fact, and that they may well have regarded that circumstance as material and determinative of the issue as to whether or not the defendant actually did practice a system of treating the sick and afflicted. The instruction also assumes that the defendant had claimed discrimination against him by the Board of Medical Examiners. Being aware that there was no evidence to support such a charge, the jury might easily be prejudiced against him because of having made so false and base a calumny. This would, of course, prevent that fair consideration of the evidence upon the material issues to which every defendant is entitled. It is unnecessary to point out in greater detail the prejudicial character of this erroneous instruction.

The judgment must be reversed, and it is so ordered.

We concur: FINLAYSON, P. J.; WORKS, J.

59 Cal. App. 296

## PEOPLE ex rel. WEBB, Atty. Gen., v. HEIKEN, County Treasurer.
(Civ. 2540.)

(District Court of Appeal, Third District, California. Oct. 7, 1922.)

**Drains ⊂=85—County treasurer held not authorized to accept warrants in lieu of cash payments of assessments.**

Under St. 1919, p. 1095, § 15, authorizing cash payment of drainage district assessments levied by the reclamation board under St. 1911 (Ex. Sess.) p. 117, as amended by St. 1913, p. 252, and St. 1915, p. 1338, within 30 days after the assessment list is filed, to the county treasurer, who shall deposit the amount received with the state treasurer, and St. 1919, p. 1096, § 17, requiring the reclamation board to fix the amount unpaid at the end of such period as the basis of the call for an election to ascertain whether such unpaid portion shall be met by a bond issue or by calls made by the board, only payments in cash may be credited to the landowners, and the county treasurer cannot accept warrants in lieu thereof.

Application by the People of the State of California, on the relation of U. S. Webb, Attorney General, for writ of mandate requiring Fred H. Heiken, as Treasurer of the County of Sutter, to deposit certain moneys with the State Treasurer. Writ granted.

Frank Freeman, of Willows, for petitioner.

Arthur Coats, Dist. Atty., of Yuba City, for respondent.

PER CURIAM. The application was for a writ of mandate to require respondent, as county treasurer of Sutter county, to deposit with the state treasurer in cash a certain amount of money claimed to have been collected by respondent on account of a certain assessment, No. 6, for the benefit of the Sacramento and San Joaquin drainage district fund.

Section 15 of "an act to authorize the issuance and sale of bonds of the Sacramento and San Joaquin drainage district based upon assessments levied by the reclamation board upon lands in said district," approved May 27, 1919 (Stats. 1919, p. 1092), provides as follows:

"At any time within thirty days after said assessment list has been so filed in the office of the county treasurer as provided in section fourteen hereof, the whole amount of such assessment upon any tract of land therein separately assessed may be paid in cash to the county treasurer and thereupon the county treasurer shall issue his receipt therefor and shall indorse the fact and date of such payment upon the assessment list, and thereupon the lien of such assessment upon such tract of land shall cease. The report of such payment shall be made by the county treasurer at once to the secretary of the reclamation board, and the amount so received by the county treasurer shall, within thirty days after the receipt thereof by him, be deposited by him with the state treasurer and shall be by said state treasurer safely kept and credited to the construction fund of said assessment."

In the argument this act of 1919 was designated as the "Bonding Act," and the Act of 1911 (Stats. 1911 [Ex. Sess.] p. 117), as amended in 1913 (Stats. 1913, p. 252) and 1915 (Stats. 1915, p. 1338) as the "Reclamation Board Act," and in this opinion we may so distinguish them.

It is agreed by both parties that the vital question involved is whether the county treasurer was authorized by said Bonding Act to take warrants in payment of the assessment in lieu of actual cash.

We agree with petitioners that the so-called "Bonding Act" is supplementary to said "Reclamation Board Act," that the two must be construed together, and that the special feature of the former is the provision affording an alternative method for the raising of the money with which to pay an assessment already levied under the provisions of the latter act, and that when this method is adopted, contemplating the issue and sale of bonds, the proceeds of which are to be used for the payment of that portion of the entire assessment remaining unpaid at the close of the 30-day period mentioned in said section 15, the clear intent of the Legislature is that only such payments may be credited to the landowners as have been made in cash, and that the difference between such amount and the amount of the levied assessment shall constitute the extent of the bond issue. This method of procedure is a substitute for that of "calls" in the Reclamation Board Act, the procedure therein contemplating the payment of the assessment in cash or warrants in installments at the option of the reclamation board.

Section 17 of the Bond Act provides that the amount of the assessment remaining unpaid at the expiration of the 30-day period shall be determined by the reclamation board, and an order fixing the same be made and entered in the minutes, and there is no provision in the Bond Act that said unpaid portions, or any part thereof, of the assessment may be paid at any time, or in any manner, other than is provided by said section 15 of that act. It is apparent that said order determines the amount that constitutes the basis of the call for an election to ascertain whether the remaining portion of the assessment shall be met by the issuance of bonds or by calls to be made by said board, and, manifestly, the statute contemplates that no payment shall be made subsequent to the making of said order until the result of said election has been determined. We think it equally apparent, as already stated, that said statute contemplates that any pay-

ment made within said 30 days by the property owner or after said election, must be paid in cash, and the county treasurer is not authorized to accept warrants for the same.

We see no necessity for an elaborate review of the various sections of these two acts, nor for any comment upon the well-settled rules of construction to which our attention has been invited by respondent. It is sufficient to say that, in our opinion, there is no provision made in said Bond Act for the payment of the assessment by the property owner except as provided in said section 15, nor is any person authorized to accept payment thereof except as provided in said section, and that the method therein prescribed was clearly intended to be exclusive.

The foregoing is a brief statement of the reason which impelled us to order the peremptory writ to issue herein.

---

59 Cal. App. 309

## KRIEG et al. v. CRAWFORD et al. (Civ. 4303.)

(District Court of Appeal, First District, Division 2, California. Oct. 11, 1922.)

**1. Partition ⟸12(5)—Widow with life estate and son with undivided interest in fee held not entitled to maintain partition.**

A widow with a life estate in the homestead, and her son with an undivided fractional interest in the fee, are not joint tenants or tenants in common, so as to entitle them to have the homestead partitioned under Code Civ. Proc. § 752.

**2. Appeal and error ⟸193(9)—Where complaint states no cause of action, objection can be raised for first time on appeal.**

Where in partition proceedings the complaint on its face failed to state a cause of action, an objection thereto can be raised for the first time on appeal.

**3. Partition ⟸95 — Decree setting apart a homestead is a judgment in rem not subject to collateral attack.**

Decree in partition setting apart a homestead is in the nature of a judgment in rem, and can be successfully attacked only upon the same grounds as a judgment in personam may be annulled, and such judgment is not subject to collateral attack.

**4. Partition ⟸116(1)—Leasing of homestead by widow after partition held not to defeat her life estate.**

In an action of partition *held*, the decree setting apart a homestead to the widow for life vested in her an unconditional life estate not subject to defect by any condition subsequent, and hence a lease by the widow of her interest in the homestead property did not defeat her estate therein.

**5. Homestead ⟸145—Bringing mistaken action for partition and sale held not to forfeit widow's life estate.**

A mistake by a widow in bringing an action for a partition and sale of the homestead property, to which relief she was not entitled, did not operate to effect a forfeiture of her life estate in the homestead or enlarge the estate of defendants therein.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Lawrence Krieg and Margaret Krieg against Maria Crawford and others. From a judgment for defendants and for plaintiff Lawrence Krieg, both plaintiffs appeal. Reversed.

Tum Suden & Tum Suden, of San Francisco, for appellants.

Edgar D. Peixotto, of San Francisco (Cleveland R. Wright, of San Francisco, of counsel), for respondents Crawford and others.

Sawyer & Sawyer and F. W. Sawyer, all of San Francisco, for respondents Krieg and others.

LANGDON, P. J. This is an appeal by the plaintiffs from an interlocutory decree in a partition suit. By said decree certain land in San Francisco was ordered to be sold and the proceeds divided in fractional parts among the defendants and the plaintiff Lawrence Krieg.

The plaintiffs alleged that Margaret Krieg was the owner of, and in possession of, a homestead right for life in the said land, granted to her by a decree of the superior court of this state, in and for the city and county of San Francisco, in proceedings in the matter of the estate of her deceased husband; that plaintiff Lawrence Krieg was the owner of an undivided one-fifth interest in fee simple absolute in said land, subject to the life estate of said Margaret Krieg. It was alleged, further, that the various defendants were, respectively, the owners in fee simple absolute of fractional shares in the remainder after the expiration of the life estate, and the court was asked to partition the property, and, if partition in kind be found to be impracticable, that a sale be ordered and the proceeds thereof directed to be invested for the benefit of Margaret Krieg during her life, and the principal distributed to the defendants as their interests might appear after the expiration of the life estate.

Defendants answered setting up that Margaret Krieg had not been residing on the property in question for a long time prior to the commencement of the action; that she was not at the time of the commencement of said action the head of a family; that she had abandoned, terminated, and surrendered the homestead and all her rights thereunder. They asked for partition of the property

among themselves and plaintiff Lawrence Krieg.

The trial court found that Margaret Krieg claimed under an order of the superior court in the proceedings in probate in the matter of her deceased husband's estate; that by said order the property in controversy was set apart to Margaret Krieg as and for a homestead for and during the term of her natural life, and as and for a homestead unto Lawrence Krieg, minor son of decedent, during the term of his minority, or up until October 16, 1920; that by the decree of distribution in said estate, said property was distributed to the defendants and Lawrence Krieg, in the proportions prescribed by the will of decedent, subject to the homestead for life in Margaret Krieg; that Lawrence Krieg has arrived at his majority; that Margaret Krieg has not, for a long time prior to this action, occupied the premises as a homestead; that she is no longer the head of a family, and that she has abandoned, terminated, and surrendered the homestead and all rights thereunder, and has no further right, title, or interest in the property. Upon these findings the trial court made an order for a sale of the premises and a distribution of the proceeds among the defendants and Lawrence Krieg, excluding Margaret Krieg from participation in the distribution.

The plaintiffs admitted in open court that Margaret Krieg was not, at the time of the commencement of this action, nor for a long time prior thereto, occupying the land and premises described in the complaint and sought to be partitioned, as and for a home, but that she had rented out the said premises to tenants who were then and there paying rent therefor and occupying the same as such tenants. These admissions, together with the order setting apart the homestead, the decree of distribution, etc., in the matter of the estate of Anton Krieg, comprise all the evidence in the record.

[1, 2] It is beyond question that the plaintiffs were not entitled to the remedy which they sought. Section 752, Code Civ. Proc. Plaintiffs were neither joint tenants nor tenants in common with the defendants. They are not entitled to have the property partitioned. Mills v. Stump, 20 Cal. App. 84, 128 Pac. 349. Appellants' contention that defendants waived this objection by their failure to raise it, specifically, is without merit. The complaint on its face does not state a cause of action in this state. Such an objection is not waived by failure to make it in the trial court, but may be taken advantage of for the first time upon appeal.

[3, 4] But a decision of this question does not meet the problem presented upon this appeal, because the trial court went further than to deny the prayer of the plaintiffs; it gave to the defendants such affirmative relief as absolutely destroyed the homestead right of Margaret Krieg in this property. Such action was based upon the finding that Margaret Krieg had abandoned her homestead rights. We are thus confronted with the questions: Does a widow, to whom there has been set apart by decree of the superior court a homestead for life out of the separate estate of her husband, forfeit that homestead if she fails to continuously reside thereon, but holds possession of the property through her tenants? Is there any forfeiture or abandonment evidenced by the joinder of the widow with the owner of an undivided interest in the fee, in seeking a partion of the homestead property?

We are of the opinion that both of these questions must be answered in the negative. The decree of the superior court, setting apart to Margaret Krieg a homestead for life, vested in her estate in the property. Fealey v. Fealey, 104 Cal. at page 360, 38 Pac. 49, 43 Am. St. Rep. 111; Estate of Moore, 96 Cal. 522, 31 Pac. 584. It was an unconditional estate and was not subject to be defeated by any condition subsequent. A decree setting apart a homestead is in the nature of a judgment in a proceeding in rem and can only be successfully attacked in equity upon the same grounds as a judgment in personam may be annulled. Fealey v. Fealey, supra, 104 Cal. at page 360, 38 Pac. 49, 43 Am. St. Rep. 111. Such a judgment is not subject to collateral attack. Otto v. Long, 144 Cal. 144, 147, 77 Pac. 885. The order setting apart a homestead to Margaret Krieg for life, being a judgment in rem and binding upon all persons (Kearney v. Kearney, 72 Cal. 591, 15 Pac. 769), and having the effect of vesting in her, absolutely, the estate thereby set apart to her, it would seem, as a natural consequence, that such an estate could not be defeated by the happening of some condition subsequent such as occupation of the property by her tenants. It is needless to point out the incongruities that would arise if, after the vesting of title to the homestead for life, the widow was to be subjected to continual suits to divest her of this right upon various allegations of fact relied upon to evidence and abandonment. Her vested right would be in constant peril and its retention would depend upon her vigilance not only with regard to her own conduct but with regard to making proof thereof in a court of law. Such a condition would be repugnant to the absolute estate vested in her by the operation of the decree.

[5] As to the effect of Mrs. Krieg's action in seeking a partition of the property, we know of no theory upon which such action could divest her of a vested right. She was simply mistaken as to one of the incidents of her estate, and the trial court would have been justified in so holding and denying her prayer for partition and sale of the property. But her mistake in this regard cannot

have the effect of working a forfeiture of her life interest in the homestead property, nor enlarge the estate of the defendants therein.

The judgment in the present case is in conflict with the decision in this state as to the nature of the estate conveyed to a widow by a decree in a probate proceeding setting aside to her a homestead, and in conflict with the settled rule regarding the finality and binding effect of such a decree

The judgment is reversed.

We concur: NOURSE, J.; STURTEVANT, J.

---

59 Cal. App. 286

## McCREADY v. BULLIS. (Civ. 3959.)

(District Court of Appeal, Second District, Division 1, California. Oct. 6, 1922. Rehearing Denied Nov. 3, 1922. Hearing Denied by Supreme Court Dec. 4, 1922.)

**1. Waters and water courses ⟸158(4)—Landlord's contract to sink artesian well on property construed.**

Where land leased for agricultural purposes was known to be valueless unless water was supplied for irrigation, and landlord agreed to provide a well from which tenant might obtain water, the contract must be construed in the light of the parties' knowledge and understanding of conditions present, and it is not unreasonable to say that the agreement in fact was that the well which landlord agreed to sink should produce a quantity of water adequate for the purposes intended.

**2. Damages ⟸5 — "General" and "special damages" defined.**

Damages are either general or special; general damages are such as the law implies or presumes to have accrued from the wrong complained of; special damages are such as really took place and are not implied by law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General Damages; Special Damages.]

**3. Damages ⟸142—Facts out of which special damages arise must be pleaded.**

The facts out of which special damages arise must be averred in the complaint.

**4. Damages ⟸23—On breach of contract offending party is held for such damages as it may be inferred ordinarily result.**

On breach of contract the offending party can only be held for such damages as it will be inferred may ordinarily result considering the contract terms; and if there are special circumstances under which the contract was made, because of which damage results from the breach, these must have been made known to the party committing the breach at the time the contract was entered into.

**5. Waters and water courses ⟸158½(1)—Rule of general damages for landlord's breach of contract to produce water for irrigation stated.**

Where land was leased and the landlord required to sink an artesian well on the property in ample time for irrigation requirements of the tenant, if the landlord failed to make land available for use by producing sufficient water thereon, tenant's general damage would be the rental value of the land.

**6. Landlord and tenant ⟸48(2)—Special damages incurred in moving implements to leased land by tenant not in contemplation of the parties.**

Where, in tenant's action against his landlord for failure to perform conditions of the lease, there was no evidence to show at the time of making lease landlord understood the circumstances that required tenant to bring his farming equipment from a distant point to the leased land, it cannot be said that special damages incurred on that account were in contemplation of the parties.

**7. Contracts ⟸274—Party rescinding contract cannot claim benefits.**

If a party to a contract elects to rescind it, he cannot then continue to claim benefits of it: he cannot go on and perform it, nor can he claim compensation for loss of profits.

**8. Waters and water courses ⟸158½(1)—Rule of damages when tenant stands on breach of lease by landlord stated.**

Where by a lease it was required that landlord sink an artesian well on the property to provide water for irrigation, and the tenant, being ready to perform, was prevented from securing benefits intended under the lease by reason of the landlord's failure to complete the well, tenant was entitled to abandon effort at further performance of the lease and recover damages for the breach, which should include profits of which there might be a reasonable expectation.

**9. Landlord and tenant ⟸48(2)—Rule of damages for tenant's loss of "profit on crops" stated.**

Where a tenant was entitled to recover as for profit on crops, that profit would mean net profit, to produce which there should be deducted as a charge all sums expended in the production or attempted production of the crops, including rental and the reasonable cost of bringing the crops to maturity and marketing them.

**10. Landlord and tenant ⟸48(2)—Right of recovery for prospective profits on future crops on breach of lease is question of evidence.**

On breach of a lease by landlord, the right of tenant's recovery for prospective profits on a future crop is no less than on a crop planted, but the profits on crops to be grown in the future may be difficult to establish with any certainty, and because of that difficulty may be classed as speculative, and hence not recoverable.

**11. Waters and water courses ⟸158½(1)—Where crop damage compensated tenant for such expense, deducting hog feed purchased was improper.**

In tenant's action for landlord's failure to sink an artesian well for irrigation purposes, where the crop damage would compensate him

for such expense, it was improper to make allowance for cattle and hog feed purchased.

**12. Waters and water courses ⟸158½(1)—Tenant's alleged losses in sale of hogs not attributable to landlord's breach of contract to irrigate.**

In tenant's action against landlord for failure to sink an artesian well to irrigate the land, where his investment in live stock was not induced by any dependence on the prospect of securing the land and water for irrigation, and hogs had long before that been plaintiff's property, whose business was that of hog breeder, loss on account of difference between the value of the hogs and the price obtained by him cannot be attributable to breach of the contract.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by A. W. McCready, Jr., against W. S. Bullis. Judgment for plaintiff, and defendant appeals. Reversed in part, and affirmed in part.

John E. Biby and Harry C. Biby, both of Los Angeles, for appellant.

Chandler P. Ward and Stephens & Stephens, all of Los Angeles, for respondent.

JAMES, J. Defendant has appealed from a judgment allowing a recovery to the plaintiff of the sum of $5,977 as damages.

On the 2d day of October, 1917, defendant, being the owner of a certain 70 acres of land in Los Angeles county, entered into a written contract of lease whereby he let the same to the plaintiff for a period of three years. As rental therefor plaintiff was to pay the sum of $1,200 for the first year, and, as is stated in the lease, "for the remaining two years the sum of $1,500." By a term of the lease it was required that the lessor should sink an artesian well on the property "of at least 12 inches' diameter from which water may be pumped by the lessee should said well not flow; the said well to be sunk in the spring of 1918 in ample time for the requirements of the lessee, and to be located as agreed upon by the parties hereto. Lessor also agrees to equip said well with a good and sufficient electric motor or gasoline engine and water pump." It appeared in evidence that the land was of agricultural nature, and that, except for a small portion thereof, crops could not be raised without irrigation. At the time of the making of the lease there was an old well, engine, and pump on the property, which the defendant stated to plaintiff would probably not be sufficient for the purposes desired, and for that reason it was agreed (the lessor himself writing in the condition) that a new well should be sunk at the lessor's expense. Early in the year 1918 the lessee complained to the lessor that the well was not being sunk expeditiously. However, a well was completed in May, 1918. At this well there was installed a pump and an engine, but the well, upon being tested, failed to produce water in quantities sufficient for irrigation purposes. That such was the fact appears to have been conceded by the lessor, who at a later date caused a second well to be sunk. To the second well a pump was attached but no means of operating the same were connected with it, and in October, 1918, the lessee, whose crops had failed for lack of water, abandoned the land, possession of which was resumed by the lessor. As a matter of fact, the second well, when subjected to a test subsequent to the time when the lessee abandoned the land, was found to produce ample water for the irrigation of the seventy acres.

[1] Appellant's first contention, construing the terms of the lease, is that his engagement regarding the sinking of the well did not require that any specific amount of water be produced; in other words, that if the well produced any water at all the condition of the lease was satisfied. Such a conclusion might be suggested by a consideration of the bare language used in the lease, but the contract must be construed in the light of the knowledge of the parties and their understanding of the conditions present. It was shown that the land was leased for agricultural purposes; that it was known by both parties to be valueless for such purposes unless water was supplied for irrigation. With these conditions in mind, the lessor agreed to provide a well from which the lessee might obtain water. In the light of the circumstances, it is doing no violence at all to the expressions used in the contract to say that the agreement in fact was, as from the intention of the parties, that the well which the lessor agreed to sink should produce a quantity of water adequate for the purposes intended. The fact that the court found, as it did, that 50 miner's inches of water were required to properly irrigate the land, need not be analyzed by comparison with the evidence, for it is plain enough that no amount of water approaching an adequate supply was ever produced from any well up to the time the lessee elected to abandon the property after his crops failed.

On the subject of damages appellant objects to several items included in the judgment of the court on the ground that the same are not proper damages to be recovered, partly because of their particular nature and partly on the ground that such damages (in view of the fact, as appellant asserts it to be, that there had been a rescission of the contract) could in no event form the basis of a judgment.

The various items of damage which entered into the judgment may be summarized briefly as follows: For moving equipment and implements from adjoining county, $400; rental paid to defendant for year 1918, $1,200; paid

for cattle and hog feed because of failure of crops, $600; for preparing land for crops other than for alfalfa and barley, $286; net profit which would have been made on alfalfa and barley crop in 1918, $781; loss sustained by sale of hogs and equipment, $2,610; paid for installing equipment, $100.

[2, 3] The damages allowed were all in their nature special damages. They were not such as naturally and necessarily arose from the failure of appellant to supply with water the ground leased to respondent.

"'Damages are either general or special. General damages are such as the law implies, or presumes to have accrued from the wrong complained of. Special damages are such as really took place and are not implied by law. * * *' 1 Ch. Pl. 395." Stevenson v. Smith, 28 Cal. 102, 87 Am. Dec. 107.

"When the damages are special—that is, such as do not necessarily arise, or are not implied by law, from the act complained of—the facts out of which the damages arise must be averred in the complaint." L. T. Co. v. S. & W. W. R. Co., 41 Cal. 562; Mitchell v. Clarke, 71 Cal. 163, 11 Pac. 882, 60 Am. Rep. 529.

[4] A further principle of the law of contracts is that, upon breach committed, the offending party can only be held for such damages as it will be inferred may ordinarily result, considering the contract terms, and that, if there are special circumstances under which the contract was made, because of which damage results from the breach, these special circumstances must have been made known to the party committing the breach at the time the contract was entered into.

"If those special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances for such a breach of his contract." Wallace v. Ah Sam, 71 Cal. 197, 12 Pac. 46, 60 Am. Rep. 534; Page on Contracts, vol. 3, §§ 1580, 1581.

The opinion in the case last cited further declares that, where special damages are allowed upon breach of contract they are "awarded upon the theory that the parties who contracted with a full knowledge of the facts, circumstances, and objects of the agreement, may well be supposed to have had in contemplation all the proximate and natural results flowing from its breach."

[5] Plaintiff's general damage, assuming that his lessor failed to make the land available for the intended use by producing water thereon sufficient for irrigation, would be the rental value of the land. He makes no claim on that account, other than to demand the return of the $1,200 paid as rental for the first year of the term.

[6] In stating his first item of damage plaintiff alleges that "he expended the sum of $400 in moving his equipment and implements to said property." The evidence did not support this allegation, for by the plaintiff's testimony it was shown that his "farming implements, hog wire, posts, a wagon and a team of mules" were brought down in a motortruck by the plaintiff with the assistance of an employee. These things were brought from a point about 100 miles distant. While it was admitted by the answer that the use for which the land was leased included the raising of hogs and cattle, there was no evidence to show that at the time of the making of the lease the defendant understood the circumstances that required plaintiff to bring his farming equipment from such a distant point. That not being understood, it cannot be said, under the rules above declared, that special damages incurred on that account were in contemplation of the parties. Conceding that the cost of moving the property described was recoverable as damages, the proof does not meet the allegations of the complaint, because it was not shown that plaintiff expended any sum on that account; if he chose to recover the value of his own services and for the use of his vehicle, the facts respecting such matters should have been particularly alleged.

[7] The allowance of some of the other items of damages, as specified by the court in its findings, proceeds from two theories, which are conflicting. If it be concluded under the facts that there was a rescission of the contract, then the parties would be entitled to be placed in statu quo. To work this result the plaintiff would have been entitled to recover all of the rental paid. If he recovered the rental paid, he could not recover expectant profits, for, by a rescission, all contractual terms are put at an end, and there can be no damages for an alleged breach in such circumstances.

"If a party to a contract elects to rescind it, he cannot then continue to claim the benefits of the contract. He cannot go on and perform it nor can he claim compensation for loss of profits of it." Sedgwick on Damages (9th Ed.) vol. 2, § 655a.

[8] If the party merely stands upon the breach committed by the other, as was the case here, and being ready on his part to perform, but being prevented from securing benefits intended to be derived under the contract by reason of the act of the second party, he in that event is entitled to abandon effort at further performance and recover damages for the breach, which, under the facts of this case, should include profits of which there might be a reasonable expectation. Anvil Mining Co. v. Humble et al., 153 U. S. 540, 14 Sup. Ct. 876, 38 L. Ed. 814; Wald's Pollock on Contracts (3d Ed.) p. 351; Cox et al. v. McLaughlin et al., 54 Cal. 605.

[9] Plaintiff in framing his complaint evidently did not intend to rely upon claim of

rescission, notwithstanding he demanded the return of the rental, which the court allowed him. If he was entitled to a recovery as for profit on crops, that profit would mean net profit, to produce which there should be deducted as a charge against the plaintiff all sums expended in the production or attempted production of the same, including rental and the reasonable cost of bringing the crops to maturity and marketing them. To allow to the plaintiff recovery of rental in such a case is to allow him more than a net profit on crops; in other words, it allows to him a net profit plus the rental paid. It requires no argument to show that such a judgment cannot be justified. Rice v. Whitmore, 74 Cal. 619, 16 Pac. 501, 5 Am. St. Rep. 479; Teller v. Bay & River Dredging Co., 151 Cal. 209, 90 Pac. 942, 12 L. R. A. (N. S.) 267, 12 Ann. Cas. 779.

[10] There is no less a right of recovery for prospective profits on a future crop than on a crop planted and which may not mature because of acts committed by a defendant constituting a breach of the contract. The question becomes more a question of evidence; that is, profits on crops to be grown in the future may be difficult to establish with any reasonable certainty, and, because of that difficulty, may in particular cases be classed as speculative, and hence not recoverable. Such is the trend of the decisions. Crow v. San Joaquin Irrigation Co., 130 Cal. 309, 62 Pac. 562, 1058. In the opinion in the case of Shoemaker v. Acker, 116 Cal. 239, 48 Pac. 62, the court comments on the subject further as follows:

"An examination of the authorities will show that the cases in which future profits were rejected as 'speculative' or 'too remote' were cases where the asserted future profits were entirely collateral to the subject-matter of the contract, and not consequences flowing in a direct line from the breach of such contract. * * * But, where the prospective profits are the natural and direct consequences of the breach of the contract, they may be recovered; and he who breaks the contract cannot wholly escape on account of the difficulty which his own wrong has produced of devising a perfect measure of damages. * * * Contracts for the purchase and sale of future crops running through a series of years have been recognized as valid."

In Rice v. Whitmore, supra, the Supreme Court approved the giving of an instruction which allowed the jury to estimate the net value of a crop which had not been planted, and in the same case approved an instruction advising the jury that there could be no recovery for the loss of the labor of the plaintiff or for the use of his teams. Where the action for prospective profits on crops not planted is brought to trial after the years during which such crops might have been grown have passed, the available evidence to establish the net value of such crops is clearer, in that the weather, market, and other surrounding conditions can all be shown to a certainty in the proof; whereas in a case where the evidence is based upon assumed future conditions the result is naturally and necessarily highly speculative. The court, as has been stated, allowed $781 for profit on the crop of alfalfa and barley. The item $286 allowed for preparation of ground not planted to crops is not shown to be the equivalent of the net profit on all crops intended to be planted, except the hay and barley, for the court omitted to find what, if any, such net profit would have been, although the plaintiff alleged it. The profit might have been of a less sum, or there might have been no profit. Appellant insists, too, that only a portion of $286 is shown to have been expended or incurred on account of the work alleged, but, because of what has just been stated, the evidence need not be analyzed to that particular point.

[11] In order to ascertain the net value of the crops planted which might have been grown during the year 1918, the total rental of $1,200 paid, together with other production and marketing costs, should have been deducted from the gross amount. It was improper to make allowance of $600 for cattle and hog feed purchased, for the crop damage would compensate plaintiff for such expense.

[12] Appellant objects to the item of $2,610 allowed by the court as damages accruing on account of the difference between the value of plaintiff's hogs and the price obtained by him when he sold them in August, 1918. Plaintiff alleged in his complaint that, because of the failure to obtain water and feed on the land leased from the defendant, he was compelled to sell his "stock," and that the best price obtainable was $2,765, while the value of the property was $5,375. The evidence showed that plaintiff had for several years prior to the time he leased defendant's ground been engaged in the business of hog raising at his father's ranch in another county. He had acquired the lot of hogs in the course of that business, and did not purchase them especially for the purpose of stocking the defendant's land. He testified that he took the hogs off the latter land on August 28, 1917; that he sold first a part of them, after advertising the sale, and removed the remainder, numbering about 20, to another ranch, to the owner of which he finally sold them. From all that can be gleaned from the record, it would appear that the plaintiff obtained a reasonable market price for his hogs. The investment in the live stock was not induced by any dependence upon the prospect of securing the defendant's land and the water for irrigation, for the hogs had long before that been the property of the plaintiff, whose business, in part at least, was that of a hog breeder. So it cannot be said that the loss under this item was directly attributable to the defend-

ant's having breached his contract. Further than that, it cannot be concluded from the evidence, for it is wholly short of establishing any such condition, that had the plaintiff been furnished the water which it was agreed should be furnished him, and consequently had continued in the hog-raising business, he might not have suffered by the sale of his stock in due course of that business precisely an equivalent amount of loss. Admitting that the evidence was sufficient to establish the value of the hogs at the time they were sold (which appellant contends it was not), the facts established were not sufficient to prove recoverable damage.

Appellant further contends that the item of $100 was not proven. The testimony as to that item admits of the reasonable inference that the defendant expended the money in hiring help to do the work. It admits also of the inference, taken in connection with the evidence on other branches of the case, that the outlay resulted in a loss properly chargeable as a damage resulting to the plaintiff.

For the reasons given, defendant is entitled to a new trial as to the issues of damage.

The judgment is reversed as to all amounts of damage and costs allowed by the court. It is otherwise affirmed. The superior court is directed to retry all issues as to damages and to enter such a new judgment as the facts justify and as may be consistent with the conclusions herein expressed. Appellant will recover costs on appeal.

We concur: CONREY, P. J.; SHAW, J.

---

59 Cal. App. 299

## PEOPLE v. SALISBURY. (Cr. 893.)

(District Court of Appeal, Second District, Division 1, California. Oct. 9, 1922.)

**1. Infants ⇐20 — Information held not to charge offense of contributing to delinquency of child.**

An information alleging merely that accused had sexual intercourse with a female 19 years of age, who was not his wife, does not charge the offense of contributing to the delinquency of a minor under Juvenile Court Law, § 21, providing that a person committing an act which causes or tends to cause or encourage any person under the age of 21 to become delinquent within the meaning of section 1 of the act shall be guilty of a misdemeanor.

**2. Criminal law ⇐1186(4)—Conviction based on information not charging offense not cured by harmless error clause of Constitution.**

Const. art. 6, § 4½, providing that no judgment shall be set aside for any error as to procedure unless the error has resulted in a miscarriage of justice, does not apply where, in a prosecution for a misdemeanor, the information is so defective that no crime is charged, and where accused properly urged his objections thereto, although the evidence would have sustained the verdict as to some offense under the statutes.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Frank A. Salisbury was convicted of contributing to the delinquency of a minor, and appeals. Reversed.

Farnsworth, McClure & Burke, of Visalia, for appellant.

U. S. Webb, Atty. Gen., for the People.

CONREY, P. J. The charge against the defendant is contained in an information whereby the defendant was accused by the district attorney of the crime of misdemeanor, to wit, contributing to the delinquency of a minor, committed as follows:

"The said Frank A. Salisbury on or about the 8th day of March, A. D. one thousand nine hundred and twenty-one, at the county of Tulare, state of California, and before the filing of this information, did willfully and unlawfully have and accomplish an act of sexual intercourse with and upon one Mary Schlotthauer, a female under the age of twenty-one years, to wit, of the age of about nineteen years, the said Mary Schlotthauer not being then and there the wife of the said Frank A. Salisbury, contrary to the form, force and effect of the statute in such cases made and provided, and against the peace and dignity of the People of the state of California."

It is, of course, apparent that this information did not charge the crime of rape, or any other offense denounced by the Penal Code. Although it does not appear by any statement in the record that the proceedings were under the Juvenile Court Law, or that the defendant was tried before the superior court sitting as a juvenile court, it is claimed on behalf of the people that the prosecution was for an offense committed under the provisions of the Juvenile Court Act (St. 1915, p. 1225). Section 21 of that act provides, among other things, that any person who shall commit any act which causes or tends to cause or encourage any person under the age of 21 years to come within the provisions of any of subdivisions 1 to 13, inclusive, of section 1 of this act, or contributes thereto, shall be guilty of a misdemeanor; "and the superior court, sitting as a juvenile court, shall have original jurisdiction over all such misdemeanors." According to section 1 of the Juvenile Court Law, and subdivision 11 thereof, any person under the age of 21 years "who is leading, or from any cause is in danger of leading, an idle, dissolute, lewd or immoral life" is a person to whom the act applies.

---

[1] Appellant contends that by the information he was not charged with any offense under these provisions of the Juvenile Court Law. He insisted upon this objection at all stages of the proceedings. He made this objection by demurrer to the information, by motion to strike out and vacate the information, and by motion in arrest of judgment. In all of the analogous cases to which we have been referred in which judgments of conviction under this law have been brought up for review, it has been definitely charged that the alleged acts of the defendant tended to encourage the minor to become a person of the character described in section 1 of the Juvenile Court Law, or words of equivalent import have been used. In the absence of any such allegations in the charge presented in this case, it unfortunately results that the information fails to charge facts sufficient to constitute any crime. Although she was under the age of 21 years, the woman in this case was more than 18 years of age; that is to say, above the age of consent. But so far as shown by the information, the act described may have been accomplished by force and violence and wholly against her will. And on this assumption the case for the people is not aided, since it is conceded that the information was not sufficient to charge the crime of rape. In People v. Cruse, 24 Cal. App. 497, 141 Pac. 936, following the statement of testimony tending to show that a forcible rape had been committed, this court held that upon that evidence alone the offense of contributing to the dependency of the girl named would not appear to have been committed. The court said:

"Upon the case thus made, viewed in the light of this evidence introduced by the prosecution, it would seem that the girl was not a dependent or delinquent child, for it could not be properly said that, with the disposition thus ascribed to her and the fact that the act of intercourse committed with her was accomplished by force and against her will, there was danger of her 'growing up to lead an idle, dissolute or immoral life.' It might as well be said where, for instance, a married woman is assaulted and outraged and she chances to be under the age of 21 years, that she thereupon becomes a delinquent person and that the perpetrator of the outrage could be prosecuted as one having caused the woman to become of that character."

[2] We deem it unnecessary to discuss other errors relied upon by appellant. The fact that the evidence would have sustained the verdict if the information had described the commission, by defendant, of a criminal offense, does not entitle the state to an affirmance when the information is so defective that no crime was charged, and particularly when, as in this case, the objections made by the defendant were continually urged upon the attention of the court. Under such circumstances, section 4½ of article 6 of the Constitution does not apply to the case.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

59 Cal. App. 394

## MOORADIAN v. MARKARIAN.

## MARKARIAN v. MOORADIAN.

(Civ. 4286.)

(District Court of Appeal, First District, Division 2, California. Oct. 23, 1922. Hearing Denied by Supreme Court Dec. 22, 1922.)

Appeals from Superior Court, Fresno County; D. A. Cashin, Judge.

Separate actions by D. J. Mooradian against Garabed Markarian and by Garabed Markarian against D. J. Mooradian, tried together by stipulation. Judgment in both cases for Markarian, and Mooradian appeals. Affirmed.

Everts, Ewing & Wild and J. R. Fitch, all of Fresno, for appellant.

Gallaher, Simpson & Hays, of Fresno, for respondent.

NOURSE, J. Two actions were, by stipulation, tried together, one brought by the appellant against respondent for the cancellation of a promissory note; the second, by respondent against appellant for collection of the same note. Respondent obtained judgment in both cases. In his answer to the second case appellant alleged that the note had been taken by him in payment for the first installment of the purchase price of a piece of property which he agreed to sell to the respondent; that an agreement of sale was executed by both parties wherein it was agreed that the note should be canceled and declared void; that respondent thereafter entered into possession of the premises, but had failed to pay the interest due on the 1st day of December, 1920, and had thereafter abandoned the property.

The trial court found that the agreement which was executed by the parties was merely a preliminary agreement which expressly called for a final agreement, and which contemplated further negotiations for the purpose of agreeing upon the terms, conditions, and provisions to be included in the final contract; that this preliminary agreement was not delivered to respondent, but was by the appellant delivered to his own attorney with instructions to said attorney to prepare a final agreement. The trial court also found that the allegations relating to the taking of possession by respondent were not true.

On this appeal appellant attacks the findings relating to the manner in which the preliminary agreement was executed and delivered and also the finding that the preliminary agreement contemplated further negotiations. As to the first, appellant refers to the testimony of the witness Ohanian, in which he said that he understood that he was acting as attorney for both parties and not for the appellant alone;

but respondent points to the testimony of the appellant in which he said that Ohanian was his attorney. On the other issue the evidence is even less conflicting; the testimony of appellant showing that as to several important matters future negotiations were to be had.

Appellant does not attack the finding that respondent did not enter into possession, but does refer to some testimony of the appellant himself, brought out upon inquiry of the trial court, from which it might have been found that this allegation of the answer was true. The testimony is not positive or convincing, and we assume the trial court rejected it. We find substantial evidence in the record to support the findings under attack.

Judgments affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

190 Cal. 113

## SCHURMAN v. LOOK. (Sac. 3392.)

(Supreme Court of California. Nov. 20, 1922.)

**1. Appeal and error ⊂=757(3) — Presumption that appellant has printed such evidence as he intends to rely on.**

Under Code Civ. Proc. § 953c, providing that the parties must print in their briefs or in a supplement appended thereto such portions of the record as they desire to call to the attention of the court, it will be presumed that appellant has done so.

**2. Appeal and error ⊂=766—Motion to compel appellant to print additional evidence denied, as respondent can print same.**

Under Code Civ. Proc. § 953c, providing that the parties must print in their briefs or in a supplement appended thereto such portions of the record as they desire to call to the attention of the court, respondent may print such portions of the evidence as he intends to rely on, and it is sufficient to state the substance of the evidence only; hence a motion by respond-

ent to compel appellant to print additional evidence will be denied.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Martha Schurman against Halleck Hart Look. Judgment for defendant, and plaintiff appeals. Motion by defendant to require plaintiff to print additional evidence in her brief. Motion denied.

Irving D. Gibson, of Sacramento, for appellant.

C. E. McLaughlin and W. F. Renfro, both of Sacramento, for respondent.

PER CURIAM. The motion of the respondent, Halleck Hart Look, to require the appellant to print additional evidence not in his brief is denied.

[1, 2] The Code provides that—

"In filing briefs on said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." Code Civ. Proc. § 953c.

The appellant, it must be presumed, has done so. The respondent may print in his brief such portions of the record as he relies on. It is proper to add that in doing so it is not necessary for him to print every part of the record. It is sufficient for him to state the substance of the evidence. For illustration, where the evidence is produced by question and answer, he may give only the answer, where it sufficiently explains the question to which it was presented. In this way the respondent can very much abridge the evidence he desires to have presented. Other methods of abbreviation will doubtless occur to the respondent.

SHAW, C. J., and WILBUR, LENNON, SLOANE, and LAWLOR, JJ., concur.

---

190 Cal. 105

## In re CARROLL'S ESTATE.

## GEORGESON v. STEINHOFER et al.

(S. F. 10228.)

(Supreme Court of California. Nov. 15, 1922.)

**Appeal and error ⊜1140(8)—Remittitur required by judgment of District Court of Appeal held properly filed in such court.**

Judgment for claim against an estate was affirmed by the District Court of Appeal, on condition of remittitur of a portion of the claim within 30 days from filing of the opinion, and within the time attorneys for the respondents sent a release of such sum to the clerk of the District Court of Appeal, stating it was their desire to release such portion of the judgment, and the clerk returned the release, stating that the matter of release should be taken up with the lower court. Thereupon the attorneys filed a similar release with the clerk of the lower court, and that court made an order reciting the due filing of the release with it, and subsequently made order that the executor pay the claim as so reduced. *Held* that, since the appellate court, under Const. art. 6, § 4, had exclusive jurisdiction of the case during the 30 days specified, its order required the remission to be filed in that court, and that this was done by respondents by filing release with the clerk of that court, although he returned it, and although respondents filed release in the lower court, this not constituting withdrawal of the tender of release in the appellate court, so that the order requiring the payment of the claim as reduced was proper, the reference in the findings supporting it to the filing of the release in the lower court being properly construed as surplusage, and not impairing the efficacy of the findings as a whole that there was a proper remission.

In Bank.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

In the matter of the estate of Alice M. Carroll, sometimes called Alice M. Perry. From an order directing F. W. Georgeson, executor, etc., to pay a certain sum from the moneys of the estate to Bertha Steinhofer and another, the executor appeals. Affirmed.

H. C. Nelson and Puter & Quinn, all of Eureka, for appellant.

W. Ernest Dickson, of Eureka, for respondents.

LENNON, J. This is an appeal from an order of the superior court of Humboldt county, directing the executor of the last will and testament of Alice M. Carroll to pay to Bertha Steinhofer and Herman Steinhofer, respondents herein, the sum of $2,024.43, less the sum of $69.43, from the moneys of said estate. The facts are as follows:

Alice M. Carroll, sometimes called Alice M. Perry, died testate in the county of Humboldt on or about August 20, 1917. F. W. Georgeson, the appellant herein, was duly appointed the executor of her last will and testament, and at all times since then has been and is now the duly qualified and acting executor. During the course of the administration of said estate Bertha and Herman Steinhofer, the respondents herein, presented a claim to said executor for certain services and expenditures claimed to have been made by them for and on behalf of said deceased. Said claim was rejected and disallowed by said executor. Thereafter the said claimants, the respondents in the present case,

filed an action in the superior court of the county of Humboldt against the appellant herein as the executor of said estate. A trial of said cause was had with a jury, and a verdict rendered in favor of the plaintiffs and against the said executor in the sum of $2,024.43. Judgment was accordingly duly entered on said verdict for said sum in favor of the plaintiffs, who are respondents here. Upon an appeal from the judgment thus rendered and entered in the case the District Court of Appeal for the Third Appellate District, in its opinion rendered and filed October 15, 1921, after disposing of the points made in support of the appeal, ordered and directed that if the plaintiffs in that action, who were the respondents upon the appeal taken therein, "within 30 days from the filing of this opinion, remit in due and proper form the sum of $69.43 of the amount awarded them by the verdict and judgment, * * * the said judgment shall stand as affirmed, but if the plaintiffs fail or refuse within said time to remit said sum * * * from said judgment, then the judgment appealed from will stand as reversed, and the cause remanded for a new trial." 202 Pac. 350.

Thereafter on October 19, 1921, the attorneys for the respondents upon that appeal wrote, addressed, and mailed a letter to the clerk of said District Court of Appeal, which letter was to the effect that inclosed therein was a release by respondents of said sum of $69.43 from said judgment, and that it was the desire of respondents "to release that portion of the judgment in accordance with the suggestion of the appellate court." The letter referred to requested the clerk of the appellate court to advise the writer whether or not the release inclosed therein was in proper form. The release inclosed to the clerk was signed by the attorney for the plaintiffs in the action, and also signed and acknowledged by the plaintiffs. It was appropriately captioned with the title of the court and cause. It was addressed to the appellate court and, after reciting the fact of the rendition of the said court's opinion and the direction therein for a remittance of a portion of the judgment therein referred to, proceeded to and did declare that "in pursuance of said opinion and direction, we, the plaintiffs above named, do hereby remit and release from the amount of said judgment the sum of sixty-nine and forty-three hundredths ($69.43) dollars."

The letter and the release were received in due season by the clerk of the appellate court, who shortly thereafter returned the release to the attorney for the plaintiffs, accompanied by a letter which stated that the release was returned for the reason that the clerk was "instructed by the court to return the same to the attorney for the plaintiffs." The letter last referred to further stated that the clerk had been directed by the appellate court to inform the attorney for plaintiffs that the matter of remitting a portion of the judgment should "be taken up with the superior court of Humboldt county," in which court the judgment was originally made and entered. Following the receipt of the letter last referred to and the return of the release from the clerk of the appellate court, the attorney for the plaintiffs in the action on October 26, 1921, filed with the clerk of the superior court of Humboldt county a release executed and acknowledged by the plaintiffs, which was substantially the same as the release forwarded in the first instance to the clerk of the appellate court. On October 27, 1921, the said superior court made and entered an order in the action in question, which, after reciting the facts of the making and entering of the original judgment, the direction of the appellate court for a remission of a portion thereof, and the filing, in said superior court, of the plaintiff's written consent to a remission from the judgment of the sum of $69.43, directed that the said judgment be accordingly modified of record by deducting therefrom the sum so remitted. Thereafter on March 3, 1922, the superior court of Humboldt county, in response to a proceeding instituted in that court by the plaintiffs in the original action, now the respondents here, made and entered an order in the estate of said Alice M. Carroll, directing the defendant in said action, now the appellant here, as the executor of said estate, to pay to said plaintiffs the sums called for by the judgment in controversy, less the sum of $69.43, which had been remitted therefrom in keeping with the direction of the appellate court. It is from this order of the superior court that the appeal is taken.

The remittitur in the case came down from the appellate court and was filed with the superior court on the 15th day of December, 1921. No contention is made that the appellate court did not have the power to make the affirmance or reversal of the judgment conditional upon the waiver or nonwaiver of a portion of the judgment appealed from. It is contended, however, in support of the present appeal, that no remission of the judgment was made in "due and proper form," as required by the opinion of the appellate court, and that as a consequence the judgment appealed from was in effect reversed. This contention is based solely upon the fact that the remission was not filed with the appellate court within the time limited by the opinion of that court. It is argued in this behalf that, inasmuch as the appellate court retained jurisdiction of the action until the remittitur came down and was filed with the superior court, the filing of the remission in the superior court was a vain and useless thing, which, in the absence of jurisdiction

in that court to proceed at all in the premises until the remittitur came down, could not be made the predicate for modification of the judgment. Conceding this contention to be correct, still it is not conclusive of the question of whether or not the plaintiffs made, in due and proper form, a remission of the judgment in controversy as directed by the appellate court. It is not uncommon for reviewing courts to make a conditional order, as was done in the instant case, that the judgment be affirmed upon the requirement that the respondents consent to remit a portion of the judgment. Paige v. O'Neal, 12 Cal. 483; Doll v. Feller, 16 Cal. 432; Smith v. Johnson, 23 Cal. 64; Hooper v. Wells, 27 Cal. 11, 85 Am. Dec. 211; Crowthers v. Rowlandson, 27 Cal. 377; Lally v. Wise, 28 Cal. 539; Carpentier v. Gardiner, 29 Cal. 160; Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657; Tarbell v. C. P. R. Co., 34 Cal. 616; Kinsey v. Wallace, 36 Cal. 462; Kline v. Central Pacific R. R., 39 Cal. 587; Hodapp v. Sharp, 40 Cal. 69; Mahoney v. Middleton, 41 Cal. 41; Salstrom v. Orleans Bar Gold Mining Co., 153 Cal. 551, 96 Pac. 292. Ordinarily, the reviewing court may in its discretion order that the remission be filed in the reviewing court, or direct the court below to make the requisite order for a modification of the judgment upon the going down of the remittitur. Pinkerton v. Woodward, Crowthers v. Rowlandson, Kinsey v. Wallace, and Salstrom v. Orleans Bar Gold Mining Co., all supra. It would appear, therefore, that there is no fixed or uniform rule as to where, whether in the reviewing or trial court, the remission of judgment should be filed; but in whatever court the remission is directed to be made the judgment becomes automatically and permanently affirmed or reversed, as the case may be, upon the performance or nonperformance of the condition. Durkee v. Garvey, 84 Cal. 590, 24 Pac. 929.

In the instant case the order for a remission of the judgment did not designate the court in which the remission should be filed. The remission, however, was directed to be made within 30 days after the filing of the opinion of the appellate court. The appellate court retained jurisdiction of the case on appeal for 30 days following the filing of the opinion (Const. art. 6, § 4), and the superior court would not be reinvested with jurisdiction of the case until the going down of the remittitur, which, in the ordinary course, would not issue until the expiration of 60 days from the filing of the opinion (Rule XXXIV of Rules of Supreme Court, 177 Cal. lxi, 176 Pac. xiv). In short, there was no court, other than the appellate court, which had jurisdiction of the action during the time designated by the opinion of that court within which the remission was to be filed. In re Jessup, 81 Cal. 408, 472, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594; Niles v. Edwards, 95 Cal. 41, 30 Pac. 134. It would appear, therefore, that the conditional order of the appellate court should be construed to mean that the remission of the judgment should be filed in that court. This, we take it, is what the plaintiffs in effect did.

The return of the release of the judgment by the clerk of the appellate court to the attorney for the plaintiffs in the original action, with directions to present the same to the court below, was tantamount to a refusal to file the release in the appellate court. It will be noted that the release was not refused filing by the clerk of the appellate court because of any formal defect therein, nor because of a failure to pay any fees which might be required for its filing with the appellate court. While counsel for the plaintiffs did not in his letter to the clerk of the appellate court, in which was inclosed the release, request in so many words that the release be filed with the records of that court, nevertheless, the very nature of the release itself, the fact that it was addressed to the appellate court and made specific reference to the opinion of that court concerning the conditional order of affirmance, coupled with the statement in the letter of the counsel for plaintiffs that the release had been executed and forwarded to the clerk of the appellate court for the purpose of conforming to the direction of the appellate court, was in effect a request for a filing of the release with that court. The fact that counsel for the plaintiffs in his letter to the clerk of the appellate court expressed his anxiety to have the release executed in proper form did not militate against his tender of the release to said clerk for filing, nor does the act of the clerk of the appellate court in returning the release to counsel for plaintiffs upon the theory that it should have been filed in the court below operate to make the tender of a filing with him in the first instance ineffective. Nor does the fact that counsel for plaintiffs filed a release in the court below constitute a withdrawal of the tender for filing of the release in the first instance with the clerk of the appellate court. All of the circumstances attending the forwarding of the release to the clerk of the appellate court indicate that it was the intention of the counsel for plaintiffs to have the release filed with the records of the appellate court, and a paper is filed of record, in contemplation of law, when it is delivered to the proper official, with the intention that it shall become part of an official record, and the filing thus made is not impaired by the clerk's failure or refusal, without good cause, to receive and record the same as filed in the records of his office. Smith v. Biscailuz, 83 Cal. 344, 21 Pac. 15, 23 Pac. 314; Howell v. Slauson, 83 Cal. 539, 23 Pac. 692; Rollins v. Wright, 93 Cal.

395, 399, 29 Pac. 58; Edwards v. Grand, 121 Cal. 254, 256, 53 Pac. 796; Thomason v. Carroll, 132 Cal. 148, 152, 64 Pac. 262; Hoyt v. Stark, 134 Cal. 178, 66 Pac. 223, 86 Am. St. Rep. 246; Dillon v. Superior Court, 24 Cal. App. 760, 142 Pac. 503; People v. Marsh, 30 Cal. App. 424, 430, 159 Pac. 191; Tregambo v. Comanche Mills, 57 Cal. 501; Keller v. Gerber (Cal. App.) 193 Pac. 809; Hart v. Forgeus, 184 Cal. 327, 193 Pac. 764; Reed v. Curry, 35 Ill. 536; Grubbs v. Cones, 57 Mo. 83, 84; Bensley v. Haeberle, 20 Mo. App. 648; Aultman v. Utsey, 33 S. C. 611, 12 S. E. 628; Poole v. Poindexter, 72 Kan. 654, 83 Pac. 126; Bade v. Hibberd, 50 Or. 501, 93 Pac. 364.

While the order appealed from seems to have been based in part upon a purported finding that the remission in question was made in the superior court of Humboldt county on the 27th day of October, 1921, nevertheless, the findings, as a whole, upon which the order appealed from must ultimately rest may be fairly construed in support of the order to mean that the lower court found that the remission in due and proper form from the judgment of the amount designated by the court of appeal was made within the 30 days designated in the opinion of said court. The reference in the findings to the filing of the release in the superior court of Humboldt county as of the 27th day of October, 1921, may be taken as surplusage and ignored without impairing the efficacy of the findings as a whole to support the order appealed from. The findings thus construed are amply supported by the evidence. This is so because the superior court had before it, so the record shows, at the time of the making of its findings and the order appealed from, all of the evidentiary matters pertaining to the execution and forwarding in the first instance of the remission by the plaintiffs in the original action to the clerk of the appellate court. The findings as a whole, therefore, may be fairly said to have been made and based upon the tender to the clerk of the appellate court of the filing of the remission which, as we have said before, was equivalent to an actual filing.

Upon the filing with the clerk of the appellate court the judgment automatically became affirmed, and nothing further was needed to be done to make the affirmation final, but the sending down of the remittitur. This was done in due course on December 15, 1922, and the lower court, having thereupon regained jurisdiction, had jurisdiction to make the order appealed from.

The order appealed from is affirmed.

We concur: SHAW, C. J.; LAWLOR, J.; WASTE, J.; WILBUR, J.; RICHARDS, Justice pro tem.

190 Cal. 114

## PRESS PUB. CO. et al. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.

## GENERAL ACCIDENT, FIRE & LIFE ASSUR. CORPORATION, LIMITED, OF PERTH, SCOTLAND v. SAME.

(L. A. 7197, 7198.)

(Supreme Court of California. Nov. 22, 1922.)

**1. Master and servant ⟸361—Term "contract for hire" within Compensation Act defining "employee" construed.**

The term "contract for hire," as used in Workmen's Compensation Act, § 8a, defining an "employee," means a contract for personal service as is indicated by the fact that the basis of compensation provided by the act is the amount of wages earned.

**2. Master and servant ⟸405(2)—Compensation claimant held under contracts for personal service.**

Circumstances surrounding the employment of compensation claimant, injured by the overturning of his motorcycle, *held* to warrant the inference that he was under contract for personal service to carry cream for a creamery, and likewise under a contract for personal service to a publishing company for the delivery of papers along the same route; it appearing that he was paid fixed wages, and was subject to discharge for unsatisfactory service.

**3. Master and servant ⟸367—Employer's power to terminate employment incompatible with relationship of independent contractor.**

The power of the employer to terminate the employment at any time is incompatible with the full control of the work usually enjoyed by an independent contractor, and is a strong circumstance to show the subserviency of the employee.

**4. Master and servant ⟸405(2)—Existence of power of control determined from circumstances.**

In the absence of any express terms affirming or negativing the power of control and direction, its existence must be determined from the reasonable inferences to be drawn from all the circumstances surrounding the making of the contract of employment, considered in conjunction with the nature of the contract and the duties ordinarily to be performed thereunder.

**5. Master and servant ⟸367—Control test of status of employee or independent contractor.**

It is not the actual exercise of control, but the right of control, which is important in a determination of whether or not the status of an employee or independent contractor exists, and one of the means of ascertaining whether or not this right to control exists is the determination of whether or not, if instructions were given, they would have to be obeyed.

**6. Master and servant ⊜367 — Compensation claimant held an "employee," and not one engaged in "transfer business" as an "independent calling."**

Where compensation claimant purchased his motorcycle when he undertook the service of carrying cream for a creamery and delivering papers for a publisher, and the carrying of packages for patrons along the route when requested by them was merely incidental to the other service, and the amount he received for the incidental service was trivial in comparison with his regular wages, it cannot be said that he was engaged in the conduct of a "transfer business," and therefore in pursuit of an" independant calling" within Civ Code, § 2009, so as to defeat his claim as "employee" within the Workmen's Compensation Act, § 8(a).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employee.]

**7. Master and servant ⊜375(1)—Compensation claimant delivering newspapers held within scope of employment.**

Compensation claimant, injured by the overturning of his motorcycle carrying cream for a creamery and newspapers for a publishing company, *held* within the scope of his employment as to the company, though he was on one road instead of another; it appearing that either road was a reasonable road to be used, in the absence of instructions to the contrary.

In Bank.

Applications for writ of review by the Press Publishing Company and others and by the General Accident, Fire & Life Assurance Corporation, Limited, of Perth, Scotland, to annul an order of the Industrial Accident Commission of California and others, awarding compensation to Leon Benefiel. Award affirmed.

Geo. H. Moore, of Los Angeles, for petitioner Press Publishing Co.

Joe Crider, Jr., of Los Angeles, for petitioner General Accident, Fire & Life Assur. Corporation, Limited, of Perth, Scotland.

A. E. Graupner, of San Francisco, for respondents.

LENNON, J. This is a proceeding by petitioners, General Accident & Fire Assurance Company, insurer of Lucia K. Hicks, owner of a creamery in Santa Barbara, and the Press Publishing Company, a newspaper published in that city, and its insurer, Employers' Liability Assurance Corporation Limited, of London, England, to have annulled the award made by the Industrial Accident Commission to Leon Benefiel for injuries found by the Commission to have arisen out of and in the course of his joint employment by said Lucia K. Hicks and the Press Publishing Company. The liability for compensation was apportioned according to the ratio which the wages Benefiel received from each employer bore to the sum total of the wages he received from both. On behalf of General Accident & Fire Assurance Company, insurer of Lucia K. Hicks, it is contended that Benefiel was, at the time of the injury for which compensation was awarded, not an employee of Lucia K. Hicks, but an independent contractor, and that therefore Lucia K. Hicks was not liable for compensation for injuries received by him. On behalf of the Employers' Liability Assurance Company, insurer of the Press Publishing Company, it is contended that Leon Benefiel was at the time of injury an independent contractor and not an employee of the said company, and, furthermore, that even though it be found that he was an employee, nevertheless the Press Publishing Company was not liable for compensation, for the reason that at the time of the accident said employee was acting outside the sphere of his employment for the Press Publishing Company, and the injury was not, as found by the Commission, "in the course of" his employment. The facts upon which the Commission made its findings and based its award, briefly stated, are these:

Benefiel, a minor, was employed for some time by Miss Lucia K. Hicks, at Santa Barbara, washing milk cans and doing similar work around her creamery. During this time a portion of her milk and cream was secured from the Dabney ranch at Los Olivos, about 60 miles northwest of Santa Barbara, and, owing to the strenuousness of the trip, she was having constant difficulty in getting any one to make the trip daily for the wages she was able to pay. One of the newspaper routes of the Press Publishing Company of Santa Barbara paralleled the route to be taken to the Dabney ranch for the cream, and Benefiel made an arrangement with Miss Hicks that he should endeavor to obtain the job of delivering the papers along this route, and by combining the work of going after the cream and delivering the papers make sufficient money to compensate him adequately for the work involved. It was also expected that from occasional errands which he could perform for parties along the route, as delivering packages or filling small orders, he would earn enough to pay for the gasoline and oil for his motorcycle to be used in the work. A satisfactory arrangement was consummated with the Press Publishing Company whereby he was to deliver papers, some in bulk and some single copies, between Santa Barbara and the Dabney ranch, and Benefiel thereupon purchased a motorcycle with a side car attachment and commenced his joint duties.

Benefiel's work for Miss Hicks consisted in carrying ice and empty cream cans daily from Santa Barbara to Los Olivos and bringing back the cream from the farm there. For this work he was paid $6 a day, regardless of the amount of cream carried and re-

gardless of whether he used his own motorcycle or used Miss Hicks' automobile. If, however, he used her automobile the arrangement was that she was to receive the money he earned on the trip by performing the incidental errands. Benefiel's work was always satisfactory, and Miss Hicks gave him no directions as to the time he was supposed to leave or the route he was to take, except that it was understood that he should have the cream back from the Dabney ranch to the dairy by 3:30 or 4 o'clock in the afternoon in time for the bottling.

The duties of Benefiel for the Press Publishing Company consisted of his calling for the papers at their office early in the morning and delivering them along the route. Every morning before leaving he was supposed to look for slips upon which were written instructions from the Press Publishing Company as to the names of new subscribers and those dropped from the subscription list. For this service he was paid a flat rate of $15 a week, and was paid at the same time and in the same manner as the carriers engaged upon each of the other routes of the Press Publishing Company. No directions were given him as to the time he was supposed to start nor as to the road he should take in reaching the commencement of the route. He was, however, supposed to start sufficiently early in the morning to have the last papers delivered at Los Olivos by 12 o'clock noon. While there seems to have been no complaint of his services by the Press Publishing Company, he was subject to being discharged by it at any time that his services should prove unsatisfactory.

There are two roads going out of Santa Barbara which he could use, both of which unite outside of the city and join the state highway. The Hollister road is better paved from the newspaper office to the state highway than is the Modoc road, which is, however, a little shorter and closer to Benefiel's home and the dairy. As he had no duties to perform until after the junction point of the two roads with the state highway, he was equally starting upon his route when using either of the two roads. Owing to the rattling of the milk cans in the empty side car, it was his practice to go to the dairy the night before and bring the empty cans to his home. The next morning he would go to the ice plant and procure the ice for icing the milk, and get his bundles of papers from the office, then stopping at home, he would load on the empty milk cans and leave by the Modoc road on his daily trip.

On the morning of February 11th, Benefiel, after getting the ice and papers and stopping at his home for the empty milk cans, started out the Modoc road from home as usual. While proceeding along that road at a point shortly before its intersection with the Hollister road, his motorcycle overturned in passing an automobile, and he was very seriously injured. At the time of the injury he was carrying in his side car the empty milk cans and ice for the creamery, the papers of the Press Publishing Company, and a storage battery for a garage along his route. An application for adjustment of claim was filed by Benefiel with the Industrial Accident Commission against Miss Lucia K. Hicks and her insurance carrier, the General Accident Fire & Life Insurance Corporation, and the Press Publishing Company, and its insurance carrier, the Employers' Liability Assurance Corporation. The Industrial Accident Commission awarded compensation against both insurance companies, dismissing the employers because of their insurance. The separate writs of the two insurance companies having been consolidated for briefing and the facts upon which the award was made being practically the same, both cases will be considered and decided in this opinion.

[1] An employee is defined by section 8 (a) of the Workmen's Compensation Act (Stats. 1917, c. 586, p. 831) to be:

"Every person in the service of an employer as defined by section seven hereof under any appointment or contract of hire or apprenticeship, express or implied, oral or written."

A "contract of hire" means a contract for personal services, as is indicated by the fact that the basis of compensation provided by the act is the amount of wages earned. Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 810, 159 Pac. 721.

[2] That Benefiel was under a contract for personal services to Lucia K. Hicks to carry ice and empty milk cans daily from Santa Barbara to Los Olivos and bring back the cream from the farm there, and likewise under a contract for personal services to the Press Publishing Company for the delivery of the Morning Press on route 19 between Santa Barbara and Los Olivos, is, in our opinion, a fair inference from the surrounding circumstances of his employment as is shown by the undisputed evidence. As to his arrangement with Miss Hicks, the fact that Benefiel was previously employed by her, rendering personal services in and around the creamery, the fact that the work to be performed was not a particular transaction, but contemplated a continuity of service, the fact that his payment was not a specified recompense for a specified result, but was proportionate to the amount of labor involved, rather than for the amount of cream carried, all support the inference that Benefiel was an employee rather than an independent contractor. There is no direct proof of any actual control exercised over Benefiel in the performance of his duties. It is an admitted fact, however, that he was required to have the cream at the creamery in Santa Barbara by 3:30 or 4 o'clock in time for bottling. It is also an admitted fact that Miss Hicks had the power to discharge him at any time his services should prove un-

satisfactory, and this undoubtedly gave her the potential power of control.

[3] This power of the employer to terminate the employment at any time is a strong circumstance tending to show the subserviency of the employee, since it is incompatible with the full control of the work usually enjoyed by an independent contractor. Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so. 14 Ruling Case Law, p. 72. Moreover, the fact that Miss Hicks had agreed that, in case Benefiel was unable to use his motorcycle, she would furnish him with an automobile to make the trip, indicates that it was his personal services for which she contracted.

[4] As to the services rendered for the Press Publishing Company, they were of an essentially personal nature. It was understood that the services were to be rendered by Benefiel himself. The Press Publishing Company retained control of its route, and hired carriers to deliver its papers, and Benefiel was hired on the same terms, treated in the same manner, and paid in the same way as the other carriers. It is not contended by the Press Publishing Company that Benefiel bought the papers himself and resold them, or that he could have sublet the route. It is insisted, however, that there was no power of direction or control over Benefiel by the Press Publishing Company, which power was essential to establish the status of Benefiel as an employee. The existence or nonexistence of this power of direction, and control cannot be determined from the terms of the contract, since nothing is expressly said therein as to this right. In the absence of any express terms affirming or negating the power of control and direction, its existence must be determined from the reasonable inferences to be drawn from all of the circumstances surrounding and attending the making and execution of the contract, considered in conjunction with the nature of the contract and the duties ordinarily to be performed thereunder. The circumstances attending the hiring of Benefiel warrant the inference that he was subject to the direction and control of the Press Publishing Company in the performance of his work. The most significant fact in this regard, and one which points towards the relation of employee rather than to the status of an independent contractor, is the fact that Benefiel was hired on the same terms as the other carriers, and the Press Publishing Company had the right to exercise the same direction and control over Benefiel as it did over the other carrier boys, concededly employees. While it is true that Benefiel was "on his own time" as to the time of starting, nevertheless his work was required to be finished at Los Olivos by 12 o'clock noon. He was also required to look each morning at the Press Publishing Company's office for slips concerning the addition of new subscribers or the discontinuance of old ones. If any complaints were made by patrons, he would be required to note and remedy the defective delivery.

[5] As previously indicated, it is not the actual exercise of control, but the right of control—that is to say, the potential power of control—which is important in a determination of whether or not the status of an employee or independent contract exists. Claremont Country Club v. Industrial Accident Commission, 174 Cal. 395, 163 Pac. 209, L. R. A. 1918F, 177. One of the means of ascertaining whether or not this right to control exists is the determination of whether or not, if instructions were given, they would have to be obeyed. In the instant case, it is undisputed that the Press Publishing Company had the power to hire and the power to discharge its carriers for unsatisfactory service, and in this regard Benefiel was in no better position than the other carriers. This power of discharge made obligatory any instructions given, for it gave to the Press Publishing Company the power to require obedience to those instructions and insured their being carried out. As was held in Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 417, 156 Pac. 491, 495 (Ann. Cas. 1917E, 390):

"The real test by which to determine whether a person is acting as the servant of another is to ascertain whether, at the time when the injury was inflicted, he was subject to such person's orders and control and was liable to be discharged by him for disobedience * * * or misconduct."

The fact that Benefiel furnished his own transportation does not, of course, affect his status as an employee. Eng-Skell Co. v. Industrial Accident Commission, 44 Cal. App. 210, 186 Pac. 163. The fact that Benefiel was paid a weekly salary which was proportionate to his labor, the fact that he delivered papers to individuals and not only in bulk, as well as the fact that a continuity of service was contemplated rather than a definite specified job, also support the conclusion that Benefiel was an employee of the Press Publishing Company.

[6] The term "employee" has been held to be synonymous with the word "servant." Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 810, 159 Pac. 721. And servant as defined by section 2009 of the Civil Code is one "who is employed to render personal service to his employer, *otherwise than in the pursuit of an independent calling*, and who in such service remains entirely under the control and direction of the latter who is called his master." It is insisted by both petitioners that because of the fact that Benefiel owned his own motorcycle, paying personally for its upkeep, gasoline, oil, etc., and also because of the fact that he carried packages and filled small orders for persons along his

route in order to defray the expenses of his machine, it must be held that he was engaged in an independent calling, viz., in the conduct of a transfer business, and that it was in pursuit of this calling that he contracted both with Lucia K. Hicks and the Press Publishing Company. These facts, however, must be taken and considered in conjunction with the other facts of the case, which show, in substance, that Benefiel was not "engaged in the transfer business." Previous to his employment by Miss Hicks and the Press Publishing Company, Benefiel did not own a machine, and attempted no transfer service of any kind. His motorcycle was purchased only at the time he undertook the service of delivering the cream and papers, and the carrying of packages was merely incidental to his main employment of performing his duties for them. Benefiel did not hold himself out to the public generally for messenger service, nor had he any place where calls could be left for him. He only performed small errands for patrons along his route when requested by them. He never allowed this incidental service to interfere with his main work, and never made more than the one trip during the day, which trip was made primarily in the performance of his duties as an employee of Miss Hicks and the Press Publishing Company. The amount which he received for this incidental service was trivial in comparison with his regular wages. It amounted at most only to enough to pay for the upkeep of his machine, and in the event that Benefiel had been discharged by either Miss Hicks or the Press Publishing Company there would have been no incidental business remaining to warrant him in making the trip. In view of the fact that the work for Miss Hicks and the Press Publishing Company was not incidental to this other business, but, on the contrary, this other work was merely incidental to their work, it cannot be said that Benefiel was engaged in the conduct of a "transfer business," and therefore was in pursuit of an independent calling at the time of the accident. The case of Flickenger v. Industrial Accident Commission, 181 Cal. 425, 184 Pac. 851, 19 A. L. R. 1150, cited in support of the contention that Benefiel was an independent contractor is readily distinguishable from the instant case. All the circumstances of that case pointed to an independent business of trucking carried on by the injured person prior to the accident which produced the injury, from a regular place of business, where the injured person received calls and made contracts for hauling and held himself out to the public generally as engaged in that business. Obviously, that case is not analogous to the instant case.

[7] We cannot agree with the separate contention of the Press Publishing Company that Benefiel at the time of the accident was outside the scope of his employment as to them merely because he was on the Modoc road after having gone to his mother's home for the empty milk cans. Although there is evidence that the Hollister road is the better paved road, there is also evidence that the Modoc road was shorter, and, furthermore, that due to bumps on the Hollister road it made but little difference to a motorcyclist which road he took. Either road, therefore, was a reasonable road to use for the purpose of the Press Publishing Company's business, and, in the absence of definite instructions to the contrary, Benefiel was equally in the course of his employment when upon either road. It is not denied that the Press Publishing Company was aware of and acquiesced in the practice of Benefiel to take the Modoc road. There is no showing that the newspaper carriers were not privileged to select the road which they would take in reaching the commencement of their route for the delivery of papers to the first customer, and admittedly they were in the course of their employment from the time of procuring the papers from the newspaper office until they had completed their deliveries. At the time of the accident any deviation which Benefiel had made for the purpose of performing duties for others than the Press Publishing Company had been completed, and he was at that time engaged in the performance of his duty of carrying the papers in bulk preparatory to their delivery to individual customers.

The award of the commission may be annulled only if there is no substantial evidence in support of its findings. The award is affirmed.

We concur: SHAW, C. J.; SLOANE, J.; WASTE, J.; LAWLOR, J.; WILBUR, J.

---

59 Cal. App. 364

## MORRIS v. CITY AND COUNTY OF SAN FRANCISCO.

(Civ. No. 4301; S. F. 10107.)

(District Court of Appeal, First District, Division 2, California. Oct. 17, 1922. Hearing Denied by Supreme Court Dec. 14, 1922.)

**1. Eminent domain ⇐107—No right of recovery for injury to business.**

Damage to that form of property known as business or the good will of a business is damnum absque injuria, and does not form an element of the compensating damages to be awarded under Const. art. 1, § 14, providing that property shall not be taken or damaged for public use without just compensation.

**2. Eminent domain ⇐277—Demand to board of supervisors for damages from street improvement necessary.**

Failure to present a demand to the board of supervisors of San Francisco for damages incident to public street improvements is a bar

to an action therefor, under San Francisco Charter, art. 2, c. 2, § 8.

**3. Eminent domain ⟸281—Acceptance of award of damages forecloses right of action.**

Acceptance by owner of leasehold in the city of San Francisco of an amount awarded by the board of public works as damages occasioned by a street improvement barred an action to recover damages, where the ordinance under which the improvement was made provided for those dissatisfied with an award a remedy by appeal to the board of supervisors within 20 days after publication of notice of award.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Oregon E. Morris against the City and County of San Francisco. Judgment for plaintiff, and defendant appeals. Reversed in District Court of Appeal, and hearing denied in Supreme Court.

George Lull, City Atty., and Charles S. Peery, Asst. City Atty., both of San Francisco, for appellant.

Wm. M. Abbott, Wm. M. Cannon and K. W. Cannon, all of San Francisco (Enid Childs, of counsel), for respondent.

NOURSE, J. Plaintiff sued the city and county of San Francisco for damages to her business as a hotel keeper, caused by the construction by the city under contract of a public improvement known as the Stockton street tunnel. The suit was based upon a claim filed with the board of supervisors as required by the charter. The items of damage specified in the claim were:

| | |
|---|---|
| Value of business lost and destroyed..... | $35,000 00 |
| Loss and injury to credit..... | 5,000 00 |
| Loss on account of expense of conducting business from May 1, 1913, to December 31, 1913..... | 5,802 82 |
| Loss of profits during same period..... | 4,500 00 |
| Loss of value of time and services during same period ..... | 2,500 00 |
| | $52,802 82 |

The complaint alleged that—

The $35,000 item accrued from the total loss and destruction of plaintiff's business of conducting the hotel; that the $5,000 item accrued from the loss of credit with her bank and with merchants with whom she had been dealing; "that immediately upon the commencement of said work [construction of the tunnel], and by reason thereof, the plaintiff's said hotel business commenced to decrease, * * * and said hotel was by the plaintiff conducted and operated in order to preserve her said business and for the purpose of preventing the same from becoming lost to her, at a continued money loss from the time of the commencement of said work up to and including the 31st day of December, 1913."

The expense of the conduct of her business over the gross income for that period was alleged to be $5,802.82. The loss of profits during the same period was alleged to be $4,500; and the reasonable value of her services in conducting the hotel during the same time was alleged to be $2,500.

In addition to the items specified in the claim, damages to the amount of $1,795.58 were alleged to have been suffered because the plaintiff laid out that sum in repairs and replacements of the furniture, carpets, and linens used in the hotel. The plaintiff did not pray recovery of this sum, and for that reason and because it was not included in the claim presented to the supervisors, no further consideration need be given to the allegation.

The action is not based upon any claim of negligence on the part of the city or its contractor, the plaintiff's theory being that the city, "acting by and through its officers, agents, contractors, and employees thereunto duly authorized and empowered," constructed the tunnel and approaches thereto for street purposes and for purposes of public travel, and that, during the course of construction, ingress to and egress from the hotel was interrupted by the maintenance of excavations, barriers, trestlework, and temporary buildings, and the view from the hotel was obstructed, while the noise arising from the prosecution of the work both in the daytime and in the nighttime disturbed her patrons, and caused many of them to leave. Parenthetically it should be said that the allegations of the complaint are confined to acts occurring between May 1, 1913, and December 31, 1913, when plaintiff voluntarily abandoned her lease, and no claim is made that any damage would accrue to plaintiff's property or business after the work of construction was completed. In other words, the whole claim is based upon a temporary discomfiture arising during the progress of a public improvement, and whether the improvement would be a permanent benefit or injury is not alleged.

The defendant answered, denying the material allegations of the complaint, and set up a separate defense, alleging that the proceedings for the construction of the tunnel were had under an ordinance of the city and county providing for the prosecution of the work under contract and the levy of an assessment upon the private properties benefitted, such assessment to cover *the entire cost of the project.* Section 4 of this ordinance provided that—

"Any owner of property or *persons interested* therein claiming that *such property* would sustain damages if the proposed tunnel construction is completed, may file with the board of public works * * * a petition showing the fact of such ownership, *or interest therein,* * * * and the estimated amount of damages which the property would sustain by the pro-

posed tunnel construction if completed." (Emphasis added.)

Section 5 of the ordinance provided that after the claims for damages had been adjusted, the board of public works should estimate the total amount of damages, together with the costs of construction of the tunnel, and assess the private property within the district a sufficient amount to pay the whole. It was alleged in the answer that pursuant to the terms of this ordinance the plaintiff presented her claim to the board of public works, setting out her interest in the property described in her complaint and the damage such interest would sustain by the construction of the tunnel, that said claim was duly approved by the board, and that the city had paid the plaintiff before the commencement of the action the full amount of the claim, $6,166.

The trial proceeded upon the issues so framed. Plaintiff's case consisted of evidence of the value of her business, its profits and losses and the value of her own time. It was shown that her lease to the premises had but a year to run from the commencement of the construction of the tunnel—May 1, 1913, to May 1, 1914—and, over the objection of defendant, testimony was admitted to the effect that she had a verbal promise of renewal. The defendant moved for a nonsuit upon the ground, among others, that damages were not recoverable for the loss to plaintiff's business, but that the only damages recoverable on account of the construction of the public improvement were those caused to the leasehold, which had already been paid. The trial court denied the motion, and permitted plaintiff to file an amendment to her complaint, alleging that by reason of the acts of defendant her "leasehold interest and hotel business" was of the value of $35,000 on April 26, 1913. In support of the amendment additional testimony was taken over defendant's objection, and a general verdict for $5,000 was returned by the jury. From the judgment upon the verdict the defendant prosecutes this appeal.

[1] Appellant points to a fact that cannot be successfully denied—that respondent's case was one for damages to her business, and not one for damages to her leasehold interest. In this connection reference is made to the allegations of the complaint that no action or proceeding of any kind had been commenced against plaintiff for the purpose of assessing or ascertaining the compensation to be made for the damage to her business or property, as alleged in the complaint, and that—

"neither the defendant nor any one else has ever made or paid to the plaintiff * * * just or any compensation for the damages *to her said business or property hereinabove alleged.*" (Emphasis added.)

There can be no doubt that such was the theory upon which respondent went to trial—that her business as proprietor of the hotel was damaged by the construction of the tunnel without compensation to her. The case was framed on the guaranty of section 14 of article 1 of the Constitution, providing that—

"Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner."

But in Oakland v. Pacific Coast Lumber, etc., Co., 171 Cal. 392, 153 Pac. 705, the Supreme Court held that damage to that form of property known as business or the good will of a business is damnum absque injuria, "and does not form an element of the compensating damages to be awarded." Respondent had therefore no right of recovery except for the injury to her leasehold interest. It was for this reason that the amendments were made to the complaint after the motion for a nonsuit was denied, and that evidence was taken to show injury to the leasehold interest.

[2] But to this appellant answered that no claim had been presented to the supervisors covering damages to the leasehold interest, and that full payment of all damages suffered had been made. The necessity for the presentation of a demand to the board of supervisors, as required by the San Francisco charter, has been determined by unquestioned authority. San Francisco Charter, art. 2, c. 2, § 8; Crim v. City and County, 152 Cal. 279, 281, 92 Pac. 640; Bancroft v. San Diego, 120 Cal. 432, 438, 52 Pac. 712; Bigelow v. Los Angeles, 141 Cal. 503, 507, 75 Pac. 111; Spencer v. Los Angeles, 180 Cal. 103, 119, 179 Pac. 163; Metropolitan Life Ins. Co. v. Rolph, 184 Cal. 557, 560, 194 Pac. 1005. That the demand which was presented to the board and upon which the suit was predicated did not include a claim for damage to the leasehold appears from the demand itself and from the allegations of the complaint. This demand being one for damages to the business, the supervisors were not required to allow it, and the failure to present a proper demand for damages to the leasehold is a bar to the action upon that item. Cases cited above.

[3] In addition to this it appeared without conflict that respondent had been paid $6,166 after an award by the board of public works in response to a claim which she had presented to that board for damages to her interest in the property. This claim was presented in accordance with the terms of the tunnel ordinance adopted by the board of supervisors. The only damages which the board of public works could allow under the ordinance were those contemplated by the Constitution and the statutes for injury to private property taken or damaged for public

use. Under the rule of Oakland v. Pacific Coast Lumber, etc., Co., 171 Cal. 392, 153 Pac. 705, damages to the business of respondent could not be considered. The ordinance itself called for claims from "any owner of property or persons interested therein." The interest of respondent was her leasehold. For this she had been fully compensated before the action was commenced. If she was dissatisfied with the award made by the board of public works, the ordinance provided a remedy by appeal to the board of supervisors within 20 days after the first publication of the notice of the award. But she accepted payment from the city of the amount awarded, and thus foreclosed her right of recovery in this action.

Judgment reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for a rehearing is denied. We withhold our approval of that portion of the opinion which declares that no demand was presented to the board of supervisors for a claim for damages to the leasehold. In our opinion the claim so presented included damages to the leasehold, as well as other damages. But the items of damage which it is claimed were damages to the leasehold were included in the claim for damages which was allowed by the board of public works and paid to the respondent.

SHAW, C. J., and LAWLOR, SHURTLEFF, SLOANE, LENNON, WASTE, and WILBUR, JJ., concur.

---

59 Cal. App. 345

**McLEAN v. MOOSER et al. (Civ. 4238.)**

(District Court of Appeal, First District, Division 2, California. Oct. 16, 1922. Rehearing Denied Nov. 14, 1922. Hearing Denied by Supreme Court Dec. 14, 1922.)

**1. Pledges ⟸6 — Pledgor must have title or right to pledge.**

Where persons assuming to pledge property had no title to the property, nor authority from the owner to pledge or transfer it, there was no legal pledge.

**2. Appeal and error ⟸1036(6)—Where pledgors admitted legal title to pledged property in another, allowing such other to intervene to establish title, held not prejudicial.**

In action on note, where defendants set up a pledge of jewels and claimed right to have them sold and the proceeds applied to the payment of the note, defendants were not prejudiced by overruling their demurrer to a complaint in intervention by the owner of the jewels setting up title thereto, where it appeared from the undisputed evidence and was admitted by defendants that intervener was the owner of the jewels.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Arthur T. McLean against Louis H. Mooser, Jr., and another, in which Florence B. Mooser intervened. From judgment for plaintiff, defendants appeal. Affirmed.

Philip S. Ehrlich, of San Francisco (Simeon E. Sheffey, of San Francisco, of counsel), for appellants.

John Guthrie Heywood, of San Francisco (Frederick L. Berry, of San Francisco, of counsel), for respondent and intervener.

LANGDON, P. J. This appeal is taken by the defendants from a judgment against them in an action upon a promissory note for $1,598, signed by them jointly, payable to Messrs. Dudley and McLean and by them assigned to plaintiff.

The complaint was the usual one to recover upon a promissory note. The answer alleged that at the time of the execution of said note it was secured by a pledge of certain jewels; that the original payees of the note sold said jewels for a sum in excess of the amount of the note, and have refused to account to defendants for the sale or to pay over the surplus to defendants; that no notice was given by the pledgees to the pledgor of the time and place of the sale of the pledged property, and that the said property was not sold in accordance with the provisions of the law of this state. As a separate defense, defendants alleged the pledge of said jewels, and that said jewels were being held by said Dudley and McLean, original payees of the note; that defendants have demanded the sale of said jewels and the application of the proceeds thereof to the payment of the note, but that said Dudley and McLean have refused to comply with said demand; also that defendants have demanded a return of said pledge upon the payment of the amount of the note, and have offered to pay the amount of the note with interest upon the return of said pledged property. Defendants pray that the court order the said Dudley and McLean to return said personal property or make a sale thereof in accordance with law and account for the proceeds thereof.

The trial court made an order permitting the filing of a complaint in intervention by Florence B. Mooser. This complaint alleged that intervener was the owner and entitled to the possession of the jewels in controversy; that Messrs. Dudley and McLean and Louis H. Mooser, Jr., and Louis H. Mooser,

Sr., on or about the 14th day of July, 1919, without intervener's consent and wrongfully, came into the possession of said personal property, and took said personal property from the possession of said intervener; that intervener had never allowed, permitted, or consented to or authorized any person whomsoever to assume the apparent ownership of said personal property for the purpose of making any transfer of any character whatever of said property; that intervener had demanded of Messrs. Dudley and McLean the return of said personal property, which had been refused, and, thereafter intervener had commenced an action in claim and delivery in the superior court in and for the county of Placer, state of California, against said Dudley and McLean, and had recovered possession of said personal property. A certified copy of said judgment in claim and delivery was attached to the complaint in intervention. It was then alleged:

"That intervener is informed and believes and therefore alleges that it is the intention of the defendants, Louis H. Mooser, Jr., and Louis H. Mooser, to wrongfully possess themselves of said personal property and unlawfully withhold and detain the same from the possession of intervener, to her damage in the sum of $1,600.

"Wherefore, intervener prays that the defendants, and each of them, take nothing by this action; that your intervener be adjudged to be the owner and entitled to the immediate possession of said personal property."

The trial court found the execution and delivery of the note; that it had not been paid; that it was not secured by the pledge of the jewelry mentioned in defendant's answer; that the intervener was, at all times mentioned in the complaint, ever since has been, and now is, the owner of said personal property; that Messrs. Dudley and McLean and said defendants, Louis H. Mooser, Jr., and Louis H. Mooser, on or about the 14th day of July, 1921, without intervener's consent and wrongfully, came into the possession of said property, and took said personal property from the possession of the intervener; that on the 12th day of July, 1921, said Dudley and McLean still unlawfully held and detained said property from the possession of the intervener, and claimed to hold the same as security for the payment of said promissory note; that intervener did not at any time allow, permit, consent to or authorize any person whomsoever to assume the apparent ownership of said personal property for the purpose of making any transfer or disposal of the same, and that said intervener did not deposit said property with said Dudley and McLean by way of security for the payment of said promissory note. The facts regarding the recovery of the possession of said property by said intervener are found in accordance with the allegations of the complaint in intervention. It is recited in the findings that up to the time of the filing of the complaint, the defendants Mooser had attempted to wrongfully possess themselves of said property and to withhold the same from intervener. Judgment was given against the defendants upon the promissory note, and the intervener was adjudged to be the owner and entitled to the possession of the jewelry.

[1] Appellant argues two matters upon appeal. The first is that the evidence shows that the property was pledged with Dudley and McLean as security for the payment of the note. Extracts from the testimony are called to our attention. They are entirely without significance so far as a reversal of this judgment is concerned. The most that can be said for the appellants is that an attempt was made by defendants and Messrs. Dudley and McLean to pledge these jewels as security for the payment of the promissory note of the defendants. But their action was void of legal effect, because they had neither title to said property nor control of the same for the purpose of pledge or transfer, nor for any other purpose. Appellants admit in their brief:

"It is true and conceded by the appellants that both appellants and respondent knew that the jewels belonged neither to appellant nor respondent. It is also conceded that with reference to the rightful owner of the property that no transaction could be had without her consent that would in any way bind her or affect her rights."

It is further stated by appellants in their brief:

"Now, it is contended by appellants, since both parties were dealing with the jewels knowing exactly what the facts were, it was within their power to make the payment of the note by appellants dependent upon the use of the jewels as collateral for the payment of the note or upon any other condition that they saw fit. The jewels belonged to Florence B. Mooser, it is conceded."

It being conceded that the jewels were the property of the intervener, and it being found that she never gave to any one authority to pledge or transfer the same, and that intervener did not at any time allow, permit, consent to, or authorize any person whomsoever to assume the apparent ownership of said personal property for the purpose of making any transfer or disposal of the same, it follows that no legal pledge was ever made of the jewels, and the trial court was correct in its finding upon this question.

There is no evidence or finding to the effect that the parties intended to make the obligation of the note contingent upon the acquiescence of Florence B. Mooser in the attempted pledge of her property. If such had been the case, the taking of the note would have been an entirely idle proceeding, as the money would have been repaid without resort to the note had the proceeds from

the sale of the jewels been applied to the loan, and the note would have been unenforceable if the proceeds of the jewels had not been so applied.

[2] The other objection made by the appellant is that the complaint in intervention does not state a case for intervention, and that the demurrer to said complaint, filed by the defendants, should have been sustained. This is because the intervener had possession of the property which she claimed, and no judgment depriving her of the possession or title thereto could have been given in an action to which she was not a party. Reliance is placed upon the cases of Horn v. Volcano Water Co. et al., 13 Cal. 62, 73 Am. Dec. 569; Moran v. Bonynge, 157 Cal. 295, 107 Pac. 312; Elliott v. Superior Court, 168 Cal. 727, 145 Pac. 101; Raey v. Butler, 69 Cal. 572, and others. Conceding that the facts did not show a case entitling Florence B. Mooser to intervene in the action, we fail to see how the error in this matter was prejudicial to the defendants. The most that could be said is that by the adjudication that the intervener was the owner and entitled to the possession of the jewels the defendants are precluded from contending with her as to the ownership and right to possession of said property, and that intervener had no right to have that question settled in the present action. If defendants had any shadow of a claim to the jewels, there might be some merit to their contention, and they might be justified in desiring to litigate that question with Florence B. Mooser at some other time and under other circumstances. But in view of their admission that the jewels are the property of Florence B. Mooser, and the undisputed evidence in the record to this effect, there is no cause to reverse the present judgment because it contains a provision establishing this fact judicially against said defendants.

We find no prejudicial error in the record, and the judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

---

59 Cal. App. 361

## MEYERCORD CO., Inc., v. CLARK WISE & CO. et al. (Civ. 4256.)

(District Court of Appeal, First District, Division 1, California. Oct. 17, 1922.)

**Sales ⊂⊃52(7)—Evidence held to sustain finding that price charged was not in excess of the market value.**

In seller's action for price of decalcomania transfers, defended on the ground that seller procured the order by false representations that the price agreed upon was the reasonable and market value, evidence that about 75 per cent. of decalcomanias used in the United States were supplied to the trade by the plaintiff, that its schedule of prices practically established the market value thereof, and that the price charged defendants was the same as that charged others, *held* to sustain finding that price charged defendants was not exorbitant and excessive and was not in excess of the market value.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the Meyercord Company, Inc., against Clark Wise & Co. and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Samuel T. Bush, of San Francisco, for appellants.

Ernest K. Little, of San Francisco, for respondent.

TYLER, P. J. This action is one in assumpsit for goods sold and delivered in the agreed sum of $450, representing the value of some 7,200 decalcomania transfers.

Defendants by their answer denied any indebtedness in a greater sum than $165.05, and alleged that the contract was procured by fraudulent representations. Judgment was rendered in favor of plaintiff for the full amount prayed for, and defendants appeal.

It appears from the evidence that plaintiff corporation is a manufacturer of what is known as decalcomania transfers, which are designs or printed figures on specially prepared paper so manufactured as to be permanently affixed to furniture or wood.

Defendants are copartners engaged in the piano and musical instrument business, and use transfers indicating their firm name which they affix to the fallboards of pianos and talking machines. They were desirous of securing some of these articles in their business, and accordingly one of the officers of defendant company wrote to the plaintiff corporation that they were in the market for decalcomania transfers. The parties had transacted business together for a period of over 30 years. Upon receiving this communication plaintiff sent its representative to interview defendants. Samples were submitted, and, after a discussion concerning the price, an order was obtained from defendants for 2,500 each of two sizes of transfers at an agreed price of 6½ cents per transfer. The agreement was reduced to writing, and it provided that the order was not subject to countermand. About a month thereafter defendants advised plaintiff that there must have been some mistake concerning the price, as they had received quotations from other firms at a much lower figure than their agreement with plaintiff called for, and in this communication they requested plaintiff, in the event that there was no mistake, to can-

cel the order. In reply thereto plaintiff informed defendants that it had telegraphed to its representatives to get in touch with them and explain the difference in price to defendants' satisfaction. The representative called, but no adjustment was had between the parties. Shortly thereafter the entire order, including an overage of some 2,200 transfers, was received by defendants. A lengthy correspondence was thereafter entered into between the parties which resulted in plaintiff agreeing to allow a discount of 15 per cent. from the invoice as rendered. Defendants refused to pay any sum in excess of $168.05. Negotiations for a settlement were thereupon ended, and the present suit followed.

By their answer defendants alleged that at the time they gave their order the representative of plaintiff assured them that the price agreed upon for the goods was the reasonable and market value thereof, and they further alleged that they relied upon these representations and did not know otherwise, and that the statements were false and plaintiff knew that the price was exorbitant and excessive, and that it was a deliberate and willful overcharge. Plaintiff claims that the contract was fair and reasonable.

No question is here raised as to the overage. Plaintiff was willing to accept the return of the transfers not included in the order, and to accept the amount of the contract price for the number agreed upon. Defendants made no offer to return the excess quantity except upon condition that the entire contract be canceled.

It appears in evidence that about 75 per cent. of decalcomanias used in the United States are supplied to the trade by plaintiff, and that its schedule of prices practically establishes the market value of the articles. It further appears that the price agreed upon by the parties was the usual one, and that similar goods were not sold to others for a less price. The trial court found that at the time defendants gave the order for the transfers plaintiff did not state to them that the price quoted was the reasonable and market value, and that defendants did not rely upon any such assurance. It further found that the price agreed upon was not exorbitant or excessive, and that the market value of the goods was not less than the price charged. The evidence fully sustains the findings. There is therefore no merit in the defense that plaintiff procured the contract through fraudulent representations.

Appellants further claim that the evidence shows without contradiction that the representative of plaintiff made use of his printed list of prices in an improper manner in reaching the amount charged. In this behalf it is contended that the contract price was figured on a basis of running the smaller and larger decalcomanias together on a single plate, and that under such method of combination an order for 2,500 of each of the transfers would have justified a charge of but one-half of the amount made. Evidence upon the subject shows that it was not the custom to accept orders in this manner, and that the quotation was made on the usual basis and was not exorbitant. This being so, it follows that the judgment should be, and it is, hereby affirmed.

We concur: KERRIGAN, J.; ST. SURE, Judge pro tem.

---

59 Cal. App. 341

## NEEDHAM v. SISTERS OF MERCY.
(Civ. 4096.)

(District Court of Appeal, First District, Division 2. California. Oct. 16, 1922. Hearing Denied by Supreme Court Dec. 15, 1922.)

**Contracts ⟸289, 346(8)—Arbitrary refusal of architect's certificate renders it unnecessary; allegation of due performance of all conditions permits contractor to show arbitrary refusal of certificate.**

An unreasonable, arbitrary, or capricious refusal of the architect to give the certificate required by the contract excuses the contractor from producing such a certificate as a condition precedent to the recovery of the payment due, and the allegation of due performance of all conditions on the part of the contractor is a sufficient allegation to put this matter in issue and to permit the contractor to offer evidence showing the reason the certificate had not been produced.

Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by Arthur E. Needham against the Sisters of Mercy, a corporation. From judgment for plaintiff, defendant appeals. Affirmed.

Garret W. McEnerney, of San Francisco, for appellant.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued as assignee of Owen McHugh upon two counts, one to recover the amount remaining due for work completed under an express written contract and under a subsequent oral contract, and another upon a quantum meruit for the work done. The trial court found in accordance with the evidence that the work was performed in compliance with the terms of the contracts and that the sum of $6,088.50 agreed to be paid under the contracts had not been paid. Judgment in that sum and interest from November 11, 1908, was awarded to the plaintiff.

---

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

While not conceding the correctness of the finding of the trial court as to the amount due under the contracts (though as to this it must be said there is no room for doubt), the defendant set up four defenses to payment: (1) That a certificate was not obtained from the architect showing that the contractor was entitled to the money sued for and that such a certificate was required by the written contract; (2) that Owen McHugh by express agreement made with the defendant through its architect and its president agreed to accept the sum of $7,000 as a full and final payment in respect to the matters then pending between them, and that in compliance with said agreement the defendant paid Owen McHugh the sum of $7,000 as a full and final payment; (3) that an accord and satisfaction arose when Owen McHugh cashed two checks aggregating $7,000 knowing that the payment thereof was made to him "as per" the architect's certificate, which described such payment as a "full and final payment"; (4) that an account was stated between Owen McHugh and defendant when he cashed said checks and appropriated the proceeds in the manner above stated.

The trial court found against all these defenses. As to the first, it found that neither the plaintiff nor his assignor had obtained an architect's certificate for the amount in suit, but that their failure to do so was excused by the arbitrary refusal of the architect to issue such a certificate. This finding was within the issue framed by the pleadings and was supported by an abundance of evidence. As to the second defense, the trial court found that no express agreement had been made to accept the sum of $7,000 as a full and final payment, and though there is some conflict in the testimony of the witnesses called upon this issue, there is very substantial and persuasive testimony in support of the finding. It need scarcely be said that the trial court was required to pass upon the credibility of the witnesses who appeared before it and that this finding cannot be disturbed on appeal.

In respect to the third and fourth defenses, the trial court found that it was not true that Owen McHugh agreed to receive the sum of $7,000 as a full or final payment, or that he agreed to or did release defendant from all or any claims against it arising out of the contract, but that, on the contrary, he received the $7,000 on account only of a balance then due him for said work. It also found that there was no accord or compromise of any claims between the parties at the time of the payment of the $7,000 or that said payment was made upon any condition that it should be a full or final payment for all work done by McHugh for the defendant.

On this appeal several attacks are made upon the findings of the trial court, namely, the conditions and circumstances of the $7,000 payment, in relation to the defenses of accord and satisfaction, and of an account stated between the contractor and the defendant. But in each and every case ample evidence appears in the record to support the finding of the trial court. The same may be said as to the authority of Father Mulligan to act as agent for the defendant in the premises.

The only point of law involved in the appeal is the right of the plaintiff to recover the amount due under the written contract, notwithstanding the failure of the architect to issue a certificate showing that amount to be due. In this connection it is necessary to refer to some of the facts of the case. The written contract was executed on November 21, 1907. Work was commenced soon thereafter, and on February 1, 1908, March 7, 1908, and April 17, 1908, the architect issued to McHugh three certificates showing, respectively, that there was due to him on account of the work done by him $2,500, $3,500, and $4,000. The defendant had paid McHugh in accordance with these certificates the total sum of $10,000 up to April 21, 1908. All work under the contract was finished by August 12, 1908. Though it was apparent, as afterwards found by the trial court, that the sum of $13,088.50 was due McHugh at the time of the completion of the work, nothing was paid to him on account thereof from August 12, 1908, until November 12th of the same year. During all this period repeated requests had been made by McHugh and his representatives upon the architect that he issue the certificate, and upon defendant for payment of the amounts due. All these requests and demands upon the architect were rejected in an arbitrary and unreasonable manner. Unreasonable and unjustifiable demands were made by the architect upon McHugh, and the failure to comply therewith was used as an excuse for the nondelivery of the certificate. The defendant refused payment solely upon the ground that the architect had not issued his certificate. In Wyman v. Hooker, 2 Cal. App. 36, 40, 83 Pac. 79, 81, the court in a similar case said:

"It is not to be presumed that the parties intended that money rightfully belonging to the contractor should be forfeited upon the arbitrary will or caprice of the architect in withholding the final certificate. Antonelle v. Lumber Co., 140 Cal. 315, 73 Pac. 966. Nor was it necessary that any excuse for not obtaining this final certificate should be set out in the complaint. It was sufficient in that behalf to allege the performance of the contract on the part of the contractor, and thereafter to prove such performance."

The rule is that an unreasonable, arbitrary, or capricious refusal of the architect to give the certificate required by the contract excuses the contractor from producing such a

certificate as a condition precedent to the recovery of the payment due, and the allegation of due performance of all conditions on the part of the contractor is a sufficient allegation to put this matter in issue and to permit the contractor to offer evidence showing the reason the certificate had not been produced. The better practice, of course, is to allege the excuse for the failure to present the certificate, as in other cases of nonperformance. But the neglect to do so is not a sufficient ground for reversal when the trial of the issue has been had and a good and sufficient excuse has been proved.

Other questions raised in the briefs do not require consideration.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

59 Cal. App. 334

## MILLER v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 3949.)

(District Court of Appeal, Second District, Division 2. California. Oct. 14, 1922. Hearing Denied by Supreme Court Dec. 11, 1922.)

**Executors and administrators ⇐122(2)—Special administrator entitled to sue in claim and delivery for safe and contents belonging to decedent.**

Under the direct provisions of Code Civ. Proc. § 1415, and in view of section 1582, authorizing executors and administrators to sue and be sued for recovery of property, it is one of the duties of a special administrator to recover and take charge of the property of an estate which he represents, and he has full authority to maintain any action necessary to the performance of this duty, including an action of ordinary claim and delivery to recover a safe and its contents, belonging to decedent, in the possession of defendants.

Application by Jared H. Miller for a writ of prohibition, prayed to be directed to the Superior Court of California in and for Los Angeles County and others, to prevent the trial of a certain action. Writ denied.

See, also, 210 Pac. 832, 835.

McDonald & Thompson and Kimball Fletcher, all of Los Angeles, for petitioner.

Anderson & Anderson, of Los Angeles, for respondents.

CRAIG, J. The petitioner asks for a writ of prohibition to enjoin the respondent superior court from proceeding further in an action by which Frank M. Kelsey, as special administrator of the estate of Mary Moore Miller, deceased, brought suit to recover a safe and its contents from Jared H. Miller and Cecil A. Miller. The action sought to be enjoined is an ordinary claim and delivery suit. The complaint therein alleges that the safe and its contents were the property of Mary Moore Miller during her lifetime, and were then in the possession of petitioner herein, and that since her death he has continued to hold the same from the plaintiff in that action.

It is one of the duties of the special administrator to recover and take charge of the property of an estate which he represents, and he has full authority to maintain any action necessary to the performance of this duty. Code Civ. Proc. §§ 1415, 1582; In re Welch, 106 Cal. 427, 39 Pac. 805.

The petition for the writ is denied.

We concur: FINLAYSON, P. J.; WORKS, J.

59 Cal. App. 340

## MILLER v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 3950.)

(District Court of Appeal, Second District, Division 2. California. Oct. 14, 1922. Hearing Denied by Supreme Court Dec. 11, 1922.)

**1. Prohibition ⇐28—Allegations in complaint in action sought to be enjoined must be assumed to be true.**

On an application for a writ of prohibition to enjoin the superior court from further action in a suit at law, brought by a special administrator to secure possession and title of property of the estate, the allegations of the complaint in the action by the administrator must be assumed to be true.

**2. Executors and administrators ⇐122(2) — Special administrator may sue former executor of estate for misappropriation of funds in his personal capacity.**

Where a special administrator brought suit to secure possession and title of property of the estate, alleged to have been misappropriated by defendant in his personal capacity as the agent of decedent, the fact that defendant for a time acted as executor of the estate did not affect plaintiff's right to sue.

**3. Executors and administrators ⇐122(2)—Special administrator may bring any action necessary to recover property of estate.**

A special administrator, equally with an executor, has full authority to bring any action necessary to recover property of the estate which he represents.

**4. Pleading ⇐49—Prayer for relief in part inappropriate held not to affect jurisdiction to award relief to which complaint showed plaintiff entitled.**

Where a special administrator brought suit against one who had formerly been executor of the estate to recover money embezzled in his personal capacity, and in effect demanded an accounting as of an agent to his principal, that the prayer of the complaint asked that defend-

ant be required to account "in the matter of the estate" of the deceased, which prayer was inappropriate, *held* not to affect the superior court's jurisdiction to direct the accounting to which complaint shows plaintiff to be entitled.

**5. Pleading ⊜49 — Averments of complaint, and not prayer, determine jurisdiction.**

The prayer for relief in a complaint is not determinative of the question of jurisdiction, since it is the averments of the complaint, and not the prayer, that decide such question.

**6. Judgment ⊜252(5)—Accounting by agent held properly granted under prayer for general relief.**

Where a complaint by a special administrator to recover money misappropriated by defendant in his personal capacity erroneously prayed for an accounting "in the matter of the estate of deceased," but also prayed general relief, an accounting as by an agent to his principal might be granted under the clause for general relief, in view of Code Civ. Proc. § 580, authorizing relief consistent with the case made by the complaint embraced within the issues.

Application by Jared H. Miller for a writ of prohibition, prayed to be directed to the Superior Court of California in and for Los Angeles County, and others, to prevent further proceedings in a certain action. Writ denied.

See, also, 210 Pac. 832, 835.

McDonald & Thompson and Kimball Fletcher, all of Los Angeles, for petitioner.

Anderson & Anderson, of Los Angeles, for respondents.

CRAIG, J. By this proceeding petitioner asks that the superior court, named as respondent, be enjoined from further action in a suit at law in which Frank M. Kelsey, special administrator of the estate of Mary Moore Miller, is plaintiff, and George H. Miller, Jared H. Miller, and Cecil A. Sheward Miller are defendants. The instant proceeding will be referred to as the "proceeding," and the action sought to be enjoined as the "action."

It is the theory of petitioner that the superior court has no jurisdiction to try the action. Many authorities are cited by both sides concerning certain legal phases of the case as presented for our consideration. However, the controversy centers upon a determination of the nature of the action. Petitioner insists that it is a suit for an accounting against an executor; respondent avers that it is an ordinary action by an administrator to secure the possession and title of the property of the estate which he represents. If the action is determined to be as contended by respondent, clearly the injunction prayed for should not issue. We think that respondent's contention is sound.

[1] Mary Moore Miller and Mary E. Moore were one and the same person. So much of the complaint in the action as bears upon the issue will be quoted. For the purpose of this proceeding the allegations of the complaint in the action must be assumed to be true. After first alleging that Jared H. Miller and Mary Moore Miller entered into a purported marriage, which was in fact illegal, and that thereafter until the death of the ostensible wife these parties lived together, holding themselves out as husband and wife, and that prior to said marriage Mary E. Moore owned large sums of money and property, the complaint goes on to state:

"That after the said purported marriage of the said Jared H. Miller and the said Mary E. Moore, and at the instance of herself and the said Jared H. Miller, and as this plaintiff is informed and believes and upon his information and belief alleges at the instigation of the said Jared H. Miller, a large portion of this property aggregating about the sum of $200,000 was transmitted to the said Mary E. Moore, then known as Mary Miller Moore, at Los Angeles, Cal., from time to time between the period of said purported marriage, to wit, October 13, 1915, and the date of the death of the said Mary E. Moore, to wit, the 17th day of February, 1921, and that some at least of these moneys were directly turned over to the said Jared H. Miller as agent for and trustee of the said Mary E. Moore, and were transmitted by him out of the state of California, and, without the knowledge or consent of the said Mary E. Moore, were wrongfully appropriated by him to his own use and benefit, and are now being wrongfully retained by him for his own use and benefit in at least the sum of $15,000, and in further sums, the exact amount or amounts of which are unknown to plaintiff, and that plaintiff is informed and believes, and upon such information and belief alleges, that *all of said moneys* so transmitted to the said Mary E. Moore, and aggregating about the sum of $200,000 *were turned over by her* to the said Jared H. Miller, *or were received and retained by said Jared H. Miller, as her agent and trustee,* to be held and handled by him as her moneys and for her benefit, but that he has wrongfully and fraudulently misappropriated and retained the same to his own use and benefit." (Italics ours.)

Then follows an allegation that Mary E. Moore turned over to Jared H. Miller the sum of $11,500. Following this is paragraph 13 of the complaint, in which it is set forth that all of the money placed in the hands of Jared H. Miller by Mary E. Moore to be handled by him as her agent, consisting of the sum of approximately $200,000 in one item and approximately $11,500 in another, "have been embezzled, misappropriated and retained by the said Jared H. Miller for his personal use and benefit," and also that Jared H. Miller has not returned said property as a part of the estate of Mary E. Moore, and has no intention of doing so.

[2] From this and other similar language it cannot be doubted that the complaint

plainly alleges the receipt by Jared H. Miller of the property in question in his personal capacity. By no possible construction can it be said that he came into possession of this property as the executor of the estate of Mary Moore Miller, for the complaint states that he received the same during her lifetime and "as her agent," and "to be handled by him for her use and benefit."

Holding the property as he did as the agent of Mary Moore Miller, and refusing to account for it to her estate, his possession is no different from that of any other individual who might have in his possession property belonging to the estate of a deceased person. The mere fact that for a time he was acting as executor of the estate, as well as having been the agent of the deceased, does not alter the situation in any degree.

[3] It cannot be questioned that the special administrator, equally with an executor, has full authority to bring any action necessary to recover the property of the estate which he represents.

It is true that the complaint, in addition to the essential allegations above discussed, goes on to recite other facts, among them the death of Mary E. Moore, the appointment of Jared H. Miller as one of the executors of her last will and testament, and certain other matters of an evidentiary nature to show that Jared H. Miller possessed but little property, and that whatever he had belonged to the estate of Mary Moore Miller, and that Jared H. Miller as executor never filed an inventory or made an accounting for the property to the estate of Mary Moore Miller.

The prayer of the complaint is that "Jared H. Miller be required to forthwith account to the court in the matter of said estate of said Mary Moore Miller, deceased, for all of said moneys and properties of said estate hereinabove referred to and now in his possession or under his control and belonging to said estate of said Mary Moore Miller deceased," and for an injunction restraining him, and also his wife, Cecil A. Sheward Miller, from dealing with said money or property or transporting it outside of the state.

[4] It may be that some of the allegations in the complaint are unnecessary and evidentiary only. If this is true, it does not change the nature of the action or deprive the court of jurisdiction over its subject-matter. The petitioner lays great stress upon the fact that the prayer asks for an accounting in the estate of Mary Moore Miller, deceased, and insists that this is proof that the action is intended as one to require Jared H. Miller to render an accounting as executor of said estate. There is no foundation for this claim. Neither in the prayer nor elsewhere in the complaint is there any suggestion or demand that Jared H. Miller account in his capacity as executor. Throughout the complaint there is contained the assertion that Jared H. Miller, during the lifetime of Mary Moore Miller, his purported wife, received from her large sums of money as her agent, and that he embezzled the same, and now refuses to account to the special administrator of her estate for it. The accounting demanded is clearly asked for in his personal capacity, and in the ordinary one of an agent to his principal. It may be added that from the very nature of the situation the special administrator could not well sue Jared H. Miller for a definite sum as having been converted by him, but must first depend upon an accounting to establish the amount to which he as administrator has the right to claim possession.

[5] It is true that the prayer of the complaint asks that Jared H. Miller be required to account "in the matter of the estate of said Mary Moore Miller, deceased," etc. The complaint, having stated a good cause of action, concludes with a prayer for relief, which is in part inappropriate. Plaintiff in the action is entitled to demand an accounting, not in the probate proceeding, but in the action whose further proceeding is here sought to be enjoined. But this defect in the prayer does not affect the superior court's jurisdiction to direct the accounting to which the complaint shows plaintiff to be entitled. Of course, the prayer cannot be the subject of demurrer. Bailey v. Dale, 71 Cal. 34, 11 Pac. 804; Althof v. Conheim, 38 Cal. 230, 99 Am. Dec. 363. It is not determinative of the question of jurisdiction. Lehnhardt v. Jennings 119 Cal. 199, 48 Pac. 56, 51 Pac. 195. The entire lack of a prayer does not deprive the court of jurisdiction if the facts stated constitute a cause of action against the defendant, or, even though defective in that regard, if susceptible of amendment so as to be made to state such a cause of action. Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741; Hale Bros. v. Milliken, 142 Cal. 137, 75 Pac. 653. The prayer may be amended. The averments of the complaint, not the prayer, decide the question of jurisdiction. Hoffman v. Pacific Coast Const. Co., 37 Cal. App. 130, 173 Pac. 776.

[6] But in the instant case the prayer concludes by asking for general relief. It was stated in the early case of Rollins v. Forbes, 10 Cal. 299, that—

"If the specific relief asked cannot be granted, such relief as the case stated in the bill authorizes may be had under the clause in the prayer for general relief."

This decision was based upon a construction of section 147 of the Practice Act, which is the same as section 580 of the Code of Civil Procedure.

The petition for a writ of prohibition is denied.

We concur: FINLAYSON, P. J.; WORKS, J.

(59 Cal. App. 392)

## MILLER et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 3948.)

(District Court of Appeal, Second District, Division 2. California. Oct. 21, 1922. Hearing Denied by Supreme Court Dec. 18, 1922.)

**Executors and administrators ⟸122(2)—Special administrator may sue to recover money of estate procured by conspiracy with executor.**

Where third persons have conspired with the executor of an estate to defraud it of money, a special administrator may sue to recover the money so obtained.

Application by Jared H. Miller and another for a writ of prohibition, prayed to be directed to the Superior Court of California in and for Los Angeles County, and others, to prevent respondent from proceeding with the trial of a certain action. Writ denied.

See, also, 210 Pac. 832.

A. P. Thomson and Kimball Fletcher, both of Los Angeles, for petitioners.

Anderson & Anderson, of Los Angeles, for respondents.

CRAIG, J. An action was begun in the superior court for a personal judgment against Jared H. Miller and Cecil A. Miller. The suit is based upon the claim that one George Miller presented a claim against the estate of Mary Moore Miller, deceased; that at that time Jared H. Miller was the executor of this estate, and as such approved and allowed claim, which was also allowed and approved by the judge of the probate court. It is further alleged that all of those mentioned except the judge conspired and acted together to defraud the estate of Mary Moore Miller, deceased. In this proceeding we are asked to enjoin the superior court from proceeding with that action.

The complaint contains no allegation that the executor has rendered an account. It may be that if a contest were properly interposed when Jared H. Miller's account as executor is presented for settlement, the probate court might vacate its order approving and allowing the claim, and charge the executor with the amount of it and with interest. However, under these circumstances, there is nothing in the case of Weihe et al. v. Statham et al., 67 Cal. 84, 7 Pac. 143, cited by petitioner, which declares that this is the sole remedy provided by law, especially as against joint tort-feasors, some of whom are not directly amenable to the orders of the probate court in the proceeding before it. Regardless of the right of the special administrator to sue Jared H. Miller, this action can be maintained as against Cecil A. Sheward Miller and George A. Miller. If the last-named parties have any money belonging to the estate of Mary Moore Miller, the legal representative thereof may unquestionably bring an action to recover it. Jared H. Miller himself, while executor, could have maintained such an action. The allegation of the complaint in the action sought to be enjoined, that the three defendants carried out a conspiracy to defraud the estate, and in that way have secured the money whose repayment is demanded, gives the court jurisdiction of the subject-matter of the action.

The writ is denied.

We concur: FINLAYSON, P. J.; WORKS, J.

(59 Cal. App. 350)

## JONES et al. v. STURZENBERG. (Civ. 2519.)

(District Court of Appeal, Third District, California. Oct. 16, 1922.)

**1. Taxation ⟸725 — Redemption from state includes prior delinquencies and redemption valid though auditor overlooked some such delinquencies.**

Under Pol. Code, § 3817, redemption of land sold to state for delinquent taxes upon certificates and estimates furnished by the auditor in any year necessarily includes all prior delinquencies, and a redemption was valid where owner was misled, though auditor overlooked prior delinquencies in making his certificate and estimate, in view of sections 3678, 3680, 3727–3739, 3801.

**2. Taxation ⟸788(1)—Conclusiveness of tax deed under statute.**

The legislative intent in the enactment of Pol. Code, § 3787, was that a tax deed should be conclusive with respect only to matters not covered by section 3786, declaring its effect as prima facie evidence.

**3. Taxation ⟸795—Repayment of taxes, penalties, and costs to tax purchaser condition to cancellation of tax deed.**

Where the owner comes into equity asking equitable relief to remove or cancel a tax deed sale as a cloud upon his title, or to obtain a judgment which in effect will invalidate such sale or deed, the courts should refuse any relief except upon the condition that he first repay the taxes, penalties, interest, and costs justly chargeable upon the land, and which the purchaser had paid at the sale, or afterward upon the faith of it, with legal interest from the time of such payment, less rents received, if any, if the purchaser has been in possession.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by D. N. Jones and another against John Y. Sturzenberg. Judgment for defendant, and plaintiffs appeal. Affirmed.

W. H. Carlin, of Marysville, for appellants.

W. E. Davies, of Marysville (Russell W. Cantrell, of San Francisco, of counsel), for respondent.

FINCH, P. J. The land in controversy was assessed in 1913 to A. M. and E. L. Miller, and, the taxes thereon becoming delinquent, the land was duly sold to the state in 1914 for the sum of $50.21. In 1914 the land was assessed to E. L. Walker and Wm. T. Parker, and, on their failure to pay the taxes for that year, the land was again sold to the state in 1915, contrary to the express provisions of section 3814 of the Political Code. All subsequent taxes were allowed to become delinquent up to the year 1918, when the then owner applied to the county auditor for an estimate of the sum necessary to redeem. The auditor made the required estimate based on the purported sale to the state in 1915, inadvertently overlooking the sale to the state in 1914, and the owner paid the amount so estimated. The pleadings admit that the land is of the value of $5,000. The defendant Sturzenberg alleges in his cross-complaint that the land is worth $10,000, and there is ample evidence to support the allegation. It is further admitted by the pleadings that the consideration for the deed from Williams to Eich, hereinafter referred to, was less than $500, and that for the conveyance from Eich to plaintiffs less than $1,000. The other facts necessary to an understanding of the controversy are stated in the opinion of the trial court, which, in so far as applicable to the issues presented by the appeal, is adopted as the opinion of this court, and is as follows:

"In this suit to quiet title, the issue as to present ownership is only between D. N. and Elba L. Jones, plaintiffs and cross-defendants, upon the one side, and John Y. Sturzenberg, defendant and cross-complainant, upon the other. The former hereinafter, for convenience, will be referred to as the plaintiffs, and the latter as the defendant. All other parties, plaintiffs, defendants, cross-complainants, or cross-defendants, will be referred to by name.

"The opposing claims arise from the following facts alleged in the pleadings and shown by the record evidence: The title claimed by the respective parties traces to a common source, viz. to the parents of Frank McCarn.

"In the years 1913, 1914, 1915, 1916, and 1917, the state and county taxes on said property were unpaid and delinquent. By operation of law, the land was sold to the state for the first delinquency, but regularly assessed each year thereafter. On the 29th of July, 1918, Frank McCarn, before the property had been sold by the state, and as the person whose estate might be sold, and being the party in interest then having the right to redeem by paying to the county treasurer of Yuba county, in which county the real estate is situated, the amount of taxes, penalties, and costs due thereon at the time of the sale, with interest, together with the sums due upon subsequent assessments, and desiring to redeem said land, made application to F. H. Greely, county auditor, for an estimate of the amount to be paid in order to obtain such redemption, thus obeying the direction as to the proper procedure in such matters under section 3817, Pol. Code.

"Said auditor made out and delivered to McCarn, as directed by said section, the estimate and certificates in triplicate, purporting to specify the several and total amounts payable. The amount of money so specified was $264.50, which was paid by McCarn to Harvey D. Eich, county treasurer, who thereupon issued his receipts to McCarn, the redemptioner, who in turn delivered them as directed by statute to the auditor and state controller, obtaining from the auditor the proper receipt.

"By some inadvertence the auditor failed to include in said estimate the amount due for the delinquent taxes of 1913. McCarn believed the said $264.50, when paid, was in full payment of the sum required to redeem from all delinquencies. On October 19, 1918, McCarn conveyed said land to defendant by deed recorded November 22, 1918. This deed is the basis of defendant's claim of title. On July 8, 1919, Harvey D. Eich, as tax collector of Yuba county, purporting to act as directed by section 3771, Pol. Code, sold or attempted to sell said land for the state to one P. J. Williams, who was the highest bidder, for $167.03, the amount of taxes, costs, and penalties levied and assessed against said property for delinquent taxes of 1913, and executed a deed to said Williams on July 9, 1919, which on the same day was duly recorded. Thereafter, on February 16, 1920, said Williams deeded said property to said Harvey D. Eich, as an individual, which was recorded on February 28, 1920. Later, on April 14, 1920, said Eich executed a deed of said property to plaintiffs, which deed is duly recorded, and is the basis of plaintiffs' claim to title. * * *

"The case for plaintiffs depends upon the fact that the taxes of 1913 became delinquent and were actually unpaid at the time of the tax sale in 1919, coupled with the claim that all precedent formalities as to such a tax had been observed.

"According to the masterly and logical argument of plaintiffs' counsel, the foregoing matters last mentioned, throwing their light upon the recitals in the tax deed, establish the conclusive character of said tax deed from which plaintiffs' title is derived. That argument would control the court's view, were it not for the fact that it seems to rest upon the erroneous hypothesis that at the time of the tax sale there had been no prior redemption under section 3817 of the Political Code. Plaintiffs' counsel evidently recognized that weakness and flaw in his position, when, in his closing brief, he said: 'While it is not necessary, we desire to take a fling at section 3817 of the Political Code. Under that section counsel make the remarkable claim that a landowner may go to the county auditor and say to him in effect: "I and 10 or 12 of my predecessors in interest during the past 15 years have owned lot 5 in block 6 of range letter E, in the city of Marysville. I want you to find out if that lot has been sold for delinquent taxes during that period, and give me an estimate of the amount necessary to redeem." We say this is absurd. It is the duty of the landowner, and in this case Mr. McCarn held a mortgage upon this property in 1913 when the assessment was

levied, to watch his property and pay his taxes, but, if he does not pay them, to go to the auditor and specify the year of the sale and ask for an estimate, and not try to make the county auditor a searcher of records, and that is what the section means. "The county auditor shall, on application of the person desiring to redeem, make an estimate on the amount to be paid," etc. The application to redeem from what? Undoubtedly to redeem from a certain definite sale.'

"The above reasoning ignores the first sentence of section 3817, which, in part, is as follows: 'In all cases where real estate has been sold, or may hereafter be sold, for delinquent taxes to the state, and the state has not disposed of the same, the person whose estate has been or may hereafter be sold, his heirs, executors, administrators, or other successors in interest, shall, at any time after the same has been sold to the state, and before the state shall have disposed of the same, have the right to redeem such real estate by paying to the county treasurer of the county wherein the real estate may be situated the amount of taxes, penalties, and costs due thereon at the time of said sale, with interest on the aggregate amount of said taxes at the rate of 7 per cent. per annum; and also all taxes that were a lien upon said real estate at the time said taxes became delinquent; and also all unpaid taxes of every description assessed against the property for each year since the sale,' * * * etc.

"The rest of the section need not be quoted. There was only one sale to the state. And a fair interpretation of the section fairly discloses that, when any taxes have become delinquent upon property, and by operation of law the property is deemed sold to the state, a taxpayer may apply to the auditor for the certificates and estimates of the total amount necessary fully to redeem the property from all outstanding delinquencies. The certificates in evidence, Cross-Complainant's Exhibits 1, 2, and 3, recite as follows: 'I, F. H. Greely, county auditor in and for said county and state aforesaid, do hereby certify that the foregoing statement contains a full and correct estimate of the amount necessary to redeem the within described real estate, made in accordance with the provisions of section 3817, Political Code, as amended March 20, 1905.'

"Upon payment of the money specified in the certificates and the giving of the receipts by the officers to the taxpayer, any deed or certificate of sale that may have been made to the state shall become null and void, and all right, title, and interest acquired by the state under the tax sale shall cease and determine.

[1] "If this section is to be given any effect, it means that the redemption upon such certificates and estimate in any year necessarily includes all prior delinquencies. It must be given such effect if it be the auditor's duty to make the estimate and to give the certificates. That duty clearly is imposed upon the auditor. San Diego Investment Co. v. Shaffer, 137 Cal. 323, 70 Pac. 179; Boyer v. Gelhaus, 19 Cal. App. 320, 125 Pac. 916.

"The auditor must keep informed concerning the status of taxes and delinquencies upon every parcel of land on the assessment book. Section 3678, Pol. Code, says in part: 'The recorder must, at the time he furnishes the abstract of mortgages to the assessor, furnish said officer with a complete and true statement of all property which has been redeemed under or by virtue of any sale made to the state for delinquent taxes, together with a complete and true statement of all property sold to the state and remaining unredeemed.'

"In Yuba county the offices of auditor and recorder are both held by the same person. Section 3680, Pol. Code, provides as follows: 'Whenever property has been sold for taxes and remains unredeemed, upon each subsequent assessment the assessor shall enter upon the assessment book, immediately after the description of the property, the fact that said property has been sold for taxes and the date of the sale. Upon all bills or estimates of or for taxes accruing on said property subsequent to the date of said sale, and prior to the redemption of said property or the execution to the state of a deed therefor, shall be distinctly and legibly written, printed, or stamped the words 'Sold for taxes,' and also the date of such sale.

"Sections 3727 to 3739, Pol. Code, prescribe minutely the auditor's duties in relation to revenue.

"Under section 3801, Pol. Code, after land has been sold for delinquent taxes, the tax collector must furnish to the auditor a complete printed list of all such lands sold, and 'thereupon the auditor shall enter upon the assessment book of the current year, immediately after the description of the property, the fact that said property has been sold for taxes and the date of such sale.'

"With the mandate of this section obeyed, it is apparent that the auditor has at all times under his eye the information he is required to furnish a taxpayer who applies to him for the estimate and certificates for the redemption of property under section 3817, Pol. Code. To the extent that the auditor must examine such assessment book and obtain from it the data upon which to base a correct estimate, the law makes him 'a searcher of records.'

"All the foregoing citations show that the auditor's records at all times contain, or presumably contain, all the information required which he should give to an applying redemptioner.

"In the recent case of Skidmore & Kramer v. George C. West, as treasurer, etc., 59 Cal. Dec. 494, it is held that:[1] 'It is the duty of the proper county officers under the provisions of the Political Code relating to the assessment and collection of taxes, before and after delinquency, when required by the board of supervisors, to furnish all the data necessary to show the amount of unpaid taxes, penalties, etc., upon land deeded to the state, and the amount of land so deeded, together with such other information ascertainable from their respective books and records as the supervisors deem necessary for their enlightment in exercising their authority in the premises.' The matter just quoted is from the syllabus.

"If, at the command of the supervisors, every county officer may be compelled to furnish data and information, why should a section

[1] New opinion substituted on rehearing, see 198 Pac. 497.

like 3817, Pol. Code, which declares it to be the duty of the auditor to give a taxpayer similar information, be held invalid. The case of San Diego Investment Co. v. Shaffer, supra, supports this view, and does not compel the taxpayer to specify a particular delinquent tax sale. When Frank McCarn, in the case at bar, received from the auditor and treasurer the estimate, certificates, and receipts, and paid to the treasurer the amount found by the auditor to be the correct amount required for redemption, the property in equity became redeemed from all prior delinquent sales to the state, because in the transaction the auditor was the authorized agent of the state. It follows that, while the deed of Eich to Williams is prima facie evidence under section 3786, Pol. Code, that '6. The property was not redeemed,' that prima facie evidence was completely overthrown by the evidence in the case showing compliance on the part of McCarn with the mandate of section 3817, Pol. Code. McCarn had a right to rely on the estimate. He was ready, willing, and able to pay all delinquencies. Having been misled by the erroneous estimate given him by the authorized agent of the state, he is entitled in equity to receive the full benefit of his attempted redemption.

"The argument as to the conclusive character of the tax deed herein under section 3787, Pol. Code, does not apply herein, nor to any case where there has been a redemption under section 3817, Pol. Code. Careful consideration in this regard has been given to the case relied upon by counsel, viz. Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 Pac. 936, but the equitable principle underlying the suit at bar, and more explicitly stated in cases hereinafter cited, was not involved in the Bank of Lemoore Case. That case simply held that the failure upon the part of officers to comply with certain statutory formalities, such as stamping upon receipts, etc., the words 'Sold to the state,' would not overthrow a tax deed, certain recitals in which are made conclusive evidence of performance of some formalities by section 3787, Pol. Code.

[2] "The legislative intent in the enactment of section 3787 was that the deed should be conclusive with respect only to matters not covered by section 3786 of the Political Code, declaring its effect as prima facie evidence. McDonough v. Cooper, 179 Cal. 384, 177 Pac. 153; H. S. Dist. v. Escondido Seminary, 130 Cal. 128, 62 Pac. 401; Bruschi v. Cooper, 30 Cal. App. 682, 692, 159 Pac. 728, 734; State of California, by John S. Chambers, v. Royal Con. M. Co., 31 Cal. App. Dec. 132.[2]

"The principle controlling the suit at bar has been well stated in the Am. & Eng. Ency. of Law, vol. 27, p. 755, as follows: 'If the owner of land, or a party having an interest therein, in good faith applies to the proper officer for the purpose of paying the taxes thereon, and payment is prevented by the mistake or fault of such officer, as, for example, where a tax is omitted from the list made out by the officer, the attempt to pay is considered in most jurisdictions, as the legal equivalent of payment in so far as to discharge the lien and bar a sale for nonpayment.' The text is supported by numerous decisions.

"Again, in 37 Cyc. p. 1160, the rule is thus stated: 'Where a property owner in good faith applies to the proper officer to pay his taxes, and is furnished with a statement, certificate, or information as to the amount of taxes due, on which he relies, but which is incomplete or erroneous by reason of the mistake or fraud of the officer, and he pays all that is demanded of him, this will be equivalent to full payment, so far as to invalidate any subsequent sale of the property for the omitted taxes.' This text also is supported by numerous decisions.

"Even in the absence of such a statute as section 3817, Pol. Code, the equitable principle should furnish ample protection to the taxpayer who has been misled by the mistake of an officer charged with the duty of keeping the books and giving to the taxpayer information of their contents concerning his taxes.

"The courts' decisions in other states frequently rest upon statutory foundations similar to section 3817, Pol. Code. In commenting upon such decisions, the Supreme Court of Wisconsin said: 'These decisions are founded on the ground that the treasurer is the legal custodian of the books, and possesses full and authentic information, and it is his official duty to furnish it; that the landowner cannot get the necessary information in any other way, and is not bound to search the books for himself, and that landowners almost always do, and rightfully may, depend on information thus received; and that the party cannot be involved in loss of his land by the mistake of the officer.' Gould v. Sullivan, 84 Wis. 659, 666, 54 N. W. 1013, 1015, 20 L. R. A. 487, 492 (36 Am. St. Rep. 955).

"Such reasons strongly apply here. The defendant and his immediate predecessors in interest paid all taxes on the land involved for the years 1914, 1915, 1916, 1917, and 1918; the defendant Sturzenberg, after the time of purchase from Frank McCarn, and being a nonresident of this state, and never having received any notice of any proposed sale by the state, rested securely in the belief that all taxes were paid. This belief can be traced to its foundation in the erroneous estimate and certificate furnished by the auditor to Frank McCarn. The sale of the land for nonpayment of taxes in arrears when such estimate and certificates were furnished and not included by mistake of the auditor could and cannot divest the title of the defendant.

"Justice Shaw, in the case of Beck v. Edmison et al. (Cal. App.) 193 Pac. 158, decided September 14, 1920, said: "In order to divest an owner of his property by a sale thereof for taxes the law requires a strict compliance with every statutory provision enacted for his benefit.' Section 3817, Pol. Code, is such a provision, and was not complied with by the officer charged with the duty of compliance. Hence defendant's title is good, while plaintiff has no title.

[3] "This conclusion, however, is subject to the statement and rule which are emphasized and followed in the case of Beck v. Edmison, supra: 'Defendants, however, did not restrict themselves merely to a defense of their title, but, as they were entitled to do, by answer asserted title in themselves, and prayed for affirmative relief, thus bringing themselves

[2] For opinion of Supreme Court, see 202 Pac. 133.

within the rule announced in Holland v. Hotchkiss, 162 Cal. 366, 123 Pac. 258, L. R. A. 1915C, 492, which is that where the owner comes into equity asking equitable relief to remove or cancel a tax deed or sale as a cloud upon his title, or to obtain a judgment which, in effect, will invalidate such sale or deed, the court should refuse any relief except upon the condition that he first repay to the tax purchaser, * * * the taxes, penalties, interest and costs justly chargeable upon the land, and which the purchaser had paid at the sale, or afterward upon the faith of it, with legal interest from the time of such payment, less rents received, if any, if the purchaser has been in possession.'

"In the instant suit, plaintiffs have been in actual possession since April 14, 1920. The reasonable rental value is shown to be $1 per acre per annum. The plaintiffs should be charged with the rental during occupancy, and credited with the amount paid by Williams at the tax purchase, namely, $167.03, with interest thereon at 7 per cent. per annum to date of decree herein. Defendant is entitled to a decree as prayed for, declaring the tax sale void, and canceling the tax deed to Williams and the subsequent deeds of Williams to Eich, and of Eich to plaintiffs, and adjudging defendant the owner of the land upon his making the repayment as hereinbefore indicated, and quieting his title thereto."

In addition to the authorities cited in support of the proposition that the owner seeking to redeem was justified in relying on the auditor's estimate, the following may be noted: O'Connor v. Gottschalk, 148 Mich. 450, 111 N. W. 1048; Menasha Wooden Ware Co. v. Thayer, 150 Wis. 611, 137 N. W. 750; Beck v. Meroney, 135 N. C. 532, 47 S. E. 613; Ford Lumber Co. v. Bartlett, 32 Idaho, 638, 186 Pac. 709.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

---

59 Cal. App. 370

**DUNNE et al. v. WHITE et al. (Civ. 2493.)**

(District Court of Appeal, Third District, California. Oct. 18, 1922.)

**1. Justices of the peace, ⊜44(8)—Have jurisdiction of actions on contract in which amount claimed, exclusive of interest, is less than $300.**

It is no objection to the jurisdiction of the justice court that the amount claimed in an action on a contract exceeds $300, if the amount claimed, exclusive of interest, is less than such sum (Code Civ. Proc. § 112).

**2. Appeal and error ⊜1091(2)—Appellate court must assume, in absence of bill of exceptions on appeal from superior court, that justice court rendered judgment for sum alleged in complaint set out in judgment roll.**

To ascertain whether the justice court had jurisdiction of an action on a contract as limited by Code Civ. Proc. § 112, the appellate court, on appeal from the superior court on a judgment roll, consisting only of the complaint, answer, and judgment, findings having been waived under Code Civ. Proc. § 670, must assume, in the absence of a bill of exceptions containing the evidence, that the justice court's judgment was for the amount alleged in the complaint, and that it followed and conformed to the allegations thereof.

**3. Justices of the peace ⊜44(8)—Complaint stating cause of action for amount within justice's jurisdiction sufficient, though prayer asks for attorney's fee.**

A complaint, stating a cause of action for $280 and interest on a promissory note, brings the case within the jurisdiction of the justice court, under Code Civ. Proc. § 112, though the prayer asks for an attorney's fee, where no fact is alleged showing plaintiffs' right thereto; the body of the complaint controlling.

**4. Appeal and error ⊜846(6)—No legal proposition presented by judgment roll, where findings were waived and no objection made to form of judgment or sufficiency of complaint.**

On appeal on the judgment roll, where findings were waived under Code Civ. Proc. § 670, and no claim was made that the judgment was not in proper form or the complaint insufficient, no legal proposition was presented.

**5. Justices of the peace ⊜44(7)—Justice court having jurisdiction can issue writ for amount of judgment, though statutory affidavit was not in record.**

A justice court, having jurisdiction of an action on a promissory note, *held* authorized to issue a writ of attachment for the sum claimed or any less amount exceeding $10, exclusive of interest, as required by Code Civ. Proc. § 866, though the affidavit required by section 538, was not in the record; the appellate court assuming that it conformed to the allegations of the complaint.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Thomas H. Dunne and another against L. E. White and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

W. E. Davies, of Marysville, for appellants.

Arthur J. De Lorimier, of Marysville, for respondents.

BURNETT, J. The action was upon a bond, executed by appellants, to prevent the levy of a writ of attachment issued out of the justice court of Marysville township in the county of Yuba, in an action wherein respondents herein were plaintiffs and one W. C. Trefry was defendant. The plaintiffs therein obtained judgment against said Trefry in the sum of $280 principal sum and $24.93 interest, and costs of suit. Execution on said judgment was issued and returned unsatisfied. Whereupon this suit was brought in the superior court of said county of Yuba upon said bond to recover the amount of said judgment. The appeal is from the judg-

ment on the judgment roll. Said undertaking was in the following form:

"(Title of court and cause.)

"Undertaking to Constable to Prevent Attachment.

"Whereas, the above-named plaintiffs have commenced an action in the justice's court of Marysville township, county of Yuba, state of California, against the above-named defendant, claiming that there is due to said plaintiffs from said defendant the sum of $304.93, or thereabouts, and thereupon an attachment issued against the property of said defendant as security for the satisfaction of any judgment that may be recovered therein; and whereas, the constable of said Marysville township is about to levy upon certain property and effects of said defendant under and by virtue of said writ of attachment; and whereas, the said defendant is desirous that said property shall not be attached and seized by said constable, by virtue of said writ: Now, therefore, we the undersigned, residents and householders in the county of Yuba, state of California, in consideration of the premises, and also in consideration of said property above mentioned not being attached or seized by said constable by virtue of said writ of attachment, do hereby jointly and severally undertake in the sum of $650, and promise that if the plaintiffs shall recover judgment in the said action, defendant will, on demand, pay to plaintiffs the amount of whatever judgment may be recovered in said action, together with the percentage, interest, and costs, and as required by the terms of the judgment, and if defendant shall not so pay, we will.

"L. E. Hite. [Seal.]
"J. D. Poole. [Seal.]

"Dated the 13th day of August, 1921.

"State of California, County of Yuba.—ss.:

"L. E. Hite and J. D. Poole, whose names are subscribed as the sureties to the above undertaking, being severally duly sworn, each for himself, deposes and says: That he is a resident and householder of the county of Yuba, state of California, and is worth the sum in the said undertaking specified as the penalty thereof, over and above all his debts and liabilities, exclusive of property exempt from execution.

L. E. Hite.
"J. C. Poole.

"Subscribed and sworn to before me, this 13th day of August, 1921. Waldo S. Johnson, Notary Public in and for the County of Yuba, State of California. [Seal.]"

The sufficiency of the complaint is not questioned by appellants, nor, indeed, is any defect therein apparent. The answer denied "each and every, all and singular, the allegations in said amended complaint contained," and for a further and separate defense alleged:

"(a) That on or about the 10th day of August, 1921, in an action then pending in the justice court of Marysville township, county of Yuba, state of California, wherein Thomas H. Dunne and J. B. Dunne were plaintiffs, and one Walter C. Trefry defendant, the said justice court issued a writ of attachment, a copy whereof is hereunto attached, marked Exhibit A, and made a part hereof.

"(b) That said writ of attachment was delivered to the constable of said Marysville township, and on or about the 13th day of August, 1921, the defendants herein did make, execute, and deliver to said constable their bond and undertaking in the sum of $650 to prevent the said constable from levying upon the property of the said Walter C. Trefry, the defendant in said action, under and by virtue of said writ of attachment.

"(c) That said bond is the subject of this action and a copy thereof is hereunto attached, marked Exhibit B, and made a part hereof.

"(d) That it appears on the face of said writ of attachment that the amount claimed by plaintiffs is and was the sum of $304.93, which said sum is and was in excess of the jurisdiction of the said justice court of said Marysville township. That neither said justice of the peace of said township, nor the said justice court of said township, had any jurisdiction to issue said writ of attachment for said sum of $304.93 as aforesaid, and by reason thereof the bond herein sued on is wholly void."

[1] It is no valid objection to the jurisdiction of the justice court that the amount claimed exceeds the sum of $300, provided the action is upon a contract, and the amount claimed, exclusive of interest, is less than $300. Section 112, Code Civ. Proc.; Bartnett v. Hull, 19 Cal. App. 91, 124 Pac. 885; Bradley v. Kent, 22 Cal. 170; Solomon v. Reese, 34 Cal. 28.

[2] To ascertain whether said justice court had jurisdiction of the action, as thus limited by section 112 of the Code of Civil Procedure, we are confined to an examination of the judgment roll, since there is no bill of exceptions, and the appeal was not taken by the "alternative" method. The judgment roll herein consists of the amended complaint, the answer, and the judgment; findings having been waived. Section 670, Code Civ. Proc. The complaint alleges that, in the said action in the justice court, judgment was rendered in favor of the plaintiffs therein for the sum of $280, "together with $24.93 interest on the said sum, together with plaintiffs' costs, amounting to $7." The intendments are, of course, in favor of the jurisdiction of the superior court, and in the absence of the evidence we must assume that the proof showed that such was the judgment of the justice court, and that it followed and conformed to the allegations of the complaint in said action. In other words, if the jurisdiction of the superior court to render the judgment in this action depended upon the jurisdiction of the justice court in the other case, we must take it for granted, in the absence of anything in the record to the contrary, that the evidence at the trial herein showed such jurisdiction in the justice court. This proposition is evidently sound, and is not disputed by appellants, and we therefore pursue it no further.

[3] There is, however, printed in the tran-

script what purports to be a copy of the complaint, demurrer, and answer that were filed in said cause in the justice court. If we may consider the copy of said complaint, it is apparent that a cause of action was stated for $280 and interest on a promissory note, thus bringing the case within the jurisdiction of the justice court. It is true that in the prayer of the complaint plaintiffs asked for an attorney's fee, but no fact was alleged showing that they were entitled to any such fee. We must look to the body of the complaint to ascertain the jurisdiction, and therein we find that the justice court properly entertained the action.

[4] But it is apparent, as before stated, that these pleadings in the justice court cannot be considered because not authenticated as the law requires. The truth is that, since findings were waived, and no claim is made that the judgment is not in proper form, or that the complaint is insufficient, no legal proposition is presented by the judgment roll for discussion.

[5] The justice court having jurisdiction of the cause, the amount being composed of $280 principal and $24.93 interest, undoubtedly had authority to issue a writ of attachment for said sum. It is true that the amount for which the writ is issued is determined by the affidavit required in section 538 of the Code of Civil Procedure (De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718), but said affidavit does not appear in the record, and we assume that it conformed to the allegations of the complaint, indeed was identical as to what was due. The court manifestly cannot issue the writ for more than is demanded in the complaint, since no judgment can exceed the amount so demanded. Ralphs v. Bruns, 22 Cal. App. 153, 133 Pac. 997. But where the court has jurisdiction of the action, the writ may issue for the amount claimed, or any less amount, provided that in the justice court the sum claimed must exceed $10 exclusive of interest. Section 866, Code Civ. Proc.

The foregoing is sufficient to show that the judgment must be upheld, and there is no necessity for considering other reasons urged by respondents in support of the conclusion of the trial court.

The judgment is affirmed.

We concur: HART, J.; FINCH, P. J.

(190 Cal. 146)

**In re KURTZ'S ESTATE.**

**KURTZ v. KURTZ**

**(L. A. 7332.)**

(Supreme Court of California. Dec. 1, 1922. Rehearing Denied Dec. 28, 1922.)

**1. Wills ⟸191—Will making no provision for one subsequently married to testator held not revoked by such marriage; "mention."**

Under Civ. Code, § 1299, providing that a will is revoked by testator's subsequent marriage, if the wife survives him, unless she is provided for by marriage contract or in the will, or is so mentioned therein as to show an intention not to make such provision, a will devising testator's estate to his father or, if he died before testator, to the latter's sister, and providing that if "any person whomsoever, who, if I died intestate, would be entitled to any part of my estate," except the persons named, should assert a claim, he should receive one dollar only, was not revoked by testator's marriage the day after making the will; the wife being "mentioned" in the quoted phrase as effectually as if named therein, though she was not his wife when he made the will.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mention.]

**2. Wills ⟸489(2)—Evidence of testator's engagement to marry contestant at time of executing will and her subsequent marriage held admissible.**

In a widow's contest of her husband's will, which made no provision for her and provided that if "any person whomsoever, who, if I died intestate, would be entitled to any part of my estate," except the persons named as beneficiaries, should assert a claim, he should receive only one dollar, evidence that testator was engaged to marry contestant when he made the will was admissible to show who he intended to include by such otherwise ambiguous phrase.

**3. Wills ⟸488—Evidence admissible to show extrinsic facts explaining meaning of ambiguous words.**

Evidence is admissible to show extrinsic facts explaining the meaning of ambiguous words appearing on the face of a will.

**4. Wills ⟸191—Will held not revoked by testator's subsequent marriage to wife by whom he had unborn child at date of death.**

Under Civ. Code, § 1298, providing that a will is revoked by testator's subsequent marriage and birth of issue thereof, if the wife or issue survive him, unless provision is made for the latter or they are so mentioned in the will as to show an intention not to make such provision, a will devising testator's estate to his father, or, if he died before testator, to the latter's sister, but providing that if "any person whomsoever, who, if I died intestate, would be entitled to any part of my estate," should assert a claim, he should receive only one dollar, was not revoked by testator's subsequent marriage to one by whom he had a child as yet unborn at the time of his death, in view of Civ. Code, § 29, providing that a child conceived but not yet born shall be deemed an existing person so far as necessary to its interests in the event of its birth, as such child, if born alive, would inherit a part of its father's estate.

**5. Wills ⟸384—Whether wife has rights in deceased husband's estate, notwithstanding will not providing for her, cannot be presented on proponent's appeal from order denying probate.**

Whether a wife has rights in her deceased husband's estate, notwithstanding a will making no provision for her, cannot be presented on proponent's appeal from an order denying probate.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Proceedings for the probate of the will of William Kurtz, deceased, contested by Helen H. Kurtz. From an order denying probate, Leonhurt Kurtz appeals. Reversed.

W. H. Savage, of San Pedro, and B. M. Marble, of Los Angeles, for appellant.

C. L. Bogue, of San Pedro, and W. W. Orme, of Los Angeles, for respondent.

SHAW, C. J. This is an appeal from an order denying probate to the will of deceased.

The will was made on June 3, 1921. The next day, to wit, June 4, 1921, the testator married the contestant.

The will was contested on the ground that it was revoked by the provisions of section 1299 of the Civil Code, which are as follows:

"If, after making a will, the testator marries, and the wife survives the testator, the will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation must be received."

The wife he married on June 4, 1921, he continued to live with as such until his death, which occurred on November 2, 1921.

The material portions of the will are as follows, to wit:

"Second. I hereby declare that I am a single man, and my only living relatives are my father, Leonhurt Kurtz, also known as Leonhurt Kurz, of the town of San Pedro, city of Los Angeles, county of Los Angeles, state of California, and my sister, Ida Dunn, of the city and county of San Francisco, state of California.

"Third. I hereby give, devise and bequeath all the property, both real and personal, of which I may be legally possessed at the time of my death, to my beloved father, Leonhurt Kurtz, also known as Leonhurt Kurz, of the town of San Pedro, city of Los Angeles, county of Los Angeles, state of California, and in the event of the death of my said father prior to the date of my own death, then, and in that event only, I hereby give, devise and bequeath all the property, both real and personal, of which I may die legally possessed, to my beloved sister, Ida Dunn, of the city and county of San Francisco, state of California.

"Fourth. I hereby generally and expressly disinherit each and all persons whatsoever claiming to be, and who may be, my heirs at law, except as such may be determined by this will, and if any of such parties or such heirs, or any person whomsoever who, if I died intestate, would be entitled to any part of my estate, shall either directly, singly, or in conjunction with other persons, seek or establish or assert any claim to my estate, or any part thereof, excepting under this will, or attack or oppose or seek to set aside the probate of this will, or impair, invalidate or set aside the provisions, or endeavor to secure or procure any part of my estate other than through or under this will; then in any or all of the above-mentioned cases and events, I hereby give and bequeath to said person or persons the sum of one ($1.00) dollar and no more in lieu of any other share or interest in my estate, and all the rest of the interest, share or property which would otherwise have gone to such person or persons by devise or inheritance, or which they might be entitled to take under any provision of law shall go, and I hereby give, devise and bequeath the same, to my said father, Leonhurt Kurtz, also known as Leonhurt Kurz, of the town of San Pedro, city of Los Angeles, county of Los Angeles, state of California, or in the event of his death prior to my death, and in that event only, I hereby give, devise and bequeath the same to my said sister, Ida Dunn, of the city and county of San Francisco, state of California."

It will be noted that by the fourth paragraph of the will the testator expressly provides that if "any person whomsoever who, if I died intestate, would be entitled to any part of my estate," except the two persons named as heirs in the previous part of the will, should "seek to establish or assert any claim to my estate, or any part thereof, excepting under this will," or shall attack or seek to set it aside, or secure any part of his estate other than through or under the will, he or they shall receive one dollar and no more in lieu of any share or interest in his estate, and all the rest of the interest which would otherwise have gone to such person by inheritance he gives to his father.

[1] This clause does not mention his wife. It is obvious, however, that she is included by the phrase, "any person whomsoever who if I died intestate would be entitled to any part of my estate." In fact, so far as appears, she and the unborn child were the only persons who are included therein. Respondent contends that because when the will was made the day before, she was not the wife of the testator, there could not have been any intention to make provision for her as his wife. No reason is perceived why the wife could not be "mentioned" by any description that would include her. Certainly it would not be necessary to mention her by name and to include her, as she was included, in the description of a class, "mentions" her as effectually as if she had been named therein. He must have contemplated that such person might establish her claim to a share of the estate, for he provides that in such event all of the share shall go to his father except one dollar. It is therefore to be supposed that his wife would be included. The fact that she was not his wife when he made the will is of no significance. He was speaking of a future event, the descent that would be cast upon his death, and he could provide for the persons who might be then interested, though not so at the time, by the statement that they should have only a part of that which they would otherwise take.

[2, 3] The appellant sought to show that at the time the will was made the testator was already engaged to be married to the contestant, as indeed would almost be presumed so short a time before; but the court sustained an objection of the respondent to the evidence. This was clearly error. It was admissible for the purpose of showing who the maker of the will intended to include by the phrase "any person whomsoever who, if I died intestate, would be entitled to any part of my estate," a phrase which, if he had not been then engaged to marry the contestant, would be somewhat ambiguous, but which would be made certain by showing the fact of such engagement. Evidence is always admissible to show extrinsic facts which serve to explain the meaning of ambiguous words appearing on the face of the will, and this evidence was admissible for that purpose.

The wife of the testator is therefore "provided for" in the will.

[4] Section 1298 of the Civil Code is as follows, to wit:

"If, after having made a will, the testator marries, and has issue of such marriage, born either in his lifetime or after his death, and the wife or issue survives him, the will is revoked, unless provision has been made for such issue by some settlement, or unless such issue are provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation can be received."

One of the grounds of contest was that Helen H. Kurtz, the widow, was, at the time of filing the objections to its probate, enceinte, and that the testator was the father of the child. Section 29 of the Civil Code provides that—

"A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth."

This child would come in the same category as its mother; if it should be born alive, it would then inherit a part of its father's estate; in fact, it would inherit all of it that did not go to the mother, and it would be affected by the same provision, if it should set up a claim thereto, and would receive only one dollar of its share, the residue going to the father of William Kurtz.

The will should therefore have been admitted to probate.

[5] The question whether the wife has any rights in the estate, notwithstanding the will, cannot be presented on this appeal.

The order is reversed.

We concur: LENNON, J.; WILBUR, J.; SHURTLEFF, J.; SLOANE, J.; LAWLOR, J.; WASTE, J.

---

(190 Cal. 162)

## BOARD OF EDUCATION OF CITY OF SAN RAFAEL v. DAVIDSON, Superintendent of Schools. (S. F. 10250.)

(Supreme Court of California. Dec. 6, 1922.)

**1. Schools and school districts ⊂=45—Public school system governed by general laws.**

The organization and government of the public school system is a public matter, and governed by the general laws of the state, and in case of conflict the general laws of the state control.

**2. Schools and school districts ⊂=42(2)—On annexation of outlying elementary districts to city high school district, government is by city board of education.**

Under Pol. Code, §§ 1721, 1729–1732, section 1734a, as added by St. 1919, p. 396, and section 1734b, as added by St. 1921, p. 722, as followed by the charter of San Rafael, outlying and adjacent elementary school districts may be annexed to the city high school district of such city for high school purposes, and the district so consolidated is to be under the government and control of the city board of education, and the annexed territory becomes part of the city for the purpose of electing such board.

In Bank.

Petition by the Board of Education of the City of San Rafael for a writ of mandate against James B. Davidson, as superintendent of Schools of the County of Marin, to compel the calling of an election to choose a school board. Writ denied.

George H. Harlan, of San Rafael, for petitioner.

W. E. Duncan, Jr., of Oroville, J. Oscar Goldstein, City Atty., and John R. Robinson, Dist. Atty., both of Chico, amici curiæ.

Henry E. Greer, Dist. Atty., of San Rafael, for respondent.

SLOANE, J. The petitioner is seeking by writ of mandate to compel the defendant, the superintendent of schools of Marin county, to call an election to choose a school board for the government of the high school of the city of San Rafael, in said county.

Prior to 1912 San Rafael was a city of the fifth class, and, with some outlying contiguous territory, constituted an elementary school district. Within this district a high school was organized and maintained, thereby constituting the district a city high school district under section 1721 of the Political Code, which provides that—

"Any city school district which has been for a period of one year preceding the taking effect of this section established and maintained as a high school within such district, shall be deemed to be and constitutes a city high school district."

Subsequently, under proceedings duly had for that purpose, the city of San Rafael adopted a municipal charter and thereafter organized and operated thereunder. Such charter contains the following provisions relating to the organization and government of its public schools:

"Article XI. Section 1. The school department of the city of San Rafael shall comprise all the schools within the city of San Rafael the San Rafael school district, and all territory that is now or may hereafter be annexed thereto for school purposes, which shall be known as 'San Rafael school district,' and which shall succeed to all the obligations, property, rights and privileges of the San Rafael school district. It shall consist of elementary and secondary schools as now established or that may hereafter be established, and may, at the discretion of the board of education, include technical, industrial, kindergarten and night schools; provided that no school money

shall be used for technical, industrial or night schools or kindergarten when such use would prevent the board of education from maintaining elementary and secondary schools as provided by law.

"Sec. 2. All territory included within the limits of the San Rafael school district, or that may hereafter be included within such limits, but not within the city limits, shall be deemed a part of said city for the purpose of holding the general municipal elections, and shall constitute one or more separate election precincts, and the qualified electors therein shall vote only for members of the board of education and on questions submitted to a vote of the people at special or general elections pertaining to school matters; and said outside territory shall be deemed a part of said city for all matters connected with the school department."

"Sec. 6. The board of education shall have entire control and management of the public schools of the city in accordance with the Constitution and general laws of the state, and is hereby vested with all the powers and charged with all the duties provided by this charter and by the general laws of the state for city boards of education."

It will be observed that these charter sections are general in their terms as applied to elementary or high schools and became applicable in their terms to all territory then included for high school purposes within the San Rafael school district, or which might thereafter be added thereto, and provided for participation of such annexed territory in the election of a board of education, and gave to such board of education entire control of all public schools in accordance with the Constitution and general laws of the state.

Thereafter, under a new section of the Political Code, section 1734b (as added by St. 1921, p. 722) relating to high school districts, and in accordance with the provisions of said section the board of supervisors of Marin county annexed to said San Rafael school district, for high school purposes only, several outlying elementary school districts and the San Rafael school district was, for high school purposes, enlarged so as to include within its exterior boundaries these outlying and independent elementary school districts which were not a part of the San Rafael elementary school district, and for elementary school purposes at least, not within the jurisdiction and control of the city board of education of San Rafael.

The question here presented is whether the school board of the city of San Rafael continues to be the governing body of the high school district as thus enlarged, or whether, as contended by petitioner a condition has arisen under which a separate high school board must be chosen under the state law as contained in section 1730, 1731, and 1732 of the Political Code. The only part of these sections important for immediate consideration is the following provision of section 1732, which reads as follows:

"Whenever the number of school districts in a high school district is increased from one to two or more, the superintendent of schools having jurisdiction of such high school district shall, within fifteen days thereafter, call an election as provided in section one thousand seven hundred and thirty, and thereafter the high school board shall be elected and organized as provided in sections one thousand seven hundred and thirty and one thousand seven hundred and thirty-one."

It is to this provision of law that petitioner appeals in this proceeding. The answer is that the state school law apparently distinguishes between 'high school districts in general and city high school districts." Section 1721 of the Political Code contains this provision:

"Whenever the term high school district is used * * * it shall, unless a contrary intent appears, be deemed to include 'union high school district,' joint union high school districts and county high school districts. Any city school district which has been for a period of one year preceding the taking of effect of this section, established and maintained a high school within such district, shall be deemed to be and constitute a city high school district."

Section 1734a as added by St. 1919, p. 396, emphasizes this distinction as follows:

"Whenever an elementary school district is annexed under the provisions of this section to any high school district having the same boundaries as a single elementary school district, *except a city high school district*, such high school district shall thereafter constitute a union high school district, and shall be governed by a high school board elected according to the provisions of sections one thousand seven hundred thirty and one thousand seven hundred thirty-one of the Political Code. From and after the organization of the first high school board in any union high school district formed as hereinbefore provided, all property belonging to the original high school district shall be and become the property of the union high school district so formed.

"Whenever one or more elementary school districts are annexed under the provisions of this act *to a city high school district*, such annexation shall be for high school purposes only. Such territory shall be deemed a part of said city for the purpose of holding the general municipal election at which any member of the board of education is to be elected, and shall form one or more election precincts, as may be determined by the legislative authority of said city, the qualified electors of which shall vote only for the board of education, and such territory shall be deemed to be a part of said city or city high school district for all matters connected with the high school thereof. * * *" (The italics ours.)

[1] The latter paragraph referring to annexations to a city high school district, it will be observed, contains the same general provisions relating to the participation of annexed territory in the election of members of the city board of education as do the charter provisions heretofore quoted. It is, of course,

well settled that the organization and government of the public school system is a public matter and governed by the general laws of the state (Kennedy v. Miller, 97 Cal. 429, 32 Pac. 558), and that in case of conflict the general laws of the state control. In this case, however, no conflict exists between the state school law and the San Rafael city charter. The charter provisions by the inclusive terms used covering all grades of schools is applicable to the high school district as enlarged by annexation, and makes the new territory part of the city of San Rafael for school purposes, the city board of education its governing body, and authorizes the participation of the annexed territory in the election of such board of education.

Another section of Political Code, § 1729, relating to the annexation of a high school district to a city high school district, indicates the same intent that under such a consolidation the city district shall maintain its identity, and the governing power vest in the city board of education, in the election of which the annexed territory may participate. It is there declared:

"After any such union high school district has been so annexed to, consolidated and merged with any such high school district of any incorporated city or town, such territory of said union high school district so merged and consolidated shall be deemed to be a part of said city or incorporated town for high school purposes and for all matters connected with the high school department thereof, and for the purpose of assessing, levying and collecting property taxes for the high school funds of such city or incorporated town and for the purposes specified in sections 1880 and 1888, inclusive, of the Political Code.

"Whenever a union high school district shall be annexed to, consolidated and merged with a high school district of an incorporated city or town as hereinabove provided, the governing power and control of such union high school district shall thereafter be merged and vested in the board of education or board of school trustees of such incorporated city or town."

Our attention is called to the fact that section 1734a and section 1729 of the Political Code are directed to other methods of annexing outside territory to a city high school district than that provided by section 1734b, under which the annexation in this case was made, and that the latter section does not in terms make the city board of education the governing body of the enlarged district. On the other hand, it makes no other provision for the government of such district.

It is also suggested that under section 1734a the designation of the city board of education as the governing body of the enlarged district refers expressly to annexations under that particular procedure. We are of the opinion, however, that the various conditions under which such annexations are prescribed in these different sections are intended as parts of a uniform plan for the inclusion of outside territory in city high school districts, and should be construed together in arriving at the legislative intent as to the form of administration to be adopted in city high school districts as distinguished from districts in other county territory.

[2] We conclude, therefore, that under the state school law as followed by the charter of San Rafael it is contemplated that outlying and adjacent elementary school districts may be annexed to a city high school district for high school purposes, and that the district so consolidated is to be under the government and control of the city board of education, and the annexed territory becomes part of the city for the purpose of electing such board.

The difficulty presented here does not arise over the selection of the members of the board which shall govern the high school district, but rather as to the representation accorded the elementary schools of San Rafael. As already pointed out, the high school is placed by both the charter and the state school law under the supervision of a board of education, in the selection of which all the residents of the high school district have a voice. The city elementary school district is made subject to the same board, the choice of which may be controlled by votes in territory entirely outside such district.

However, the management of the public schools is a state affair, and school districts at most are but a state agency for that purpose, and we know of no constitutional inhibition on the Legislature to prevent the selection of city school boards for elementary schools by a different method than applies to county school districts. In any event, that question is not before us. On the point at issue it seems clear that the affairs of the San Rafael high school district are in the hands of the city board of education, and that the method of choosing that board is covered harmoniously by both the state school law and a valid provision of the city charter.

The writ prayed for is denied.

We concur: SHAW, C. J.; WASTE, J.; SHURTLEFF, J.; LAWLOR, J.; LENNON, J.

59 Cal. App. 503

## PEOPLE v. MARTY. (Cr. 895.)

(District Court of Appeal, Second District, Division 2, California. Oct. 26, 1922. Hearing Denied by Supreme Court Dec. 22, 1922.)

**Homicide ⊂=83—Accused held "concerned" in commission of manslaughter and to have "aided and abetted" another in such commission.**

Where accused and a companion, after difficulty with Mexicans on a road, returned with a shotgun carried by the companion, to seek an "understanding" with the Mexicans, and, during the ensuing dispute, his companion shot a Mexican with the shotgun, *held*, that accused, having commenced the altercation which provoked the first fire from the Mexicans, was "concerned" in the crime and had "aided and abetted" his companion in its commission, within Penal Code, § 31, as to principals.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Aid and Abet; Concern.]

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Edward Marty was found guilty of manslaughter, and appeals from the judgment of conviction and from the court's order denying his motion for new trial. Judgment and order affirmed.

Ralph F. Graham and Russell Graham, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

WORKS, J. Appellant and one Guthrie were informed against jointly and were tried jointly for the murder of one Acencion Correa. Both were found guilty of manslaughter. The appeal is from the judgment of conviction and from the trial court's order denying appellant's motion for a new trial.

The sole point made by appellant is that the evidence in the cause was insufficient to support the verdict. The question presented is to be resolved upon a construction of section 31 of the Penal Code, which, quoting so much of it as bears upon the point, is in this language:

"All persons concerned in the commission of a crime, * * * whether they directly commit the act constituting the offense, or aid and abet in its commission, * * * are principals in any crime so committed."

Appellant did not directly commit the crime with the perpetration of which he and Guthrie were charged, and we are therefore called upon to determine whether he was "concerned" in its commission and, if so concerned, whether he did "aid and abet in its commission."

In solving this problem we do not find it necessary to go beyond the facts stated in appellant's brief, taken together with fragments of the testimony quoted therein, and also with portions of the testimony pointed out in the brief by appropriate reference to the reporter's transcript. In fact, the point may be settled, practically, by the testimony of appellant alone. It appears that appellant and Guthrie proceeded one evening in an automobile driven by the latter to make a call in the town of Bell. On the way to that place they came to a point where a horse and wagon were standing diagonally across the road in such a way as to block the highway proper. There was a Mexican on the wagon and several others in its neighborhood. One of these Mexicans was the deceased Correa. Guthrie was forced to turn to the side of the road in order to pass the horse's head. We now take up the testimony given by appellant:

"I said to the Mexicans, 'What is the idea of taking all of the road?' and then they started to speak in high tones, and we got 15 or 20 feet from the wagon, when there was a shot fired. I could see the Mexican on the wagon * * * fire the shot. * * * I turned my head toward the filling station [which was a short distance further along the road], and then in about five or six seconds later another shot was fired. It sang past our heads. * * * I says to Mr. Guthrie, 'I wonder what their idea is? And Mr. Guthrie says, 'I don't know.' He says, 'We will stop at the filling station and get a gun.'"

They did then go to the filling station, and appellant opened the conversation with the proprietor of the place. Appellant himself testified:

"I said, 'Some Mexicans down the line shot at us without a reason, I don't know whether it is a holdup gang or not, but [sic] through a misunderstanding.'"

Guthrie then asked the filling station keeper to lend him a revolver, but the keeper handed him a shotgun instead. Guthrie and appellant at once turned back toward the place at which they had encountered the horse and wagon and passed 250 feet beyond. They then got out of their car and proceeded on foot to where the Mexicans were, about the wagon, Guthrie having the shotgun in his hands. We again take up the testimony of appellant:

"We both got out of the car and went back to where these here Mexicans were, and I said to them, 'Now, we are not hunting trouble, understand,' assuring them of our friendship, and so I says, 'What is the idea of firing at us?' They pointed out along the road and said, 'No business, no business.' I said, 'Haven't American citizens a right to drive on the thoroughfare without being fired on?'"

Thereupon, according to the testimony of appellant, an altercation commenced, during which one of the Mexicans asked for the names of appellant and Guthrie, which they refused; appellant saying that they came

from good families in Whittier and that the Mexicans could take the license number on their car. We again take up appellant's own words:

"After I told him that, * * * they came towards us and started in to circling us as to take advantage of us. Mr. Guthrie told them we didn't come back to get into an argument or anything of a battle, all we wanted was an understanding. Then they kept inclosing on us, and one of them had a log chain in his hand, and we knew they had a gun. Mr. Guthrie told them to stand back, and he asked them for their names. This younger Mexican [previously mentioned in the testimony] said, 'You son of a bitch Americans!' and he ran back, and Mr. Guthrie told him several times to keep his hand off his gun, which he drew from the wagon, and as he drew this gun Mr. Guthrie shouldered the shotgun and told him to lay down his gun, and when this Mexican leveled the gun Mr. Guthrie fired."

Several shots were then discharged in rapid succession, at least three of them coming from the shotgun in the hands of Guthrie. The fire of the latter killed Correa and wounded another of the Mexicans. It is worthy of note that at the time of these unfortunate occurrences appellant was 21 years of age, while Guthrie was but nineteen.

Appellant, in support of his contention that his conduct did not bring him within the terms of section 31 of the Penal Code, cites several cases to the effect that one who merely stands by while a companion commits a crime cannot be said to have aided and abetted in its commission. Here, however, appellant did much more than merely stand by. He commenced the altercation which provoked the first fire from the Mexicans. When Guthrie said, "We will stop at the filling station and get a gun," appellant made no remonstrance. On the contrary, when they reached the station, he opened the conversation with the keeper. When Guthrie asked for a revolver, appellant made no remonstrance, and when the shotgun was taken by Guthrie he made none. In defiance of all the dictates of prudence, he willingly, if not with avidity, returned with Guthrie to the wagon. That he was earnestly interested in this foolish attempt to come to an "understanding" with the Mexicans is sufficiently demonstrated by the fact that, backed by the influence of the gun in Guthrie's hands, he opened the conversation with the Mexicans and kept it up for some time. He must have been regarded by them, and justly, we think, as an aggressor. We are forced to conclude that it was only a fortuitous circumstance that the shotgun was in the hands of Guthrie. Basing our view upon the testimony of appellant alone, we cannot say that the result would have been different if the filling station keeper had placed the gun in appellant's hands instead of in those of Guthrie. We are convinced that appellant was "concerned" in the crime and "aided and abetted" Guthrie in its commission. If he did not do so, we do not see what conduct on his part could have made him an aiding and abetting principal, unless he had actually held the weapon while Guthrie pulled the trigger.

Judgment and order affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

59 Cal. App. [illegible]

## PEOPLE v. SUTHERLAND. (Cr. 906.)

(District Court of Appeal, Second District, Division 1, California. Oct. 24, 1922. Hearing Denied by Supreme Court Dec. 22, 1922.)

**1. Gaming ⟹98(1)—Conviction of bookmaking held sustained by evidence.**

In prosecution for recording and registering bets, as the offense is defined in Pen. Code, § 337a, subd. 4, evidence *held* to sustain conviction.

**2. Criminal law ⟹478(1)—Officers held competent to testify to bookmaking paraphernalia.**

In prosecution for recording and registering bets, as the offense is defined in Pen. Code, § 337a, subd. 4, it was proper to admit the testimony of two police officers, identifying documents found in rooms occupied by accused as material such as is used by bookmakers, where they testified they had had experience in ferreting out bookmakers, and had familiarized themselves with the paraphernalia ordinarily employed in that business.

**3. Gaming ⟹73—Not essential to offense of bookmaking that races be actually run.**

In prosecution for recording and registering bets, as the offense is defined in Pen. Code, § 337a, subd. 4, it was not necessary to actually establish that the races upon which bets were being taken were actually being run at the time.

**4. Criminal law ⟹721(5)—Argument of district attorney held not improper.**

In prosecution for recording and registering bets, as the offense is defined in Pen. Code, § 337a, subd. 4, assertion of district attorney in argument to the jury that not a witness had taken the stand on either side to dispute the testimony of a certain officer *held* not misconduct, as pointing to the jury's attention that accused had not testified in his own behalf.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Jack Sutherland was convicted of recording and registering bets. From judgment of imprisonment and from an order denying new trial, he appeals. Judgment and order affirmed.

E. L. Johnson and Archie C. Shreve, both of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

JAMES, J. The defendant was convicted of the crime of recording and registering bets as that offense is defined in subdivision 4 of section 337a, Penal Code. He appeals from the judgment of imprisonment and from an order denying his motion for a new trial.

As ground upon which to base his claim for a reversal of the judgment and order, appellant insists that the evidence was insufficient to warrant a conviction; that the district attorney was guilty of misconduct in his argument to the jury; and that the court erred in admitting the testimony of two police officers who identified the various papers, cards, and documents found in the rooms occupied by appellant as being material such as is used by bookmakers.

[1-3] Disposing of the first and third objections, we are convinced that the evidence was sufficient to sustain the verdict, and that there was no error in the ruling of the court admitting the testimony objected to. Appellant at the time of his arrest was occuping three certain rooms in the city of San Diego, at the entrance of which was affixed a sign bearing the word "Brokerage." The two police officers, entering the first of the three rooms, found appellant seated at a desk and engaged in the act of writing upon a card. Leaning over the desk was a man who held in his hand some paper money, which the circumstances indicated he was about to pay to appellant. Upon the entry of the officers appellant dropped the card upon which he was writing into the drawer of the desk, which drawer was afterwards found to contain various other cards. The officers were unable to identify the particular card which appellant had been writing upon, but they testified that the cards found in the drawer were cards such as were commonly used by bookmakers in registering bets. Among other documents discovered was a race chart. In fact, all of the documentary matter discovered in the rooms seems to have been only such as might make up the working materials of a bookmaker's establishment. The arresting officers had had experience in ferreting out offenders engaged in bookmaking, and had familiarized themselves with the paraphernalia ordinarily employed in that business. Their testimony that they were so familiar with those operations, together with the evidence as to just what that experience had been, was sufficient to establish prima facie their competency to testify to the facts adverted to. It was not necessary that it be actually established that the races upon which bets were being taken were actually being run at the time. People v. Carroll (Cal. App.) 202 Pac. 885.

[4] The district attorney in his argument to the jury asserted that not a witness had taken the stand on either side to dispute the testimony of Officer Sears. Counsel for appellant protested that the statement of the district attorney amounted to misconduct, and was prejudicial to the appellant because it pointed the attention of the jury to the fact that the defendant had not testified in his own behalf. The argument did not amount to misconduct, and the district attorney was wholly within his right in using the language complained of. It would be a strange rule indeed that would prevent a prosecuting officer from contrasting the evidence and pointing to that which he believed stood without contradiction or was the most convincing. This point of appellant as last referred to is of so little merit as to call for the citation of no authorities to sustain the case of the state.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

---

59 Cal. App. 330

**JOHNSON et al. v. KRIER. (Civ. 4306.)**

(District Court of Appeal, First District, Division 2, California. Oct. 14, 1922. Hearing Denied by Supreme Court Dec. 11, 1922.)

**1. Brokers ⟸49(1)—Entitled to commission on securing executory contract of sale.**

Brokers employed to make a sale *held* entitled to the agreed commission on securing a written "contract of sale" at a given price on stated terms of payment.

**2. Brokers ⟸43(1)—Oral agreement to pay commission for sale of realty not void, where ratified in writing after procurement of purchasers.**

Where an oral agreement to pay a commission for selling realty was ratified in writing after promisees procured purchasers, the bar of the statute was removed (Civ. Code, § 2310).

**3. Brokers ⟸54—Seller cannot question purchaser's readiness and ability to buy after entering into valid contract of sale.**

One agreeing to pay a commission for the sale of realty cannot question the purchaser's readiness, willingness, and ability to buy, after accepting him by entering into a valid contract of sale.

**4. Brokers ⟸61(3)—Failure of owner's wife to sign contract held not to affect broker's right to compensation for sale of land.**

It does not affect a broker's right to recover compensation for a sale of land, that, as the owner's wife did not sign the contract, it could not be specifically enforced, since the broker's action is not for specific performance, and it is also the rule that refusal of the wife of vendor to join in a deed conveying the

subject of the agency does not deprive the broker of his right to compensation.

**5. Brokers ⊜43(3)—Memorandum of commission agreement attached and referring to sale contract describing property held sufficient.**

A memorandum of commission agreement attached, and referring expressly to a contract of sale describing the property sold, *held* sufficient to satisfy the statute, though the commission agreement itself did not specifically describe it.

**6. Brokers ⊜64(1)—Seller not relieved from paying commission by buyer's default without agent's fault.**

In the absence of a special contract making the payment of commission for selling realty contingent on the validity of the seller's title or the purchaser's performance of his agreement, the purchaser's failure, without the agent's fault, to consummate the sale, does not relieve the seller from paying the commission, whether such breach was due to his own or the purchaser's fault, his remedy in the latter case being against the purchaser at law.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by C. H. Johnson and another, doing business as Johnson & Temple, copartners, against Peter Krier. Judgment for plaintiffs, and defendant appeals. Affirmed.

Lamberson & Lamberson, of Visalia, for appellant.

C. B. Wooster, of San Jose, for respondents.

LANGDON, P. J. This is an appeal by the defendant from a judgment against him for $2,000, in an action to recover that amount upon a written agreement to pay the same as a commission for the sale of certain land in the county of Tulare, state of California.

The trial court found that on or about December 1, 1920, the plaintiffs, acting at the special instance and request of the defendant, sold to one Lowell M. Washburn and Virginia Washburn, the real property described in the complaint herein. That said sale was evidenced by a written contract of sale, dated December 1, 1920, and executed by the said defendant and the said buyers, Lowell M. Washburn and Virginia Washburn. That thereupon, the said defendant made, executed, and delivered to plaintiffs an agreement in words and figures as follows, said agreement being written on the back of the above-mentioned contract of sale and signed by the said defendant:

"I hereby agree to pay Johnson and Temple a commission of $2,000 for the making of the within sale. Dated December 1, 1920. P. Krier."

There also appears a further finding that said commission has never been paid to the plaintiffs, and judgment for the same followed.

[1] The first contention of the appellant is that the contract between himself and the Washburns was not a sale, but a contract to sell, and that plaintiffs have not earned a commission upon a "sale" by securing merely a contract of purchase and sale which was to ripen into an executed sale in the future. There is no merit in this contention. The agreement appearing in the record is somewhat lengthy, and there seems to be no necessity of setting it out fully herein. It is entitled "Contract of Sale," and provides in part:

"This agreement, made and entered into this 1st day of December, 1920, by and between Peter Krier and Margaret Krier, his wife, parties of the first part, and Lowell M. Washburn and Virginia Washburn, his wife, parties of the second part, witnesseth: That the parties of the first part hereby agree to sell to the parties of the second part and the parties of the second part agree to buy that certain property situate in the county of Tulare, state of California, and more particularly described as follows, to wit."

Then follows a description of the property, a statement of the price ($47,000), the terms of sale, the security to be deposited for the unpaid portion of the purchase price, and provisions relating to other details of the arrangements between the parties. The said contract was signed by Peter Krier, Lowell Washburn, and Virginia Washburn.

The cases of Phelps v. Prusch, 83 Cal. 626, 23 Pac. 1111, and Gunn v. Bank of California, 99 Cal. 352, 33 Pac. 1105, settle the question raised by the appellant. In the last-cited case it is said:

"It is, of course, well settled that when a broker employed simply to negotiate a sale of real property has found a purchaser able, ready, and willing to purchase upon the vendor's terms, his right to the agreed commission is complete, and does not depend upon the final acceptance by the purchaser of a conveyance of the property sold."

Numerous cases are cited in support of this statement of the law.

[2, 3] In the present case, the agreement to pay commission was not reduced to writing before the rendition of the services by the plaintiff, but after plaintiffs had procured the purchasers, the oral agreement was ratified in writing and so the bar of the statute of frauds was removed. Section 2310, Civ. Code. The defendant accepted the purchaser by entering into a valid contract with him and cannot now raise the questions of his readiness, willingness, and ability to make the purchase. Sobaje v. Schubert, 37 Cal. App. 709, 174 Pac. 364; 4 Cal. Jur., 592.

[4] Appellant also contends that, as Margaret Krier, the wife of the defendant, did

not sign this contract of purchase and sale, it is not one that could be specifically enforced by the courts. The case of Jackson v. Torrence, 83 Cal. 521, at page 537, 23 Pac. 695, is relied upon. It is true that the rule, as there announced, is that an executory contract of a married woman to convey real property, which contract has not been acknowledged in the manner provided by law, cannot be specifically enforced. But this proposition is beside the mark in the present case. This is not an action for specific performance; and it is also the rule that a refusal of the wife of a vendor to join in a deed conveying the subject of the agency does not deprive the broker of his right to compensation. 4 Cal. Jur., p. 597; Farrington v. McClellan, 26 Cal. App. 375, 383, 146 Pac. 1051; Justy v. Erro, 16 Cal. App. 519, 522, 117 Pac. 575; Goodrich v. Turney, 44 Cal. App. 516, 186 Pac. 806.

[5] Another objection of appellant is based upon the fact that the contract for the payment of commissions does not specifically describe the real property to be sold. It is contended that the memorandum in insufficient to satisfy the statute. But the memorandum of the agreement for commissions is attached to the contract for the purchase and sale, and refers expressly to said contract of purchase and sale, and the description of the property therein contained. This is sufficient.

[6] The other objections of the appellant relate to the asserted injustice of allowing compensation to plaintiffs when the sale was never consummated and the defendant has received nothing of value. The evidence appearing in the record was conflicting as to the reasons for the failure to complete the transaction. The court might have concluded that either one of the parties was to blame. Appellant, therefore, argues at some length that Washburn, the purchaser, was to blame for the abandonment of the contract. But, however that may be, it is immaterial here. If the defendant's fault was the cause of the breach, that does not relieve him from payment of the agent's commission, and, if the purchaser was at fault, defendant had his remedy against him at law. There is no contention that the plaintiff caused the breach. The agent's commission is not dependent upon the validity or invalidity of his principal's title (4 Cal. Jur., 601, § 36, and cases there cited), nor upon the performance by the purchaser of the conditions of his agreement, in the absence of a special contract making the payment of commission contingent upon these matters (4 Cal. Jur., 603, § 37).

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

59 Cal. App. 444

## PEOPLE v. HUNTER. (Cr. 913.)

(District Court of Appeal, Second District, Division 1. California. Oct. 23, 1922.)

**1. Burglary ⊂⊃41(1)—Evidence held to sustain conviction.**

In prosecution for burglary in the second degree, evidence *held* to sustain conviction.

**2. Burglary ⊂⊃46(7) — Possession of stolen property evidence of guilt.**

In prosecution for burglary in second degree, where stolen property was found in defendant's possession, it was proper to advise the jury that such possession was a circumstance which, taken in connection with other testimony, was to determine the question of guilt.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Roland O. Hunter was convicted of burglary in the second degree, and he appeals. Affirmed.

Gerald C. Thomas, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of the crime of burglary in the second degree. His motion for a new trial was denied, and he was sentenced to be imprisoned in the state prison. He appeals from the judgment and from an order denying his motion for a new trial.

[1] The principal contention made by the appellant is that the evidence was insufficient to justify the verdict. The facts, as the evidence offered by the prosecution disclosed them to be, are as follows:

Mrs. Nettie Connelly, on the 29th of April, 1922, left her home about 4:30 in the afternoon, after closing and locking the doors of the house. She returned between 9 and 9:30 p. m. the same evening. She then found that one of the locked doors had been opened and the house ransacked. Among other articles taken was a suitcase and a suit of clothes. About 8:45 p. m. on the day mentioned defendant appeared at a loan or pawnbroker's establishment with the suitcase and the suit of clothes and offered them for sale. The pawnbroker agreed to pay $10 for the merchandise, which money he delivered to the defendant, who gave his name as Albright. While conducting negotiations for the purchase of the articles, the proprietor notified the police of the offer being made to him, and by the time he had concluded his transaction with the defendant two officers were waiting to intercept the latter. Upon being arrested, defendant told the familiar story of having received the articles from another person, believing them to be honestly possessed by the one from whom they were received. He par-

ticularized in his statement to the officers by saying that he had received them from Jack Albright, who was his father; that it had been prearranged that he was to meet the father at a particular address after selling the suitcase and clothes for him. Upon the officers going with him to the place named, they found that the number did not correspond to the character of the place that appellant had indicated, and they then proceeded to several other addresses. They were unable then or thereafter to find the person whom appellant had described as his "father." At a later time, the officers testified appellant retracted the statement as to Albright being his father, and said that his father's name was Hunter, and that Hunter had died in the Philippines.

At the trial appellant gave testimony and admitted that he was known under at least three different names, to wit, Roland Hunter, Johnny Cavanaugh, and R. O. Cashin. He admitted that he had previously been sentenced to the Ione Reformatory after conviction for robbery. The testimony and statements made by the appellant in his attempt to account for the possession of the stolen goods were of such character as to in themselves afford evidence of guilt, and the case in its facts is brought clearly within the ruling made in People v. Lang, 142 Cal. 484, 76 Pac. 232. What is said in the opinion rendered in that case furnishes ample support to the respondent's position here.

[2] We find no error in the giving or the refusing to give any of the instructions which were considered by the trial judge. All of the matters included in several proposed instructions offered by the defendant were sufficiently covered in the charge as it was given by the court to the jury. The trial judge did not transgress the rule that the court shall not instruct the jury as to matters of fact or the weight of the evidence. On the contrary, the judge used terms which advised the jury that the court did not, nor did it intend to, express any opinion as to defendant's guilt or as to the weight of evidence, or the inferences which the jury should draw therefrom. Referring to the matter of the possession of the stolen property, the court definitely told the jury that the mere possession of such property, unexplained by the defendant, was not sufficient to justify a conviction. The jury was advised properly that such possession was "a circumstance which, taken, in connection with other testimony, is to determine the question of guilt," and that "there must be, in addition to proof of possession of property stolen from the premises described in evidence, proof of corroborating circumstances tending of themselves to establish guilt." Under the instructions referred to, the court clearly left to the jury the whole matter of determining the weight to be given to all of the evidence.

The record in this case discloses nothing which indicates that the defendant was in any wise deprived of his right to a fair trial, or that by his conviction a miscarriage of justice has resulted.

The judgment and order are affirmed.

We Concur: CONREY, P. J.; SHAW, J.

---

59 Cal. App. 434

## PALLETT et al. v. GUENTHER et al.
## (Civ. 3964, 3965).

(District Court of Appeal, Second District, Division 1, California. Oct. 23, 1922.)

**1. Dismissal and nonsuit ⟸60(1)—Dismissal for want of diligence in bringing demurrer to hearing sustained.**

Where plaintiff has delayed for one year and four months in bringing on for hearing a demurrer interposed to his complaint, the court may dismiss for want of diligence, Code Civ. Proc. § 583, allowing dismissal in the discretion of the court, where plaintiff has failed for two years after answer to bring action to trial, limiting the court's power to dismiss only where an answer has been filed.

**2. Dismissal and nonsuit ⟸81(6) — Relief against dismissal for delay in bringing action to trial held within discretion of court.**

In action for relief against dismissal for delay under Code Civ. Proc. § 473, it was within the court's power to determine as to whether under all the facts and circumstances shown plaintiffs were excused for their delay in bringing the action to trial.

**3. Dismissal and nonsuit ⟸60(3)—Agreement between plaintiff and his attorneys to allow suit to rest held no excuse for delay in prosecution.**

A mere agreement between plaintiff and his attorneys that after the action had been commenced the matter should be allowed to rest for a while without substitution of attorneys *held* insufficient to afford foundation for a meritorious claim of reasonable excuse for a delay of one year and four months in bringing demurrer to hearing.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by William A. Pallett and others against August W. Guenther and others. From judgment of dismissal for lack of diligence, plaintiffs appeal. Affirmed.

James, Pace & Smith and Herbert Freston, all of Los Angeles, for appellants.

Thomas Tyler Robinson and Thomas A. Sanson, both of Los Angeles, for respondents.

JAMES, J. There are here presented two appeals taken by the plaintiffs, one from a judgment entered in the trial court dismissing the action for want of due diligence in

the prosecution thereof, and the second an appeal taken from an order subsequently made, denying the motion of the plaintiffs for relief under the provisions of section 473, Code of Civil Procedure. By stipulation of the parties both appeals are presented together on one set of briefs.

Plaintiffs began their action, which was to settle their right to the use of certain waters and to enjoin the defendants from interfering therewith, by filing a complaint on May 28, 1919. Defendant Guenther, on March 2, 1920, served and filed his demurrer to the complaint. The demurrer was not brought on for hearing before the court, and after notice duly given said defendant on the 24th of June, 1921, presented to the court a motion to dismiss the action on the ground that the same had not been prosecuted with due diligence. One of the counsel appearing of record as attorney for plaintiffs was in court and resisted the motion, but submitted no affidavits or other evidence to excuse the delay. The motion was on the same day granted. On the 29th of July, 1921, plaintiffs, after notice given, appeared and moved the court to set aside the judgment of dismissal. The motion was based upon the records and files in the action, together with two affidavits made by two of the counsel appearing for the plaintiffs.

[1] Considering first whether the court was authorized to dismiss the action because of delay of one year and about four months in bringing on for hearing the demurrer interposed to the complaint: In the year 1905 section 583 of the Code of Civil Procedure was enacted, which provided in part as follows:

"The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after answer filed to bring such action to trial. * * *"

The Supreme Court has definitely construed the provisions quoted, and has decided that they impose a limitation on the power of the court to dismiss only in cases where an answer has been filed; that the power of the court to otherwise and in other cases dismiss for want of prosecution exists, and that such power is governed by the rule of reasonable discretion. And, further, that a demurrer is not equivalent to an answer within the meaning of the section. Romero v. Snyder, 167 Cal. 216, 138 Pac. 1002; Overaa v. Keeney, 169 Cal. 628, 147 Pac. 466. Under the authority of the cases last cited, it must be concluded that the appeal from the judgment of dismissal is without merit.

[2] On the motion for relief under section 473, Code of Civil Procedure, the affidavits submitted to the court were not contradicted, and it is the contention of appellants that, under the facts therein set forth, the court had no discretion but to grant the motion. The same rule applied in considering a motion for such relief as applied to the motion to dismiss the action; that is, the court had the right to determine as to whether, under all of the facts and circumstances shown, plaintiffs were excused for their delay, and excused, too, for not having made a showing of the same matters when resisting the motion to dismiss. The language used in First National Bank v. Nason, 115 Cal. 626, 47 Pac. 595, is applicable, where the court says:

"Each particular case presents its own peculiar features, and no iron-clad rule can justly be devised applicable alike to all."

[3] And in Raggio v. Southern Pacific Co., 181 Cal. 472, 185 Pac. 171, where the court gave a further definition to what might amount to "legal discretion." Upon an examination of the contents of the affidavits submitted on the motion to set aside the judgment of dismissal, we are unable to find anything which would furnish adequate excuse for the delay of the plaintiffs in prosecuting the action. The substance of the first affidavit was to the effect that in September, 1920, affiant (one of the attorneys for plaintiffs) had a conference with plaintiff T. A. Pallett, at which he informed that plaintiff that on account of other pressing business matters he would not be able to continue in charge of the case, and that it would be necessary for the plaintiffs to secure the substitution of other attorneys; that the plaintiff Pallett agreed and said that he would make arrangements for substitution, but that he would like to have the matter stand awhile, and that the affiant had acquiesced and had taken no further steps to move in the case. This affidavit further set forth that affiant believed:

"That said T. A. Pallett, who was acting for himself and also for his coplaintiffs in said suit, had the impression and was acting under the impression that the suit would not be dismissed for lack of prosecution until after the expiration of two years."

The further statement was contained in the affidavit that, because of press of business, affiant was unable and had "neglected" to inform Freston, one of the other attorneys engaged with affiant in the case, of the facts as hereinbefore stated, and that Freston, who had "exclusive charge of the opposition to said motion for dismissal," did not know of the arrangement for substitution of attorneys as it had been agreed upon. Freston made the second affidavit, in which he corroborated statements made in the affidavit of the first counsel, and stated further that it was not until after the hearing of the motion to dismiss the action that he had knowledge regarding the conversation had between the first counsel and Pallett. Plaintiff Pallett made no affidavit to show any diligence in

attempting to get other counsel. The mere agreement between attorneys and their client that the matter might rest for awhile without substitution of attorneys being made can certainly afford no foundation at all for a meritorious claim of reasonable excuse for the delay of which the defendants complained.

The judgment dismissing the action is affirmed.

The order of the court denying the motion of plaintiffs to set aside the judgment of dismissal is affirmed.

We concur: CONREY, P. J.; SHAW, J.

---

(59 Cal. App. 313)

## REGER et ux. v. SOUTHERN PAC. CO.
(Civ. 2467.)

(District Court of Appeal, Third District, California. Oct. 13, 1922. Hearing Denied by Supreme Court Dec. 11, 1922.)

1. Railroads ⟸340(1)—Railroad held not responsible for baggageman's crossing signal.

A railroad company was not liable for a negligent signal to cross, causing a collision between a train and an automobile when the driver attempted to cross the track on seeing a motion, which she understood to be a signal to cross, made by a baggageman, where the evidence did not show that he had authority, either express, implied, or ostensible, within Civ. Code, §§ 2317, 2319, to act for the company in giving the signal, or that he had ever acted as a flagman at the crossing, which was not provided with a flagman.

2. Railroads ⟸340(1)—Duties of flagman beyond scope of employment of baggageman.

The discharge of the duties of a railroad flagman is beyond the scope of employment of a baggageman, and a traveler is not justified in relying on a signal of such employee from mere knowledge that he was a baggageman.

3. Railroads ⟸340(1)—Retention of baggageman giving negligent signal held not ratification of act.

Where plaintiff driving an automobile was injured in a collision with defendant's train when she attempted to cross in reliance on a signal of defendant's baggageman, his retention after the accident did not constitute a ratification of his act in giving the signal so as to render defendant liable for the consequences thereof.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by A. F. Reger and wife against the Southern Pacific Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Geo. F. Jones, of Oroville, for appellant.
Ware & Ware, of Chico, for respondent.

FINCH, P. J. This appeal is from a judgment in favor of plaintiffs for damages sustained in a railroad crossing accident.

Defendant's railroad runs north and south through the city of Chico. Fifth street crosses the railroad at right angles. Defendant's depot is immediately north of the street and its west wall is 44½ feet east of the easterly rail of the main line track. Projecting from the west wall is a small extension window. From the photographs brought up, it appears that the distance from the west side of the window to the nearest rail is at least 40 feet. The accident occurred in the middle of the afternoon. As the southbound train was drifting in on the main line at a speed, according to the varying estimates of the plaintiffs' witnesses, of from 5 to 15 miles an hour, Mrs. Reger, one of the plaintiffs, approached the crossing from the east in an automobile driven by herself. The side curtains were in place. About 50 feet east of the track, where her view to the north was obstructed by the depot, she brought her automobile almost to a stop. The defendant's baggageman, R. A. Betz, who was at the north edge of the street near the main track with a baggage truck, then made a motion which she understood to be a signal to cross. Betz was facing south at the time, and the signal given was "a rotary motion with his left arm in front of his body." Betz testified that when he first saw Mrs. Reger approaching the crossing he held up his hand for her to stop, but that she did not see the signal; that he then made a gesture with his left hand to direct her attention to the approaching train, but did not signal for her to cross. Appellant concedes that the implied finding of the jury as to the nature of the gesture is conclusive under the evidence. On seeing the signal, Mrs. Reger proceeded westerly at a speed of 3 or 4 miles an hour, in low gear, until the oncoming train struck her automobile. She testified that "she knew about the time the trains were supposed to arrive there, and * * * knew this train was about to arrive because the busses and express wagons were standing there"; that she had frequently driven over the crossing and was "familiar with the tracks and trains that came through there in both directions at different times during the day"; that when Betz gave the signal to cross she "looked out of the side curtains" to the north and saw no train and then proceeded to cross; that she did not remember whether or not she again looked; that she was listening for the train, but heard no bell or whistle; that she first saw the engine when it was about 15 or 20 feet away and when the front wheels of the automobile had reached the easterly rail of

the track. Other witnesses for the plaintiff testified that they heard the train whistle prior to the accident. At any time after reaching a point about 40 feet from the nearest rail there was an unobstructed view along the main line to the north. Leaving out of consideration the signal to cross, the evidence presents a clear case of contributory negligence. Koch v. Southern California Ry. Co., 148 Cal. 677, 84 Pac. 176, 4 L. R. A. (N. S.) 521, 113 Am. St. Rep. 332, 7 Ann. Cas. 795; Griffin v. San Pedro, L. A. & S. L. R. R. Co., 170 Cal. 772, 151 Pac. 282, L. R. A. 1916A, 842; Eddlemon v. Southern Pacific Co., 41 Cal. App. 340, 182 Pac. 811.

Respondents contend, however, that Mrs. Reger was so far misled by the signal to cross that the finding of the jury on the issue of contributory negligence is conclusive on appeal. The judgment of nonsuit in the case of Koch v. Southern California Ry. Co., supra, was affirmed on the ground that the plaintiff was not justified in relying exclusively upon the implied invitation of open crossing gates and the absence of warning bell or whistle. The court said:

"While the raising of the gates justified the plaintiff in attempting to cross when he did, and while that fact and the facts that no whistle was sounded and no bell was rung are to be taken into consideration on the question of how much he must himself look and observe as he makes his way across, these circumstances do not excuse him from looking and listening and taking thought for his own safety. He cannot rely wholly upon them, and cannot recover without showing more as to his own conduct than that he so relied."

In so far as concerns the question of contributory negligence, an invitation to cross, whether direct or implied, is important only as bearing upon the quantum of care required of the traveler. Greater reliance is naturally placed in the positive signal of a flagman to cross than in the invitation which his absence from his post or the fact of open gates implies. "The fact that a flagman signals a traveler to cross does not absolutely relieve the latter from the duty of looking and listening, but that fact may be sufficient to carry the case to the jury." Elliott on Railroads (3d Ed.) § 1661. If it be conceded that Betz had authority to discharge the duties of flagman, then, under the circumstances shown, it cannot be held that Mrs. Reger was guilty of contributory negligence as matter of law. Betz testified that when he first saw Mrs. Reger she was looking south down the track; that "there was an engine standing down there, and with steam up, and she was evidently watching it." She was under the necessity of giving some attention to the automobile she was driving and to the street ahead. She listened for the train and did not hear it, though others did. She looked before attempting to cross, though from a point where she could see but 150 feet northerly along the track. "The mere fact of looking and listening is not always a full performance of the duty incumbent on the traveler, for he must also exercise care to make the act of looking and listening reasonably effective, and must usually continue to be on the lookout and exercise his faculties until he has crossed." Elliott on Railroads (3d Ed.) § 1661. "But it cannot always be said that he is guilty of contributory negligence as matter of law because he looked and listened from one point rather than another, or because he did not continue to look and listen at all times continuously for approaching trains, where he was misled by the company or his attention was rightfully directed to something else as well." Id., § 1662.

[1] Appellant contends that it is not liable for the consequences of the negligent signal because in giving it Betz was acting without the scope of his authority and not in the course of his employment. The defendant had not authorized him to act as flagman. Neither had it at any time maintained a flagman at the crossing. Respondents urge that Betz had implied authority to control traffic during the movement of trains across the street. About 125 feet south of the center line of the street there was a standpipe from which the engines of south-bound trains were supplied with water. It was the custom of such trains to stop when the engine reached the standpipe, thus blocking the street; the baggage car then standing across the center line of the street. For the purpose of loading and unloading baggage, Betz was accustomed to run his hand truck from the depot to a point where this car was expected to stop. Betz testified that he was not directed by the defendant to regulate traffic at the crossing and was not "told by anyone to do anything concerning the stopping or starting traffic across that street and crossing"; that the station agent hired him and took him to the baggageroom and told him what to do therein and to "put the baggage on the train and take it from it and keep the books right," and that "the man that was working in the baggageroom at that time showed" him what to do in connection with handling the baggage; that hundreds of machines drive up and stop from 5 to 50 feet from the track; that "very seldom a train goes by but what a machine comes up and stops"; that at the time of the arrival of the afternoon south-bound train "there is sometimes none, sometimes two or three, and sometimes six or seven"; that it is sometimes necessary for him to ask automobile drivers to back away from the track to enable him to run his truck to the baggage car. Three witnesses for plaintiffs gave testimony relative to the practice of the baggageman in signaling travelers. J. H. Bogges testified that, off and on for two or three weeks, "he had seen Betz signal persons driving along the street to stop; that he has made motions

to me and I have seen him make motions to others. * * * Motions to stop." J. A. Brown testified that for a period of 18 months he had frequently seen the baggageman hold up his hand for travelers to stop, "that a train was coming, or something like that. * * * I think I have seen him motioning for people to go ahead, but I don't know for certain. * * * When he comes along with the trucks, if there is any one in the road, he generally whistles, or something like that, to get them out of the way." That he did not go out into the street to signal people especially, but that he signaled them to stop if he happened to be there; that he did not make it a practice to signal people except when he was preparing to get baggage from the train. John H. Murphy testified:

"I have seen him (the baggageman) on several occasions regulate traffic to the extent that (when) he was getting his trucks in position automobiles would come up practically opposite the first track there and he would have to move them out of the way back in the street so he could put his trucks into position in order to take baggage out of the train, and sometimes he would go out ahead and move the automobiles or wagons that was there just as the train was coming in; he would move them back and put his trucks in there, and would generally holler, 'Gang way,' or something like that. * * * I have seen a number of baggagemen there, and they had to do that. * * * I have been there at the depot day in and day out, and I have occasionally seen him regulating traffic more than once. * * * Q. The only regulation of traffic which you have seen him make was to get the people out of the way so he could get his trucks out? A. Not only people, but I have seen him regulate vehicles there. Q. Those vehicles that you speak of, was that the through traffic or the vehicles coming up for the train? A. No, it was through traffic, and the vehicles that there were there also. Q. These vehicles going along Fifth street across the track? A. Yes, sir; people going along Fifth street that intended to keep on going. Q. You do not seem to indicate that he got out back of the station? A. No, sir; he would have to move them back to get the American Express wagons up there. Q. I do not see how he regulated through traffic; if a man was going through with his automobile, did he go out and stop him on account of his truck? A. No, sir; that is not it, but they came up too close to the tracks so he couldn't get through. Q. They would stop their cars and wait for the train to pass? A. Yes, sir. Q. And he would regulate them? A. He would back them up so he could get through, if they were in his way."

Mrs. Reger testified that she had never "been stopped at that crossing or signaled at that crossing before" by the baggageman or any one else. There is no testimony tending to show that Mrs. Reger knew, prior to the accident, that Betz or any other employee of the defendant had ever signaled any traveler either to stop or to cross.

Within the scope of his authority as baggageman, Betz was the agent of the defendant. An agent has authority "to do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency." Civ. Code, § 2319. In so far as material here, Betz was expressly authorized to convey baggage to and from trains. It was his duty to run the baggage truck out into the street on the arrival of south-bound trains. The defendant was liable for his negligence in the discharge of that duty. Had a collision occurred between the automobile and the truck by reason of the negligent signal, then the negligence of Betz in giving the signal would have been the negligence of the defendant, for in that case the injury would have been caused by an instrumentality under the employee's control while being used by him in the course of his employment in the defendant's business, and the driver would have been justified in relying on the invitation to cross as a declaration that the truck would be so controlled as not to interfere with the passage of the automobile. Betz, however, had no control over the movement of trains, and no implied authority, as baggageman, to invite travelers to cross the track or to warn then against attempting to cross. In so far as any express or implied authority is concerned, a traveler would be no more justified in relying on the invitation of a baggageman as an assurance of safety from passing trains than on that of one sustaining no relation to the company. The protection of travelers at crossings is not one of the usual duties of a baggageman. His duty to travelers along the street is, not to guard them against danger from all the operations of the company, but only from those under his own control. The limit of his duty and authority in this connection is not unlike that of an engineer in charge of a train. A traveler would be justified in relying on the invitation of an engineer in control of an approaching train as a declaration that the crossing might be safely made without danger of injury from that particular train, but it would afford no assurance of safety from the movement of other passing trains, because the engineer's duty, unlike that of a flagman, is not to safeguard crossings generally, but only against the negligent operation of his own train. If travelers were justified in relying for their safety on the signals of the baggageman, on the assumption that he was authorized to act as flagman during the movements of trains, then they had a right to rely on his absence from the crossing, or his failure to signal if present, as an implied invitation to cross. But he had other duties to perform which manifestly would prevent him from at all times giving such signals, and hence they could not reasonably have understood that the giving of such signals was a part of his duty. "Where the injury has resulted from the omission or negligent performance of an act which it was

no part of the duty of the master to perform, and in the doing of which no duty of the master was being performed, then the person through whose negligence the injury has resulted, whatever may be his grade or rank of employment, is not as to that act the representative of the master, and the responsibility for injury is upon the individual actor and not upon the employer." Donnelly v. S. F. Bridge Co., 117 Cal. 417, 423, 49 Pac. 559, 561.

The authority of a baggageman to act as flagman may, of course, be proved by circumstantial evidence. "One customarily permitted to act as flagman, although not employed for that purpose, may render the company liable for his negligence." Elliott on Railroads (3d Ed.) § 1651. If, though not expressly authorized, he customarily acted as flagman with the knowledge of the defendant, or for such length of time as would justify the inference that the defendant, in the exercise of reasonable oversight of the conduct of its employees, ought to have known that he was so acting, then the defendant would be liable for the negligent discharge of such assumed duty. In Walker v. Hannibal & St. J. R. Co., 121 Mo. 575, 26 S. W. 360, 24 L. R. A. 363, 42 Am. St. Rep. 547, it is said:

"In order to make defendant liable for the act of the baggageman for acts of negligence committed not in the line of his employment, it must be shown that he either had express authority to transact the business connected with the injury, or that defendant, by its officers, knew that he, as its agent, was so engaged for such a length of time as would justify the presumption that he was authorized to so act."

The only act of negligence relied on by respondent is that of giving the signal to cross. The burden was on the plaintiff to prove, not only that the negligent signal was given, but that the baggageman was authorized by the defendant to give it. The evidence falls far short of showing, except by the most strained interpretation thereof, that the baggageman had ever acted as flagman, or that he had ever signaled a traveler to cross the track, except in the single instance involved in this action, or that he had ever signaled travelers to stop their vehicles or to back them away from the track, except for the purpose of making room for the movement of his baggage truck. The evidence does not show that Betz had authority, either express, implied, or ostensible, to act for the defendant in giving the signal to cross. "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." Civ. Code, § 2317. The evidence does not show that Mrs. Reger knew that the baggageman had been in the habit of signaling travelers to stop for any purpose. Under such circumstances, it does not appear in what manner she could have been misled into the belief that he had authority to act as flagman. "Although not originally under obligation to do so, if the company has maintained a flagman at a particular crossing for a long time and his presence is notorious, travelers have, within limits, a right to assume, when he is absent, that no train is approaching, and his absence or permanent removal, without notice to the public is negligence or at least is evidence of negligence, but where, not knowing that a flagman had usually been stationed at the crossing, the traveler's conduct was in no way influenced by his absence, such absence creates no liability." Elliott on Railroads (3d Ed.) § 1157. In the case of Hayes v. New York, N. H. & H. R. Co., 91 Conn. 301, 99 Atl. 694, the authorized flagman, having no flag, however, signaled plaintiff to cross the track, and the plaintiff was injured in attempting to do so. The court said:

"All that Hayes knew was that the man was standing beside the crossing, and was beckoning to him as he had to another car preceding his. This is not important as bearing upon the defendant's responsibility for the acts of the flagman, but it does possess significance in judging of the measure of prudence characterizing Hayes' conduct in relying upon the signal of one who was a stranger to him."

See, also, Elias v. Lehigh Valley R. Co., 226 N. Y. 154, 123 N. E. 73; Peck v. Grand Trunk Western Ry. Co., 155 Mich. 430, 119 N. W. 578. In discussing the question of ostensible authority, in Harris v. San Diego Flume Co., 87 Cal. 526, 25 Pac. 758, it is said:

"There are two essential features of an authority of this character; viz. the party must believe that the agent had authority, and such belief must be generated by some act or neglect of the person to be held."

[2] The discharge of the duties of flagman is beyond the scope of employment of a baggageman, and a traveler would not be justified in relying on the signal of such employee from mere knowledge of the fact that he was a baggageman.

[3] After the accident the defendant retained Betz as baggageman. Respondents contend that his retention constituted such a ratification of his act as to make the defendant liable for the consequences thereof, citing the case of Edmunds v. Atchison, etc., Ry. Co., 174 Cal. 246, 162 Pac. 1038, and Mechem on Agency (2d Ed.) § 475. The authorities cited do not sustain the contention, but rather the contrary. There is much plausibility in the testimony of Betz to the effect that he did not intend the gesture made as a signal to cross the track, but that he was en-

deavoring to call attention to the approaching train. There is no evidence that he had ever theretofore signaled travelers to cross the track or had given any signals except in connection with his movements of the baggage truck. In Edmunds v. Atchison, etc., Ry. Co., supra, it is said:

"The omission to dispense with the services of the offender, standing by itself and unsupported by any other circumstances indicating the employer's approval of his course, is never sufficient to establish ratification."

The judgment is reversed.

We concur: BURNETT, J.; ANDERSON, Justice pro tem.

59 Cal. App. 447

## HOPKINS v. HELLER. (Civ. 3957.)

(District Court of Appeal, Second District, Division 1, California. Oct. 24, 1922. Hearing Denied by Supreme Court Dec. 22, 1922.)

**1. Physicians and surgeons ⟸14(4)—Ordinary skill and knowledge required.**

One who holds himself out as a specialist in the treatment of a certain organ, injury, or disease, is bound to bring to the aid of one so employing him that degree of skill and knowledge which is ordinarily possessed by those who devote special study and attention to that particular organ, injury, or disease, its diagnosis and its treatment, in the same general locality, having regard to the state of scientific knowledge at the time.

**2. Physicians and surgeons ⟸14(1)—Duty of due care extends to subsequent treatment.**

When a surgeon performs an operation, not only must he use reasonable and ordinary care and skill in its performance, but also in the subsequent treatment of the case, and it is his duty to give the patient such attention after the operation as the necessity of the case demands, in the absence of any special agreement limiting the service or reasonable notice to the patient.

**3. Physicians and surgeons ⟸18(8)—Evidence held not to show negligence in extracting wisdom tooth.**

In patient's action against dentist for injury from defendant's negligence in extracting a wisdom tooth, judgment for plaintiff *held* not supported by evidence.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Una N. Hopkins, a widow, against Louis C. Heller. From judgment for plaintiff, defendant appeals. Reversed.

Le Roy M. Edwards, Gibson, Dunn & Crutcher, and Norman Sterry, all of Los Angeles, for appellant.

Henry J. Stevens, of Los Angeles, and Lloyd W. Brooke and F. G. Cruickshank, both of Pasadena, for respondent.

CONREY, P. J. Action to recover damages for injuries alleged to have resulted from negligence of the defendant in extracting a tooth of the plaintiff. The defendant appeals from the judgment.

On the 9th day of August, 1918, appellant was a dentist, who at that time and for a number of years prior thereto practiced exclusively the extraction of teeth. The work done on that day by the defendant for the plaintiff consisted in the removal of a small piece of tooth which had been left in the upper left jaw from a tooth that had been extracted, and in the extraction of the wisdom tooth in the lower left jaw. The alleged negligence relates to the operation of extracting the wisdom tooth. In the original complaint it was alleged that defendant negligently and carelessly failed to take or cause to be taken any X-ray photograph of the said tooth, or to request the plaintiff to have one taken, prior to the extraction of the tooth. The finding of the court was that no X-ray photograph of said tooth was taken by the defendant, or caused to be taken by him, prior to such extraction, but that the defendant did not negligently or carelessly fail to take, or cause to be taken, an X-ray photograph of said tooth prior to the extraction thereof. That element of the case, therefore, is removed from consideration on this appeal.

The remaining charge of negligence, as stated in paragraph V of the complaint, at the time of the trial and submission of the cause for decision, was:

"That said defendant extracted the said wisdom tooth of the plaintiff in a negligent and careless manner, and negligently, carelessly, and unskillfully bored into and injured the jawbone, and the nerve in the jawbone, of the plaintiff, and fractured the jawbone of the plaintiff."

After submission of the cause, it was ordered that the complaint be amended "to conform to the proof," and thereupon paragraph V was amended to read as follows:

"That the defendant extracted the said wisdom tooth in the lower left jaw of plaintiff in a negligent and careless manner, and in so extracting the said tooth defendant carelessly and negligently injured the said lower left jaw of plaintiff and the inferior dental nerve therein" —and the court so found.

It is contended by appellant that there is no evidence proving, or tending to prove, that the defendant extracted said tooth in a negligent or careless manner, or that in so extracting said tooth the defendant carelessly or negligently injured the lower left jaw or the said inferior dental nerve. Upon the 7th of August respondent arranged with appellant to have this tooth extraction done on the morning of August 9th. On the 9th she came accompanied by a friend. But this friend, Miss Garbutt, did not remain in the

operating room. An anæsthetic was administered by Mrs. Heller, wife of the defendant, who was his assistant. Dr. Bullard, the physician of the plaintiff, was present at her request for the particular purpose of observing the patient during the period of anæsthesia. There were no other witnesses to the operation, which occupied about 1½ hours.

Defendant, called as a witness for the plaintiff, described the procedure of the operation substantially as follows: He first sterilized the area and then released the tissues around the tooth by loosening those tissues so as to avoid laceration of them with the forceps. He then took hold of the tooth with the forceps, and obtained only "a lateral movement from side to side." Not being able to remove the tooth, he used an instrument called an elevator. Not gaining success with the elevator, he applied the forceps again, and in so doing the crown portion of the tooth broke off. He then used a burr and burred around the back and side of the tooth. This was for the purpose of removing the process next to the tooth. This he continued to do from time to time "and then used the elevator to assist it, change of elevators." When he first applied the forceps, he ascertained that the operation was a difficult one on account of the resistance, which he attributed to the density of the process there, which made it necessary to use the burr. He decided that it was the bone which was holding the tooth in its socket—"the back part of the tooth, and back and side of the tooth, which is the densest part of the process." Finally he succeeded in extracting the tooth, all of which came out without further breaking. He then smoothed the edges of the cavity and washed the socket with phenol-sodique, aconite, and iodine.

On recovering from the anæsthetic, plaintiff was in very great agony in the left lower jaw and her face was badly swollen. Accompanied by Miss Garbutt and Dr. Bullard, she returned to her home in Pasadena. The swelling increased, and did not begin to decrease until after three or four days. There was a drawing sensation and extreme numbness after the acuteness of the first pain had gone. These and other symptoms of distress are fully described in the testimony of plaintiff. At intervals of a few days during several weeks following the operation, the plaintiff visited the defendant for treatment at his office, and he applied a mixture of aconite and iodine. At those times she complained of the soreness and pain. After about three weeks the plaintiff suggested that she thought there must be something still in the cavity and she thought she might have an X-ray of it. The defendant approved this suggestion, and thereupon the plaintiff obtained from one Dr. Wake an X-ray of her face. According to the testimony of the plaintiff, she again visited the office of the defendant, who told her that his wife had talked with Dr. Wake over the telephone relative to the plates, and that Dr. Wake said it was all right.

"Dr. Heller did not say that he had seen the plates himself. He did not ask me if I had brought the plate. I told Dr. Heller that the pain in my face continued, and that it did not improve, and he said he did not know why it continued to pain me. He said he thought he would go down in and see about it. He put on a local anæsthetic and went down in to see if he could determine the cause. I do not know whether he make any efforts to see the plate before he did this. He did not ask me to get the plate. He put on a local anæsthetic and went down into the cavity with his instrument and probed the wound. He took out clots of blood. I think the wound had healed at that time. He did not state what the significance was, if anything, of the clots of blood. He said he couldn't see why my jaw continued to hurt. He said the jaw looked all right to him in every way, and he couldn't see why it continued to hurt me. He said he was sure it was going to be all right very soon; it must be. He said I might return again if it continued to bother me. I made another visit to his office. He reiterated that he did not see why it did not get better, and he said if he were in my place—that there was no reason why it shouldn't be better—if he were in my place he would go back to the city and try and forget it; but there was no reason why it shouldn't be better. He said that sometimes it took a long time for a nerve to repair itself. He gave me no particular treatment upon this occasion. He gave me no directions, except to keep it clean, to wash out my face. I followed his directions absolutely. After the visit at which Dr. Heller opened up the wound and probed it, I continued to visit his office every few days until the middle of October. I went to his office as often as he requested me to, and the last visit was about the middle of October."

In June, 1919, plaintiff consulted Dr. Butler of Pasadena, a dentist. On his advice, and after some additional radiographs of the jaw had been taken, an operation was performed by Dr. Warren, a dental surgeon, assisted by Dr. Butler. The two teeth immediately forward of the wisdom tooth which had been removed by Dr. Heller were extracted by Dr. Warren, who then proceeded to operate upon the bone of the jaw in order to remove a condition of necrosis which had been indicated by the X-ray plates. After scraping the bone and cleaning out the wound, he applied the customary antiseptic treatments and closed up the wound. This operation resulted in very substantial relief to the patient, although the evidence shows that she had not entirely recovered at the time of the trial of this action in February, 1920.

[1, 2] The rule concerning the degree of care required of the defendant as a specialist in his branch of dentistry is correctly set forth by counsel for respondent in their quotation from Ann. Cas. 1915D, 1124, where it is said:

"One who holds himself out as a specialist in the treatment of a certain organ, injury or disease, is bound to bring to the aid of one so employing him, that degree of skill and knowledge which is ordinarily possessed by those who devote special study and attention to that particular organ, injury or disease, its diagnosis and its treatment, in the same general locality, having regard to the state of scientific knowledge at the time."

The scope and extent of the duty of a physician or surgeon is accurately set forth in the statement quoted by counsel from 21 R. C. L. p. 389, as follows:

"When the physician takes charge of a case and is employed to attend a patient, his employment, as well as the relation of physician and patient, continues until ended by the consent of the parties, or revoked by the dismissal of the physician, or until his services are no longer needed. For example, when a surgeon performs an operation, not only must he use reasonable and ordinary care and skill in its performance, but also in the subsequent treatment of the case. It is his duty to give the patient such attention after the operation as the necessity of the case demands, in the absence of any special agreement limiting the service or reasonable notice to the patient."

Basing their argument upon these authorities, counsel for respondent have made some suggestions that appellant not only was negligent in performing the operation, but that he was guilty of further negligence in his subsequent treatment of the patient, and particularly in the removal of a blood clot in the course of one of those treatments, and that the evidence so shows. But this argument is answered by the fact that the only finding of negligence that can be found in the findings of fact is the single finding to the effect that the defendant was guilty of negligence in his manner of extracting the tooth. It was in so extracting the tooth that the defendant was found to have carelessly and negligently injured the jaw of the plaintiff and the inferior dental nerve therein. That this is the limit of the negligence upon which the judgment rests is further emphasized by the fact that the complaint did not, even after the amendment, allege any negligence subsequent to the extraction of the tooth. Therefore we are brought back to the question whether or not appellant was guilty of negligence and of negligently injuring said jaw and dental nerve in the course of the operation of extracting the tooth. This question must be answered by searching the record for some evidence showing how such negligence occurred, or tending to prove facts from which the negligence affirmed by the finding may be inferred. According to the testimony of the defendant, this wisdom tooth was a normal, fully erupted tooth, and its surface was "on a line with the occlusal surface of the adjoining teeth." According to other witnesses, it was an impacted tooth, not fully erupted and the surface was not on a line with the surface of the adjoining teeth. We shall assume, in favor of respondent, that the fact was in accordance with the latter alternative. It was in connection with this fact that respondent introduced much testimony to prove her charge of negligence of appellant in failing to obtain an X-ray photograph of the tooth prior to its extraction. But this becomes unimportant, since the court found that appellant was not negligent in that particular. This finding implies the further determination that the method of procedure adopted by appellant for removal of the tooth was not shown to be different from that which he reasonably might have used after inspection of such X-ray photograph if one had been taken.

There does not appear to be any evidence that the method of procedure or technique of the operation as performed by appellant was different from that which should have been used by a skillful and careful operator in the removal of that tooth. If appellant was guilty of negligence in the operation, it was not in the choice of instruments used, nor in the order in which they were applied. If there was negligence, it must have been by some unskillful or careless use of the instruments whereby an injury was caused. Here again our attention recurs to the fact that, under direction of the court, respondent withdrew her allegation that appellant bored into or fractured the jawbone. And we do not doubt that this allegation was properly withdrawn, since there is no evidence by which it could have been sustained.

It remains true, however, that respondent suffered extremely during the days and weeks following the extraction of her tooth, and that inflammation and other symptoms of disease followed, as described in her testimony. It further appears that the X-ray photographs afterwards made showed the development of a condition of necrosis in the jawbone, and that, during the surgical operation which followed, the facts indicated by these photographs were verified. But in order to sustain the finding it must further appear that these unhappy conditions were caused by negligence of the defendant. If there be evidence from which the court could fairly infer that the injury resulted from the operation of extracting the wisdom tooth, and further tending to prove that without negligence in the performance of the operation the injury would not have occurred, then such evidence is sufficient to sustain the finding of the court. But the evidence must be such that more than a suspicion or surmise arises therefrom. The burden of proof resting upon the plaintiff requires that the evidence of negligence proximately causing the injury be evidence which leads—not merely wavers—toward the fact sought to be proved.

"If it appears that the facts and circumstances from which a conclusion is sought to be deduced, although consistent with that theory, are equally consistent with some other theory, they do not support the theory contended for." Wilbur v. Emergency Hospital Association, 27 Cal. App. 751, 759, 151 Pac. 155, 158.

The facts that shortly after August 9, 1918, necrosis of the jawbone of the plaintiff had set in, and that this necrosis increased until the time of the performance of a curetting operation in June, 1919, were established by the X-ray photographs, supplemented by the testimony of Drs. Warren and Butler, and Dr. Parker, witnesses called by the plaintiff. In response to a hypothetical question based upon evidence relating to the symptoms following the extraction of plaintiff's tooth in the manner stated, Dr. Warren said that he would attribute those symptoms to interference with the mandibular nerve—the nerve which goes through the inferior dental canal. Being then asked to say whether, in his opinion, the necrosis, assuming that it did not exist before, was, to any extent, caused by such supposed injury, he replied that it might, but it would be hard to say that it was; that there is a large number of causes for those things, such as infection, or traumatic conditions. "In the majority of cases necrosis is caused by infection more than any one cause. Other causes are lack of nutrition." He declined to give a more definite opinion as to the cause of the necrosis. The infection, he said, most probably would be through the socket of the tooth, and might occur without fault of the operator.

Dr. Parker, in response to a hypothetical question, attributed the necrosis to "mechanical injury." Further on it appeared that this referred to injury to the inferior dental nerve. This nerve, as the testimony shows, enters the jaw back of the wisdom tooth, and proceeds along through the inferior dental canal, below the roots of the teeth. There is no evidence that the defendant drilled down to that canal. It positively appears that he did not do so. If there was any mechanical injury to that nerve, it must have occurred through the severance of the tooth when it was drawn out, or through some pressure occurring in the course of the work done by defendant during the operation.

Dr. Ross Moore, a nerve specialist called by the plaintiff as a witness, in answer to a hypothetical question stating the supposed case here and inquiring about the cause of the pain or the sensation of creeping and numbness in the jaw of the plaintiff, stated that in his opinion this condition was due to an injury to the nerve which supplies sensation to the teeth of the lower jaw on the left side. Dr. Moore did not believe that numbness, on the part of the face indicated, following the extraction of a wisdom tooth, would last for a year and a half or two years afterwards unless there had been a good deal of trouble, a good deal more inflammation or inflammatory reaction or bruising than the average extraction. If such numbness did come after the simple removal, after injury to the nerve, he would expect it to clear up within a few days or a few weeks.

[3] The evidence shows that the time occupied in extraction of the wisdom tooth was unusually long, and that this extension of time resulted from the density of the process and from the fact that the crown of the tooth broke off. This made necessary the operation of burring around the tooth, to loosen the adhesion of the tooth to the adjacent process, and make better leverage for use of the elevator. All of the witnesses agreed that the breaking of a crown from a tooth is not uncommon, and frequently occurs without fault of the dentist. We have examined the testimony at length, and particularly the testimony relied upon by counsel for respondent; but we have not found any evidence tending to prove that any act done by the defendant in extracting the plaintiff's tooth was negligently done, or that he omitted to do anything therein that in the exercise of due care he should have done. The injuries suffered by the plaintiff resulted from the operation whereby the tooth was extracted. But the evidence is insufficient to prove that they resulted from negligence of the defendant in performing that operation. To sustain the judgment without proof of such negligence would be to hold the defendant as a warrantor against misfortune. But he is not thus bound. Perkins v. Trueblood, 180 Cal. 437, 181 Pac. 642.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

## MEMORANDUM DECISIONS

59 Cal. App. 794

CUNEO et al. v. UNITED RAILROADS OF SAN FRANCISCO. (Civ. 4070.) District Court of Appeal, First District, Division 1, California. Oct. 3, 1922. Hearing Denied by Supreme Court Dec. 1, 1922.) Appeal from Superior Court, San Mateo County; Benj. K. Knight, Judge. Action by Antone Cuneo and another, as surviving partners of Cuneo & Co., against the United Railroads of San Francisco. Judgment for plaintiffs, and defendant appeals. Affirmed. Wm. M. Abbott, Kingsley Cannon, and Ivores R. Dains, all of San Francisco, for appellant. A. P. Black and Black & Black, all of San Francisco, for respondents.

PER CURIAM. This appeal is by the defendant from a judgment in the plaintiffs' favor for the sum of $1,000 damages for the destruction of an automobile truck through a collision with an interurban car. This case is as to the facts of said collision identical with the case of Noce et al. v. United Railroads, (Cal. App.) 200 Pac. 819, except that said cause was tried before a jury, while the present action was tried by the court without a jury. The former case was reversed for an erroneous instruction to the jury, but as to the question of the negligence of the defendant and the absence of contributory negligence as a matter of law the decision in that case was in favor of the plaintiffs. The reasoning and conclusions of this court as to these questions are applicable to the case at bar, and, a petition for rehearing in that case having been denied by the Supreme Court, we deem it conclusive of the instant case. For the reasons therein stated, the judgment herein is affirmed.

# CALIFORNIA REPORTER

211 PACIFIC REPORTER

# CALIFORNIA REPORTER

## 211 PACIFIC REPORTER

190 Cal. 139

### C. W. CLARKE CO. v. WALKER (two cases). (S. F. 9586, 9587.)

(Supreme Court of California. Dec. 1, 1922. Rehearing Denied Dec. 28, 1922.)

**1. Brokers ⊜8(1)—Authority to buy presumed limited to effectuate a direct exchange of property between purchaser and owner.**

When one person employs another to purchase property from a third person for him for a commission, it will be presumed, in absence of clear evidence to the contrary, to insure proper protection against fraud, that the authority conferred was limited to that of acting as an intermediary for the purpose of effecting a direct exchange of property between the present owner and the prospective purchaser.

**2. Brokers ⊜14—Contract held to authorize broker to act as intermediary between purchaser and owner, and not to purchase and resell to purchaser.**

Prospective purchaser's letter to broker, expressing a desire to purchase certain land, authorizing broker to arrange for the purchase price and retain the difference between what broker would have to pay and specified amount per acre, and referring to broker's compensation as a "commission," *held* to authorize broker merely to act as an intermediary between purchaser and owner of land, and not to direct broker to purchase the land and resell it to purchaser, in view of the conduct of the parties interpreting the contract as one of agency, notwithstanding provision that, "You may make your own contract with" owner.

**3. Estoppel ⊜90(2)—Purchaser held not estopped from claiming that his broker, on receipt of money for the purchase, was mere depositary.**

Where contract between purchaser and broker provided that, if the land was bought for less than a certain amount per acre, broker could retain the difference as his compensation, purchaser's failure to object when notice of broker's assignments of moneys due, or that might become due "on account of any services heretofore rendered by" broker, were served on him, did not estop him from claiming that broker received the moneys for the purchase of the land in the capacity of a depositary, instead of as the purchase price of land purchased by broker and resold by broker to purchaser.

Shaw, C. J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Actions by the C. W. Clarke Company against T. B. Walker. Judgment for plaintiff, and defendant appeals. Reversed.

Arthur W. Bolton, of San Francisco, for appellant.

Peter J. Crosby and Stanley R. Stearns, both of Oakland, for respondent.

LENNON, J. Arising out of the same transaction, differing only in inconsequential details, and presented upon identical briefs, the two above-entitled cases involve the same questions of law, and may be considered in a single opinion.

In the year 1902 the state of California had selected 18,000 acres of land in Modoc and Shasta counties as indemnity school lands. Thirty-seven different persons had applied to the state for these lands in tracts not exceeding 640 acres each. The applications had been approved by the state surveyor general, payments in full had been made to the state, and the register of the state land office had issued to each applicant a certificate of purchase for the land described in his application, reciting that patent would issue to the person named therein, or his assignee, after the lands had been confirmed to the state by the United States.

One of these applicants was Wm. L. Crayton, who received his certificate of purchase in April, 1902. Concerning the land covered by this certificate of purchase Thomas B. Walker, defendant and appellant herein, wrote the following letter in the fall of 1902:

"Mr. John A. Benson, San Francisco, Cal.—Dear Sir: I desire to purchase from Wm. L. Crayton or his assigns the following land, to wit: All of Sec. 21, T. 42 N., R. 7 E., M. D. M., and containing 640 acres, at a price not exceeding three dollars and seventy-five cents an acre, which amount I agree to pay for the said land, in the manner and at the times hereinafter stated.

"It is understood that the land has been purchased by said Wm. L. Crayton from the state of California and the latter holds and owns a

full paid-up certificate of purchase therefor, the title to which is based upon a state indemnity school land selection now pending before the General Land Office awaiting the approval of the Secretary of the Interior.

"You may make your own contract with said Wm. L. Crayton and buy the land as cheaply as possible, and if you obtain the same for less than three dollars and seventy-five cents an acre, you may retain and have the difference between what you have to pay for the land and three dollars and seventy-five cents an acre, any profit that you may make in this matter shall be in lieu of any commission or compensation from me to you for your services herein.

"I offer to pay for the land in the following manner, to wit:

"Upon the delivery to me of the state certificate of purchase on which full payment has been made to the state of California, together with assignment of said certificate of purchase or a grant deed to the land, described in such certificate, I will pay to you the sum of one dollar and fifty cents an acre.

"Whenever the said land or any part thereof is listed to the state by the Secretary of the Interior, I will pay to you the further sum of one dollar and seventy-five cents an acre for the land so listed.

"Whenever a patent shall be issued by the state of California to Wm. L. Crayton or his assigns for the said land or any portion thereof, I will pay to you the sum of fifty cents an acre for the land so patented.

"I desire it expressly understood that I am *not* to pay any commission or other expenses which will make the land cost more than three dollars and seventy-five cents an acre.

"Yours, very truly, T. B. Walker."

Forty similar letters were written and delivered by Walker to Benson at the same time, varying only in the names of the applicants and description of land. Benson, who for years was engaged in the business of representing individual applicants for the purchase of public lands before the federal and state land offices, accepted Walker's proposition and carried it into effect. This appears from the following allegation of the complaint, which the trial court found to be true, to wit:

"Said contract was accepted by said Benson, who thereafter purchased the said land from said certificate holders above named for and on behalf of said defendant."

Benson then delivered to Walker the said certificates of purchase, together with instruments in writing, signed by the certificate holders, assigning the said certificates and granting the land covered by the same to the defendant. Upon the delivery of the certificates and assignments Walker paid Benson the sum of $1.50 an acre, as stipulated in the contract.

In the month of March, 1903, Benson notified Walker that he had assigned to F. A. Hyde an undivided one-half of any moneys that were then due or might become due from Walker to Benson by reason of any existing contract. On the same day Hyde and Benson notified Walker that they had assigned to C. W. Clarke their right to any moneys which were then due from Walker to them by reason of any existing contract. C. W. Clarke, in turn, assigned to C. W. Clarke Company, the plaintiff herein. Benson died in 1910.

Owing to a controversy which arose in the year 1903 over the listing of state indemnity school lands to the state of California, the listing of the lands referred to in the Walker letters did not take place until the year 1917. Shortly thereafter patents were issued by the state to the certificate holders. The sums of $1.75 and 50 cents per acre, which Walker agreed to pay upon the listing and patenting, respectively, of the lands, have never been paid, and the present suits for the recovery thereof are brought by C. W. Clarke Company. Defendant Walker appeals from a judgment adverse to him.

Defendant interposed the defense that Benson was employed as a broker or agent for Walker, and therefore was to receive the moneys for the purchase of the land in the capacity of a depositary. If this view of the case be correct, then Benson cannot, by his own arbitrary assignment, and without the consent of the vendor, compel Walker to pay to another and different person, nor can such as assignee of Benson come into court and collect *for his own use* the money which Benson was to receive as a depositary only. Upon Benson's death the vendor alone could enforce the obligation of Walker to pay for the land, and Benson's assignee can recover only the difference, if any exists, between the amount which Walker agreed to pay for the land and the price for which Benson obtained the said land, which sum represents Benson's commission. There is no evidence whatever of the vendor's consent to the assignments or of the purchase price of the certificates, plaintiff having relied upon the theory that the contract shows that Walker dealt with Benson, not as agent, but as a principal, authorizing Benson to purchase the land and resell to Walker, and that the moneys now sued for were due to Benson as vendor of the land.

[1] The principal issue, therefore, is the interpretation to be accorded the contract hereinbefore set forth. In the ordinary course of affairs, when one person employs another to purchase property from a third person for him for a commission, the authority conferred is merely that of acting as an intermediary or as a channel for the purpose of effecting a direct exchange of property between the present owner and the prospective purchaser. As a general rule there is no intention to authorize the intermediary to intervene as an independent unit in the transfer of title or to recognize him as a separate individual in the transaction. To insure proper protection against fraud, it will be pre-

sumed that the ordinary course of business has been followed, in the absence of clear evidence to the contrary. We are of the opinion that all of the evidence in the present suits tends to support this presumption.

[2] The contract itself, while somewhat ambiguous, contains strong indications that Benson was authorized to act merely as agent. Defendant expresses a desire to purchase from "Wm. L. Crayton or his assigns," but says nothing about purchasing from Benson; the contract provides that Benson may arrange for the purchase price and may "*retain and have* the difference between what you have to pay for the land and three dollars and seventy-five cents an acre," the necessary inference being that the balance of $3.75 per acre paid by Walker shall not belong to Benson, but to the persons from whom the certificates were obtained; the contract refers to Benson's "services" for Walker in obtaining the land for him, and provides for a "commission." The phrase "you may make your own contract with said Wm. L. Crayton" obviously was not intended as an authorization to Benson to purchase in his own behalf; the context in which it appears demonstrates that its meaning is limited to the fixing of the amount of the purchase price.

Moreover, by the conduct of the parties the contract was interpreted as one of agency. Thus, the written assignment of the certificates and grants of land were made out by the certificate holders directly to Walker; the complaint itself alleges, and the court found, that Benson purchased "for and on behalf of" Walker; Clarke gave Walker the following notice of the assignment from Hyde, and Benson to himself:

"You are hereby advised that on the 24th day of March, 1903. J. A. Benson assigned to F. A. Hyde an undivided one-half of any moneys that may be or become due on any account whatever by reason of any *existing contract between said Benson and yourself for any services heretofore rendered by said J. A. Benson or contracted for.*

"That said F. A. Hyde and J. A. Benson did on the same day assign to the undersigned their claim and right to any moneys that may be or become due to said Hyde, or both of them, by reason of any *contract for any services heretofore indicated.*"

Also of importance is the fact that plaintiff made no attempt to prove that the holders of the certificates had ever been paid for the certificates by Benson or any of Benson's assigns, or to introduce any contract between Benson and the holders of the certificates showing the purchase price arranged for by Benson.

Plaintiff raises the point that it is unreasonable to assume that the vendors of the land would have been willing to consent to postpone the date of payment as long as was done in this case. Plaintiff should have produced evidence of that to which the vendors did consent; furthermore, at the time the sale was made there was every reason to believe that in this case, as formerly, the lands would be listed and patented within a few months, so that the date of final payment was apparently not far removed. Plaintiff also contends that no lien has been asserted by the vendors since the sale of 1902, and that this is evidence tending to show that no lien existed. In the first place, the record does not show that no claim or lien has been asserted by the vendors; in the second place, the right to assert such liens did not arise until 1917, when the lands were listed and patented, which was shortly before the commencement of the present action.

[3] Plaintiff's contention that Walker was estopped from claiming that Benson was a depositary by failing to object when notice of Benson's assignments to Hyde and Clarke were served on him in 1903 is without merit. Even if failure to object would amount to an estoppel under some circumstances, it has no such effect in the instant case, for the reason that the notice contained the statement that the assignments were made of moneys due or that might become due "on account of any services heretofore rendered by said J. A. Benson." According to the contract, if the cost of the land were less than $3.75 per acre, Benson, or his assigns, could claim the difference as compensation. It follows that Walker was in no position to object to the assignment, and therefore cannot be estopped by his failure to do so.

The view we have taken of the main issue in the case renders it unnecessary to discuss the remaining questions presented by the briefs.

Judgment reversed.

We concur: LAWLOR, J.; WILBUR, J.; SLOANE, J.

I dissent: SHAW, C. J.

Mr. Justice SHURTLEFF, being disqualified, does not participate herein.

(190 Cal. 168)

## GIBBONS v. YOSEMITE LUMBER CO. et al. (Sac. 2934.)

(Supreme Court of California. Dec. 7, 1922.)

**Vendor and purchaser ⊂=232(2)—Actual residence on part and use of all of land for pasturage by one keeping other stock off sufficient to impart notice of occupancy of entire tract.**

Actual residence on part and use of all of a tract of land for pasturage purposes, to which it was adapted, and maintenance of exclusive possession by keeping off others' stock, pursuant to an oral agreement to buy from owner, *held* sufficient to impart notice to a subsequent purchaser of exclusive occupancy of the entire tract, though, when the feed ran short on the land, the occupant permitted his stock to go on the owner's adjoining lands by agreement with the latter.

Wilbur, J., dissenting.

In Bank.

Appeal from Superior Court, Merced County; George E. Church, Judge.

Action by John Wesley Gibbons against the Yosemite Lumber Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

H. K. Landram, of Merced, for appellants.

F. W. Henderson, of Merced, for respondent.

RICHARDS, Justice pro tem. The following portion of the opinion of the District Court of Appeal is adopted as correctly stating the facts of this case:

"This case was formerly before the Supreme Court. 172 Cal. 714, 158 Pac. 196. The judgment of the superior court was reversed upon the ground that the finding 'that plaintiff is the owner of the land' was unsupported, the action being to quiet title. However, the Supreme Court said: 'It may be that there has been such partial performance of an oral contract to convey as would meet the defense of the statute of frauds, and that the plaintiff could establish a right to have the agreement specifically enforced. But the pleadings are not so framed as to present the issues embraced in an action for specific performance. * * * If the plaintiff desires to assert his right to have the legal title conveyed to him, his only course is to seek his relief by appropriate pleadings directed to that end, either in a new action or by application to the court below for leave to file an amended complaint.' Accordingly, plaintiff by leave of the trial court did amend his complaint, and he obtained judgment in harmony with the prayer thereof.

"The trial court found that on or about the 1st day of January, 1888, John L. Ivett, who was then the owner of the 40 acres herein involved, entered into an oral agreement with plaintiff for the purchase of said property upon the following terms and conditions: That plaintiff should forthwith enter into possession thereof, take and use the same for his own benefit, build thereon, and occupy it with his family, and for a period of two years keep off of all the grazing land of said Ivett trespassing sheep and cattle on their way to and from the mountains, and that, upon the work and labor being done by Gibbons, Ivett would convey to him said 40 acres of land; that the value of said land was not in excess of $100; that the reasonable value of said services of plaintiff exceeded said amount; that the annual injury that would have been caused to Ivett's land on account of said trespassing would be in excess of $500, had it not been for plaintiff's said services; and that the land mentioned in 1888 and for many years thereafter was adapted to and fit for no other than grazing purposes. The court further found that plaintiff took possession of said 40 acres in 1888, erected valuable improvements thereon at his own expense, moved onto the property with his family, and ever since said time has continued to live thereon and use the same to the exclusion of all other persons; that the use made by him has been for grazing purposes and according to the custom of the country in and near said land; that plaintiff performed all the terms and conditions of said agreement by him to be performed; that John L. Ivett died on or about November 9, 1890, without having made any conveyance to plaintiff; that subsequently Sophie A. Ivett, now Sophie A. Leland, became and ever since has been the administratrix of his estate; that on October 24, 1911, Yosemite Lumber Company, a corporation of Nevada, the predecessor in interest of all of the other defendants other than said administratrix, acquired the record title to the property in question, with other land formerly a part of the Ivett estate; and that the lis pendens herein was filed February 18, 1913, preceding the conveyances from said Nevada corporation.

"As to said agreement of purchase, appellants admit that the evidence is sufficient to support the finding of the court, and 'that it is now too late to argue evidence in which there is a conflict or urge the relative equities of the parties as to matters upon which the finding of the lower court is conclusive.' They contend, however, that their case is that of an innocent purchaser for value without notice of plaintiff's equities. In this connection, it is conceded, though, that notice was imputed to them of the occupancy of the land covered by the buildings, a small tract, the extent of which was not shown by the evidence. But as to the lands not so occupied by the buildings their claim is that plaintiff 'did not use or possess them in such a manner as to give notice to an innocent purchaser of the legal title such as defendant.'"

The crucial question in this case is as to whether the evidence was sufficient to establish such actual possession of the premises in question by the plaintiff as to impart notice of his rights and equities therein to the defendant as purchaser of the entire tract of which these premises were originally a portion from the estate of John L. Ivett, deceased. As to the possession by the plaintiff

of that portion of said premises occupied by his dwelling house, outhouses, and corral, the evidence in the case sufficiently shows that shortly before the purchase by the defendant of the Ivett properties from the estate, the president and manager of the defendant corporation, during a visit of inspection to and over said properties, saw the buildings and improvements of the plaintiff upon that portion thereof involved in this case, and hence had actual knowledge that the plaintiff was residing upon and occupying at least that portion thereof upon which such buildings and improvements actually stood at the time of such inspection. The appellant, however, contends that, since the plaintiff was not in possession of any portion of the premises under color of title, his possession of the portion thereof occupied by his said improvement did not suffice to impart notice of his claim of ownership of the entire tract of 40 acres, which he now seeks to have conveyed to him. We are of the opinion, however, that it is not necessary to discuss the question as to whether the plaintiff herein does or does not hold under color of title, in view of our conclusion hereinafter expressed as to the nature and extent of the plaintiff's actual possession of the entire tract.

In the present case the evidence goes much farther than that of merely proving that the plaintiff was in actual possession of the limited area occupied by his dwelling, outhouse and corral, since it sufficiently appears that from the time in the year 1888, when the oral agreement for the purchase of said 40 acres of land was made between the plaintiff and John L. Ivett, the plaintiff took and held possession of the whole of said 40 acres of land, and he then proceeded and has ever since continued to put said land and the whole thereof to the ordinary and usual uses to which said land was adapted, viz., to that of grazing or pasturage purposes, that of pasturing his own cattle and horses upon said land, and that of keeping all other stock off said land. It is true that there is also some evidence that, when the feed ran short upon his own land, he permitted his stock to go on the adjoining lands of Ivett, by an agreement with the latter that he might do so; but we do not regard this latter circumstance as entitled to much significance, and certainly not as a controlling factor in determining the sufficiency of the plaintiff's possession of the land, since in reason, as well as upon authority, a possessor of land using the same for pasturage could neither be expected nor required to continuously keep his stock upon his land after its feed was gone, in order to avail himself of his rights of possession dependent upon his use of the premises for pasturage. Coryell v. Cain, 16 Cal. 573; Webber v. Clarke, 74 Cal. 11, 15 Pac. 431; Brumagim v. Bradshaw, 39 Cal. 24, 46. In the case last cited the court says:

"The general principle which underlies all this class of cases is that the acts of dominion must be adapted to the particular land, its condition, locality, and appropriate use."

The controlling factors in the instant case are: That the plaintiff was actually residing upon the land, and was actually using it for the purposes to which it was adapted, viz. that of pasturage, and that he was maintaining his exclusive possession thereof by keeping the stock of all others off the land. We are of the opinion that these facts, as shown in the evidence, sufficiently prove such actual and exclusive occupancy of the entire tract of 40 acres of the land as to amount to possessio pedis, and, as such, sufficient to impart notice to the purchaser of the plaintiff's rights and equities therein. The very early case of Sunol v. Hepburn, 1 Cal. 254, much relied on by the appellant herein, does not militate against this view. That was a possessory action, wherein the plaintiff relied for his recovery upon the fact that he had cattle on the land, which roamed and grazed at will over a much larger area; the plaintiff making no effort whatever to keep his cattle on the land, or to keep the cattle of others off it. The court properly held these facts insufficient foundation for a possessory action. In the case of Bullock v. Rouse, 81 Cal. 590, 22 Pac. 919, the court made use of the following language:

"One who uses the land for the pasturage of stock may have actual possession thereof without any enclosure, if he employs herders to keep his own stock on the land and other stock off."

We think the appellant unduly emphasizes the phrase "to keep his own stock on the land" in the foregoing extract from that case, since there was no showing therein that the party claiming possession had, either through herders or other means, prevented the escape of his own stock or the intrusion of other stock upon the land, nor that he had any dwelling or other improvements thereon other than a dilapidated fence, forming only a partial improvement. That case is, therefore, not to be taken as controlling authority in the instant case, wherein it was clearly proven that the plaintiff, by watchfulness and herding, kept the stock of all other persons off the land in question, and where, in addition thereto, plaintiff and his family was in the actual occupancy of the portion of the premises covered by his dwelling, outhouses, and corral, and that the defendant had actual knowledge of this latter fact at or shortly before the time of its purchase of the Ivett properties at administrator's sale. We think this evidence is sufficient to justify the finding of the trial court to the effect that the plaintiff was in the actual

possession of the whole of said 40-acre tract at the time of the defendant's purchase, and that, this being so, it must be held to have been charged with notice sufficient to put it upon inquiry as to the plaintiff's rights or equities in the premises. It cannot, therefore, be held to have been a bona fide purchaser for value and without notice of the premises affected by this appeal.

The judgment is affirmed.

We concur: SHAW, C. J.; LENNON, J.; WASTE, J.; LAWLOR, J.; SLOANE, J.

WILBUR, J. I dissent. As to the property unoccupied by the buildings and corrals of the plaintiff, I think the evidence is insufficient to justify the finding of notice by reason of possession, because the possession established by the evidence as to the balance of the 40 acres is not that open and visible possession indicating occupation adverse to the record title within the rule as laid down by this court in Randall v. Allen, 180 Cal. 298, 302, 180 Pac. 941. The possession maintained by pasturing stock upon the unenclosed portion of the 40 acres is not in my judgment equivalent in notice to an inclosure by fence within the rule laid down in Havens v. Dale, 18 Cal. 359, 368, where it is held that the possession to be constructive notice to a bona fide purchaser for value "must be evidenced by an actual inclosure, or something equivalent, as showing the extent and the fact of his dominion and control of the premises."

---

(190 Cal. 150)

## JANEWAY & CARPENDER v. LONG BEACH PAPER & PAINT CO.
## (L. A. 7271

(Supreme Court of California. Dec. 1, 1922.)

1. Pleading ⟸126 — Denial of doing three things joined by "and" admission of doing any two.

Denial in answer that defendant made, executed, "and" delivered the contract leaves an admission of doing any two of the three things.

2. Pleading ⟸125—Denial of sale and delivery at a certain place insufficient.

Denial, in action for price, of sale and delivery of goods at a certain place, is insufficient; the place being immaterial.

3. Pleading ⟸124—Denial in action for price held one of correctness of footings.

Denial, in action for price, of execution of the contract, being coupled with the words "at prices therein named," amounting to a certain sum, is equivalent to a denial that the footings were correct.

4. Sales ⟸353(4) — Complaint sufficient to charge defendant as buyer for specified value if contract named no price.

Complaint, alleging that goods of a certain value were delivered to and accepted by defendant, is enough to charge defendant, even if the contract of sale did not name the price.

5. Pleading ⟸126—Denial that a certain sum had not been paid insufficient to raise issue.

Denial that $6,190.88 has not been paid is an admission that any smaller sum is unpaid, and so insufficient to raise an issue; the law disregarding trifles.

6. Pleading ⟸126—Denial as to one count in view of exception insufficient to raise issue.

Denial as to one count that $426 has not been paid, or any part thereof, excepting as set forth in paragraph 18 of the third cause of action, in view of said paragraph 18, alleging that $6,443.89, comprising the balance due on the three counts, has not been paid, nor any part of it, is an admission that any smaller sum than $6,443.88 is unpaid, and so insufficient to raise an issue.

7. Payment ⟸65(6)—Pleading ⟸376—Burden of proving payment on defendant under pleadings admitting original liability.

Defendant's admissions, by pleading, of allegations of the complaint establishing that defendant originally owed a certain sum to plaintiff for goods sold, leaves defendant with the burden of proving payment, allowing plaintiff to rest its case on the pleadings.

8. Appeal and error ⟸1170(3)—Granting motion for judgment harmless, in view of stipulation.

Any error in granting plaintiff's motion for judgment on the pleadings, when under the pleadings defendant had the burden of proof as to payment, was harmless, within Const. art. 6, § 4½, the amount paid being thereupon stipulated, and judgment entered for amount claimed, as thereby reduced.

9. Sales ⟸191—Acceptance of trade acceptances necessary for payment under option in contract.

That under option given buyer in contract for sale to give trade acceptances for the price, if agreeable to both parties, he offered trade acceptances, did not effectuate payment; the seller not accepting them.

In Bank.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Janeway & Carpender, a corporation, against the Long Beach Paper & Paint Company for goods sold. Judgment for plaintiff, and defendant appeals. Affirmed.

Scarborough & Bowen, of Los Angeles, for appellant.

Bicksler, Smith & Parke, of Los Angeles, for respondent.

SHAW, C. J. The appeal is from a judgment in favor of the plaintiff upon the plead-

ings. The complaint was in three counts. The first count alleged that on September 10, 1919, defendant made, executed, and delivered to plaintiff its contract for goods, at the prices therein named, amounting to $6,190.88; that goods of that value were sold and delivered to defendant at plaintiff's mill in New Jersey, and were accepted by defendant. The second count alleges that on October 18, 1919, the defendant made, executed, and delivered its contract for goods to the plaintiff at prices therein named, amounting to $426; that goods of that value were sold and delivered to *plaintiff* at plaintiff's mill in New Jersey, which were accepted by the defendant. The third count alleges that on April 25, 1920, the defendant made, executed, and delivered to plaintiff its contract for goods at prices therein named, amounting to $4,580.36; that goods of that value were sold and delivered to defendant from plaintiff's mill in New Jersey, and were accepted by defendant. In paragraph 18 of the third cause of action plaintiff alleges that by several transactions set forth therein the sum of $4,605.56 was paid by defendant on said three contracts, leaving $6,443.89 due thereon, and plaintiff alleges that the latter sum has not been paid, nor any part thereof.

The answer denied that on September 10, 1919, or at any other time, or at all, defendant made, executed, and delivered to plaintiff its contract for goods, at prices therein named amounting to $6,190.88, or any other sum, or that goods of that value, or any other sum, were sold or delivered to defendant at plaintiff's mill in New Jersey, or were accepted by him; denied that on October 18, 1919, or at any other time, or at all, defendant made, executed, and delivered its contract for goods at prices therein named, amounting to $426, or that goods of that value, or any other sum, were sold and delivered to defendant from plaintiff's mill in New Jersey; and denies that said goods were accepted by defendant; denies that on April 25, 1920, the defendant made, executed and delivered to plaintiff its certain contract, or any contract, for goods at prices therein named amounting to $4,580.36, or any other sum, or at all, or that said goods of that value, or of any other sum, were sold and delivered to defendant from plaintiff's mill in New Jersey, or were accepted by defendant. Defendant further denies that said sum of $6,190.88, or that said sum of $4,580.36, has not been paid, or that said sum of $426, or any part thereof, has not been paid, excepting as set forth in paragraph 18 of the third cause of action.

[1-4] The answers are not sufficient. They deny that defendant "made, executed, *and* delivered" the several contracts. Defendant may have "executed and delivered" them, or it may have "made and executed" them, and the denial would be true, and yet the defendant would be liable. By connecting the words together with the conjunction "and" it has limited its denial to a simple statement that it did not do all three of the things, leaving an admission that it did any two of them. It amounts to an admission that it executed the contract, which is all that is necessary to make it liable thereon. Kuhland v. Sedgwick, 17 Cal. 123; Castro v. Wetmore, 16 Cal. 380; Blankman v. Vallejo, 15 Cal. 644; Wise v. Rose, 110 Cal. 163, and More v. Del Valle, 28 Cal. 172. It denies that goods of the value of $6,190.88 were "sold or delivered to defendant" "at plaintiff's mill in New Jersey." But the defendant would be responsible for them if they were sold or delivered at any other place. The allegation that they were sold and delivered at that place was unnecessary and immaterial, if they were sold or delivered to the defendant at another place. The same form of denial is used as to the other counts, and they are likewise insufficient. Again, each denial of the execution of the contracts is coupled with the words "at prices therein named," and this is equivalent to a mere denial that the footings were correct, or in the last count where the denial is that the goods "at the prices therein named amounts to the total sum of $4,580.36 or any other sum, or at all," is a denial that the prices therein named footed up any sum whatever, which would be true if the contract did not set forth any prices. As the complaint was framed, it asserts that goods of that value were delivered to and accepted by the defendant, and this is sufficient to charge the defendant, even if the contract did not name the price.

[5, 6] As to the first count, the only denial of nonpayment is in these words:

"Denies that the said sum of $6,190.88 has not been paid."

This is an admission that the sum of $6,190.87 is unpaid, and as the law disregards trifles it is not sufficient to raise an issue. As to the second count, the denial is as follows:

"Denies that said sum of $426 has not been paid or any part thereof, excepting as set forth in paragraph 18 of the third cause of action herein."

The allegation of nonpayment of this item makes paragraph 18 a part thereof. Paragraph 18 alleges that the sum of $6,443.89, comprising the balance due on the three counts of the complaint, has not been paid, nor any part thereof. This is an admission, therefore, that the sum of $6,443.88 is unpaid on all the counts, and this is one cent less than plaintiff asks. The same rule regarding trifles applies.

[7-9] As to the third count, defendant "denied that the said sum of $4,580.36 or any part thereof, has not been paid." This is a good denial of the allegation of nonpayment. But the admissions of the other essential allegations of the complaint established the proposition that the defendant owed this sum

of money to plaintiff for the goods sold to him. When that is established the rule of law is that it then devolves upon the defendant to prove the payment thereof. Melone v. Ruffino, 129 Cal. 518, 62 Pac. 93, 79 Am. St. Rep. 127. Consequently the plaintiff might have rested its case upon the pleadings, and awaited the introduction of proof of payment of this count. or part hereof, by the defendant. If it was technically erroneous to grant the motion, we think it was cured by what took place immediately thereafter, and was entered in the judgment. It appears therefrom that immediately after granting the motion the following occurred:

"It was then stipulated and agreed between counsel for both parties that since the complaint was filed there had been paid plaintiff certain sums which reduced the amount claimed in said complaint, including interest to the sum of $4,675."

And thereupon judgment was rendered against the defendant for $4,675 only. Evidently this allowed for payments made before the answer was filed. It also comes within the scope of section 4½ of article 6 of the Constitution. And, we may add, that this is evident from the argument in plaintiff's brief in regard to the affirmative defense. It sets up that the Long Beach Paper & Paint Company made the contract set forth in the third count of the complaint; that said contract gave defendant the option to give "trade acceptances" for the amount, if agreeable to both parties; that defendant gave trade acceptances accordingly, but it is entirely silent on the question whether plaintiff ever accepted them. The trade acceptances offered were payable in six installments from March to August, 1921, and from the argument it is plain that they were not accepted. There is therefore no merit in this denial.

The judgment is affirmed.

We concur: SHURTLEFF, J.; LENNON, J.; SLOANE, J.; WASTE, J.; WILBUR, J.; LAWLOR, J.

---

190 Cal. 174

## PEOPLE v. MARUI. (Cr. 2431.)

(Supreme Court of California. Dec. 7, 1922.)

**1. Homicide ⟸253(1)—Evidence held to sustain conviction of murder in first degree.**

Evidence *held* to sustain conviction of murder in the first degree.

**2. Homicide ⟸232—Evidence held to prove deliberation and premeditation.**

In prosecution for murder in the first degree, evidence *held* to prove deliberation and premeditation.

In Bank.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

T. Marui was convicted of murder in the first degree, with sentence of death, and he appeals. Affirmed.

C. F. Lacey, of Salinas, J. Sherman Woolf, of Monterey, and K. Osado, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., for the People.

LAWLOR, J. An information was filed against appellant, T. Marui, in the superior court of the county of Monterey, charging him with the crime of murder. He pleaded not guilty to the charge, and upon the trial the jury rendered a verdict of murder in the first degree, calling for the death penalty. In due course a motion for a new trial was interposed in his behalf and denied, whereupon judgment of death was pronounced upon him. He has appealed from the order denying his motion for a new trial and from the judgment of conviction. We have made a careful examination of the record with the view of determining whether there is any reason why the judgment of death should not be affirmed.

It appears from the record that at about 2:30 p. m. on October 28, 1921, in the city of Monterey, appellant shot Tsunematsu Shintani and his wife. The wife apparently was instantly killed, and the husband lingered for about two hours, when he died from the effect of the bullet wounds. Hemorrhage of the liver and kidneys was given as the cause of his death. This prosecution is alone for the killing of the husband.

The principals to the tragedy and many of the witnesses are Japanese. The testimony of the Japanese witnesses was taken through the medium of Japanese interpreters, and, because of this, some difficulty has been experienced in following the testimony, as it is not always clear whether the interpreter simply repeated the declarations of the witnesses or gave his own understanding of what the witnesses meant to convey. We think, however, the evidence we shall touch upon is correctly stated, is fairly reflective of the record as a whole, and is sufficient for the purposes of the appeal.

The tragedy occurred at the home of the Shintanis, which, for the preceding ten months, had been on Foam street in the city of Monterey. Appellant had been a lodger in the Shintani household for some three years, but three or four weeks before the fatal meeting changed his abode and took lodgings in the residence of Mrs. Merrill at No. 525 Lake street, in the same city. Appellant was 43 years of age, and Shintani two years his senior. The slain couple had four children.

Two of the principal witnesses were Mrs. Mitzi Natsuda and Mrs. Max Kozeni, the former residing on the opposite side of Foam street from the Shintani home, and the latter in the adjoining house nearer Pacific Grove.

---

They were friends of Shintani and his wife and acquaintances of appellant.

Apparently the killing was the result of an incident which had occurred about three weeks before. It appears that Mrs. Shintani requested appellant to purchase for her, at Goldstein's store, a pair of corduroy pants for one of her boys. The article was secured and appellant reported that it cost $2.25, whereupon Mrs. Shintani said to appellant she thought he paid too much and asked him if he had the bill. It seems that some time before she bought a similar article for another of her boys at the same store at a less figuré. Appellant appeared to regard the incident in the light of an insult, that his honor and integrity had been questioned, and thereafter that thought evidently possessed him, finally culminating in the sacrifice of the two lives. The evidence indicates that he was far more impressed with the incident than were the Shintanis, for while he seemed to be obsessed by it, making it the subject of every conversation when they met, referring to it on all occasions and expressing concern as to its effect on his standing in the Japanese community, they apparently tried to convince him his character had not been impugned; in short, their position seems to have been that the price was spoken of only because of Mrs. Shintani's purchase on the previous occasion. It might have been inferred that appellant changed his abode on account of the trouble.

According to the evidence, during the forenoon of the day of the shooting, appellant called on Mrs. Natsuda. He remained for a while, but no allusion was made to the subject which in the light of the sequel must have been uppermost in his mind. Shortly before 2:30 Mrs. Natsuda called at the home of the Shintanis and found them together with appellant in the kitchen. Two of the four children were playing on the floor. Appellant was dwelling on the "insult" which he insisted the Shintanis had offered him. Apparently they were disinclined to pursue the matter with him, for Mrs. Shintani occupied herself reading the Japanese newspaper, and at intervals the husband paid some attention to the children. Mrs. Natsuda took no especial interest in the conversation between the parties. We quote from her testimony:

"Q. Did you hear any conversation between those three after you seated yourself in the kitchen? A. Talking about those pants.

"Q. What pants? What did you hear about pants? A. Talking about those pants or trousers and regarding about the price. Mr. and Mrs. Shintani asked Marui about the bill, where is it?

"Q. What else was said? A. Then when asking about this bill Marui is very much dissatisfied about it, and Marui demanded Shintani for a written excuse and not insulting him like that again. * * * Marui asked Mr. and Mrs. Shintani to apologize to writing on the form of a letter to a form of apology which will not happen again, something like that. He is very much dissatisfied.

"Q. An apology for what? A. Well, that is, he purchased the goods for them, and they have to trust what he done for it, and as they are asking the price and they say it is kind of insulting, and therefore Marui asking to Mr. and Mrs. Shintani for apologies.

"Q. For an apology in writing? A. In writing.

"Q. What did Mr. or Mrs. Shintani say, if anything, when the defendant asked for an apology in writing? A. Mr. and Mrs. Shintani say to Marui if it is very much a necessity to do so well they might well do it, and a few conversations between them, and then Marui pulled out a pistol. * * *

"Q. Did you hear the word "thief" or "robber" used by anybody? A. Well, Marui said to the Shintanis, he says: 'You think I am a thief?' But Mrs. Shintani told Marui 'I don't think any minute you are a thief.' That is Marui said so. * * *

"Q. What did she say? A. Sorry asking for that bill; it isn't meaning to doubt you or anything like that so apologize you know Mrs. Shintani is once in a while.

"Q. She said that several times, didn't she? A. Once or twice."

Evidently appellant had come prepared to force the issue for Mrs. Natsuda had been present but 10 or 15 minutes when he arose and drew a pistol from his right-hand coat pocket. Neither of the Shintanis was armed. When Mrs. Natsuda observed appellant's movement she ran from the kitchen on to the back porch, calling to Mrs. Kozeni for help. As she reached the porch she heard the sound of two shots in quick succession. She left Mrs. Kozeni, who had appeared in response to her cries, and proceeded to the sidewalk in front of the house. About four minutes later appellant came up from behind from the other side of Foam street and said to her: "If you spread any of this news, I will kill you also." He continued on his way down the street toward old Monterey and disappeared from view. She then re-entered the house by the front door.

Mrs. Kozeni was the first to reach the Shintani house. She made her way from her yard into the kitchen, where she found Mrs. Shintani lying on the floor dead. She saw Mr. Shintani lying on the floor of the storeroom, his face turned upward. He was wounded in the body and head. Appellant was standing in the storeroom reloading his pistol. He said to her: "If you don't leave, I will shoot you." She immediately started for the door, holding her hands above her head as she took her departure. Mr. Shintani had asked her to get a doctor. She summoned Dr. H. S. Hoyt, and on his arrival the wounded man was removed to a hospital where, as already stated, he died in about two hours.

It was shown that appellant, about Sep-

tember 15, had purchased from a second-hand store the .38-caliber revolver with which he killed the couple, that three or four days before the shooting, in a conversation with one O. Enokida, he had declared, referring to the Shintanis, that he would shoot them, and that he had said to another man about three weeks before the tragedy that he had gone to the Shintani house intending to kill them both, but that, as Mrs. Shantani was there alone, he did not carry his purpose into effect. This was communicated to the Shintanis and Mrs. Kozeni by Enokida.

It further appeared in evidence that appellant was taken into custody at Tarpy Flat, about five miles from Monterey on the Salinas road, on November 1. He was detected hiding in the brush near a knoll, the neighbors having noticed that some one came in sight to get water. On being apprehended he inquired if Mr. Shintani was dead, and when told that both had died, he said: "I want to shoot myself." Appellant stated that when he was hiding he dreamed the Shantanis were there with him, or that he saw them in a dream. He identified a box of cartridges which had been found in his room as having been purchased by him from the second-hand store; also a .38-caliber revolver in two parts, containing two empty shells, which was found in a closet between two rooms in some shavings in the Shintani house. This evidence tended to connect him up with the revolver and cartridges, which were used in the killing. Appellant made a statement, which was taken down in shorthand, and reduced to writing, to the effect that he called on the Shintanis in order to have a final straightening up of the difficulty, and that, if that could not be done, he was determined to fight with them; that he had a revolver in his pocket when he went to the house; that they talked for a while, when he got up from the table and drew a gun; that Shintani came toward him and, putting his hand on appellant's shoulder, said: "Wait, wait. Don't do that way, we can fix up everything and settle trouble." Whereupon, he shot Shintani. The latter took hold of appellant's right arm and followed him into the storeroom, where he fell. Appellant further stated that he then tried to shoot himself, to commit suicide, but the gun would not work; that on going into the kitchen he saw Mrs. Shantani lying on the floor; that his mind was clear up to the time of the shooting, and that he had been "suspicious" of Shintani. It was testified appellant was sober.

[1] From the foregoing summary it is plain that the verdict rendered is amply supported by the evidence. The case went to the jury on the testimony of the prosecution alone. For three weeks or more appellant had dwelt on the asserted "insult" to his honor, which undoubtedly furnished the motive for the murder. No attempt was made to go into the details of the purchase of the trousers, whether the price stated was the price paid or whether there was any basis in fact for the comments made by the Shintanis in that behalf. It appears certain from the evidence that appellant felt he had been disgraced by the action of the Shintanis, and that, as they did not relieve him from the imputation which he felt had been put upon him, he resolved to kill them, and carried the intention into effect.

[2] There can be no question that the specific elements of deliberation and premeditation in murder of the first degree are fully established. His conduct in bringing up the subject at every opportunity following the pants incident, purchasing a revolver and cartridges; his declaration that on an earlier occasion he had formed the intent to kill and had proceeded to put it into effect but reconsidered when the wife alone was present; his antecedent threats; his going to the house armed on the day of the murder; and the admissions contained in his statement made to the officers—all tended to prove the deliberate and premeditated intention to take life. No question was raised on the trial as to his mental responsibility for the deed, and consciousness of guilt might be inferred from his immediate flight from the scene of the crime, and his remaining in hiding until he was apprehended.

In the conduct of the trial the court appeared to realize that appellant was in a defenseless position. The rulings on the objections of counsel were marked by a great liberality in his favor, and conserved the presumption of innocence. Not a single debatable question is presented thereby. The charge to the jury is a model of fairness and impartiality, and in the proceedings after verdict a scrupulous regard for the rights of appellant is apparent. His counsel safeguarded his rights at every turn, and spared no proper effort to save him from the consequences of his deed, and the record shows no error which demands consideration on appeal.

The judgment and order are affirmed.

We concur: SHAW, C. J.; WILBUR, J.; LENNON, J.; WASTE, J.; SLOANE, J.; SHURTLEFF, J.

190 Cal. 124

**PABST et al. v. FINMAND et al. (Sac. 3132.)**

(Supreme Court of California. Nov. 27, 1922. Rehearing Denied Dec. 27, 1922.)

**1. Waters and water courses ⟸138—Use on one fork of stream gives no prescriptive right against owner on other fork.**

Use of water from one fork of a stream affords no basis for a prescriptive right against an owner on the other fork; it interfering in no way with the flow on the other fork, and so not invading the right of the owner thereon.

**2. Waters and water courses ⟸138—No prescriptive right from use by upper riparian not interfering with lower owner's use in absence of notice.**

Continuous use of water for the statutory period by an upper riparian owner gave no prescriptive right against a lower owner, whose use of water was never in any way interfered with thereby, and who had no notice or knowledge that the other's use was under an adverse claim, rather than under his right as riparian owner.

**3. Waters and water courses ⟸138—Riparian owner entitled to reasonable amount of water.**

A riparian owner is entitled to a reasonable amount of water for use on his land; such amount varying with the circumstances of each case, and also from year to year; and the rights in that respect of the several riparian owners are correlative and interdependent, so that one cannot be said to be using an unreasonable amount, demanding complaint by the others to preserve their rights, so long as enough is left for them.

**4. Waters and water courses ⟸138—No prescriptive right from upper riparian owner using all the water when lower owner has no desire to use any.**

For an upper riparian owner to gain prescriptive right to waters, the other party must be clearly shown to have actual notice of adverse claim, or the circumstances must be such that he must be presumed to have known of such claim; and use of all the water when the lower owner has no desire to use any of it is not enough.

**5. Waters and water courses ⟸39—Return of water to original stream not a test of lands being riparian.**

It is not a test of the riparian character of lands, relative to right to use of waters thereon, whether water used thereon must be returned to the original stream.

**6. Waters and water courses ⟸140—Actual settlement on riparian land with intent to patent enough to protect from subsequent appropriation of water.**

Actual settlement on riparian land, preceding filing of formal application in land office, with intent of acquiring title by patent, is enough to protect it from subsequent appropriation of water.

**7. Waters and water courses ⟸138—Nonriparian owner's diversion at once hostile to riparian owners relative to prescriptive right.**

Relative to a nonriparian owner acquiring prescriptive right to use water of a stream, his diversion of it is at once an invasion of and hostile to the rights of riparian owners, though there is no damage to their present use.

**8. Waters and water courses ⟸152(6)—Burden on claimant of prescriptive right to show quantity to which he is entitled.**

One claiming prescriptive right to use of water from a stream has the burden of showing the quantity to which he is entitled.

**9. Waters and water courses ⟸143—Quantity acquired by prescription amount applied to beneficial use.**

The quantity of water acquired by one by prescription is not determined by the capacity of his ditch or the flow therein, but is limited to amount applied to beneficial use, that is actually used and reasonably necessary for the useful purpose to which the water has been applied; the amount necessary being a question of fact in each case, and not being shown merely by amount used.

**10. Waters and water courses ⟸137—No prescriptive right to continuous use from use part of time.**

Prescriptive right to use continuously a certain quantity of water is not acquired by using it part of the time.

**11. Waters and water courses ⟸152(11)—Judgment for prescriptive use construed for continuous use.**

A judgment for a certain quantity of water by prescription, not limiting the use of the water to any particular time or season, is to be considered one for continuous use.

**12. Waters and water courses ⟸152(8)—Finding of beneficial use not supported by evidence.**

A finding of beneficial use of amount of water diverted and claimed under prescriptive right *held* not supported by evidence consisting of vague and general testimony that the amount diverted was "necessary."

**13. Waters and water courses ⟸143—Carrying capacity of ditch tested at smallest point.**

The carrying capacity of a ditch, relative to amount of water diverted and claimed under prescriptive right, is to be tested by such capacity at its smallest point.

On Petition for Rehearing.

**14. Waters and water courses ⟸138—Use of water from above fork for use of lands on forks attributed to riparian right.**

Relative to acquisition of prescriptive right by diversion of water from above the fork of a stream by one owning lands on both forks, for use thereon, all such lands are to be deemed riparian, and consequently the use of the water attributed to his riparian right.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

**15. Waters and water courses ⟸138—Diversion of water from one fork for use of land riparian to other fork hostile.**

Diversion by owner of separate lands on the two forks of a stream of water from one fork for use of land riparian only to the other fork is hostile to the riparian rights of lands bordering on the fork from which the water is taken.

**16. Waters and water courses ⟸138—Taking of water from stream for use on riparian land, though not at owner's water front, attributable to riparian right.**

The taking by an owner of land riparian to one fork of a stream of water from such fork for use on such land is attributable to exercise of his riparian right, though the diverting ditch is at a point a short distance from his water frontage.

In Bank.

Appeal from Superior Court, Modoc County; C. A. Raker, Judge.

Action by Charlie Lee Pabst and others against H. H. Finmand and others. From an adverse judgment, plaintiffs appeal. Reversed.

Daly B. Robnett, of Alturas, for appellants.

Jamison & Wylie, of Alturas, and N. J. Barry, of Susanville, for respondents.

LENNON, J. This action was instituted by the plaintiffs, Charlie Lee Pabst and the Priors, against H. H. Finmand and N. H. Finmand and the Cambrons, to quiet title to the waters of Eagle creek, in the county of Modoc, state of California. Eagle creek, rising in the Warner Mountains, west of the lands of both plaintiffs and defendants, flows in a single channel until just before it reaches the land of the plaintiffs, Priors, and the defendant, N. H. Finmand. There it forks and the north branch flows across the northwest corner of N. H. Finmand's lands and across the Prior lands. The south branch flows across the south portion of N. H. Finmand's lands and thence onto and across the lands of plaintiff Pabst.

The lands of the other defendant, H. H. Finmand, are not riparian to the creek. They lie to the west of the lands of the plaintiffs Priors and to the northwest of the lands of the plaintiff Pabst and the defendant N. H. Finmand, and are irrigated by means of two ditches, the "Gee" and the "Grider" ditches, which run from the main channel of Eagle creek before it forks, northerly to the lands of H. H. Finmand.

The trial court found that the lands of the defendant N. H. Finmand were riparian to Eagle creek, and that the defendant N. H. Finmand was entitled, as an appropriator, to a first right to 300 inches of the water of Eagle creek, measured under a 4-inch pressure, and that said defendant also had a prescriptive right to said quantity of water. The court found that the defendant H. H. Finmand was entitled to a first right of 200 inches of water from Eagle creek through what is known as the "Gee" ditch, and a first right to 200 inches of water through what is known as the "Grider" ditch, both under a right by prior appropriation and by prescription. Judgment was accordingly rendered and entered in favor of the defendant N. H. Finmand for 300 miner's inches of water under a 4-inch pressure, and in favor of H. H. Finmand for 400 miner's inches of water under a 4-inch pressure, for the irrigation of his lands through the Gee and Grider ditches. It is from this judgment that plaintiffs appeal.

The N. H. Finmand lands being riparian, whereas the H. H. Finmand lands are nonriparian, the rights arising from the use of water on these different tracts are necessarily based upon different principles, and for this reason these different tracts of lands will be considered separately.

As to the rights of the N. H. Finmand lands, it is conceded by counsel for defendants that the right to the amount of water awarded to the defendants by the judgment of the trial court must rest upon a prescriptive right alone. This is so for the reason that, as admitted by defendants, the right by appropriation is not supported by the evidence, and, while the trial court found that N. H. Finmand was a riparian owner, no judgment was given such defendant based upon his right as a riparian owner, and no attempt was made to apportion the waters among the plaintiffs and defendants as riparian owners.

[1] The judgment for a prescriptive right was given in favor of the N. H. Finmand lands against both the Prior lands and the Pabst lands. The N. H. Finmand lands claimed this right, and it was adjudged to those lands upon the theory that said lands had gained it by adverse use of the water which was taken from the south fork of the creek. As to the Prior lands no right could be gained by prescription. This is so because the water used on the N. H. Finmand lands was taken from the south fork of the stream, which runs below and does not border the Prior lands, where as the water diverted for use on the Prior lands is taken from the north fork of the creek, which runs by a small portion of the northwest corner of the N. H. Finmand lands and on to the Prior lands. The Prior lands, therefore, are riparian only to the north fork of the stream. A right can be gained by prescription only by acts which operate as an invasion of the rights of the person against whom the right is sought and which afford a ground of action by such party against such claimant, and it is a rule of law so well settled by de-

cisions in this and other states as to scarcely need any citation to support it that a lower use, since it interferes in no way with the flow above, constitutes no invasion of the upper riparian owner's right, and cannot, therefore, afford any basis for a prescriptive right. Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158; Walker v. Lillingston, 137 Cal. 401, 70 Pac. 282; Perry v. Calkins, 159 Cal. 175, 113 Pac. 136; Miller & Lux v. Enterprise Canal & Land Co., 169 Cal. 415, 147 Pac. 567; San Joaquin, etc., v. Worswick, 187 Cal. 674, 203 Pac. 999; Peake v. Harris (Cal. App.) 192 Pac. 310.

[2] As to the Pabst lands, the N. H. Finmand lands are the upper riparian lands, and the Pabst lands are lower riparian lands. It is the contention of defendants that the continuous use of a certain amount of water each year for the statutory period of time gave to them a prescriptive right to that certain quantity of water so used by them, and this in spite of the fact that the use of the water by the lower riparian owner was never in any manner interrupted or interfered with by such use, and in the absence of any indication or bringing of knowledge home to the lower riparian owner that the upper riparian owner was claiming such right, not as a riparian owner, but adversely to him. This contention cannot be maintained. In the absence of a showing that the upper owner is using the water under a claim of prescriptive right, the lower owner has the right to presume that such owner is only taking that to which he is entitled as a riparian owner by virtue of his riparian right. Skelly v. Cowell, 37 Cal. App. 215, 173 Pac. 609; Oliver v. Robnett (Cal. Sup.) 210 Pac. 408. Such use was not hostile unless there was an actual clash between the rights of the respective owners. While there was sufficient water flowing down the stream to supply the wants of all parties, its use by one was not an invasion of the rights of the other. Anaheim W. Co. v. Semi-Tropic Co., 64 Cal. 185, 30 Pac. 623; Half Moon Bay Land Co. v. Cowell, 173 Cal. 543, 160 Pac. 675; Peake v. Harris (Cal. App.) 192 Pac. 310.

[3] A riparian owner is entitled to a reasonable amount of water for use on his riparian lands. What is a reasonable amount varies with the circumstances of each particular case and also varies from year to year, for the amount which might be reasonable in a season of plenty might be manifestly unreasonable in a season of drought. Nor is the question of reasonableness to be tested solely by the needs of the upper riparian proprietor. The rights of riparian proprietors are correlative, and the "reasonable" amount to which any one riparian owner is entitled is to be measured by comparison with the needs of the other riparian proprietors. The fact that there was always sufficient water coming down the creek for the Pabst lands with the exception of the two years prior to the trial is undisputed by any evidence offered by the defendants. And, so long as defendants left sufficient water in the stream for the use of the lower riparian proprietors, it cannot be said that they were using an unreasonable amount, and, so long as they were not using an "unreasonable" amount, the plaintiffs had no cause to complain, nor was any right of theirs invaded. Half Moon Bay Land Co. v. Cowell, 173 Cal. 543, 160 Pac. 675.

[4] The adverse use must be such as to raise a presumption of a grant of an easement as the only hypothesis on which to account for the other party's failure to complain thereof. Lakeside Ditch Co. v. Crane, 80 Cal. 181, 22 Pac. 76. In the absence of any facts showing an actual knowledge by plaintiffs of the adverse nature of defendants' claim or of any facts sufficient to create a presumption of a knowledge of that claim, it cannot be said that a failure of plaintiffs to assert their rights by bringing an action against the defendants was such a submission as could be accounted for only on the hypothesis of a grant. Indeed, defendants have not shown such an unreasonable use of the water on their lands as to put plaintiffs on notice of their claim. We do not mean to hold that a right may not be gained by an upper riparian proprietor by prescription, but to do so it must be clearly shown either that actual notice of the adverse claim of such owner has been brought home to the other party, or that the circumstances are such, as, for instance, the use of all of the water of the creek, that such party must be presumed to have known of the adverse claim. In the instant case there was nothing to indicate to the lower riparian owners that the owners of the N. H. Finmand lands were exercising, or attempting to exercise, any more than their riparian rights, and, in the absence of such indication to plaintiffs that the owners of the N. H. Finmand lands were asserting a right hostile to the rights of the plaintiffs, no prescriptive title was acquired. Even if the upper riparian owner is using all the water of the stream, still, if the lower riparian owner is not then using any and has no desire to do so, such use by the upper riparian owner would not be adverse, and, if continued five years, would not gain him a prescriptive right.

[5] Some point seems to be made of the fact that the water after use by the defendants could not be returned to the original stream, and because of this fact it is argued that said lands are nonriparian. Of course, there is no merit in this contention. The fact that the water used upon riparian lands must be returned to the original steam is not a test of the riparian character of the land. It is but an incident of the riparian use.

There is no evidence, pro and con, in this case as to whether or not the water referred to could be returned to its original source, and therefore we are not called upon to decide what would be the rule and relative rights of the parties where the water could not be returned.

[6] As to the H. H. Finmand lands the right to 400 inches of water was based by the trial court upon a title by prior appropriation and by prescription. There can, of course, be no question as to any riparian rights attaching, since these lands nowhere touch or border upon Eagle creek. Both the Prior and Pabst lands were settled prior to the appropriation of water for the H. H. Finmand lands through the Gee ditch, so the question of whether or not these lands of H. H. Finmand are entitled to a right by prior appropriation, as distinguished from a prescriptive right, through that ditch depends solely upon the question of whether the riparian rights attached to the Prior and Pabst lands as of the date of settlement upon them. It is well settled that a patent from the United States government operates to transfer title not merely from the date of patent, but, relating back, it becomes operative as of the date of the inception of the right to such land and cuts off all subsequent claims of others, whether they be to the lands or to any of the incidents thereof. Kinney on Irrigation and Water Rights, § 755. It is insisted by defendants that the date of the inception of the right is the date of the filing of the formal application for the land, and not the date of actual settlement thereon. Cases are cited by defendants in which it is held that riparian rights are protected from the filing of entry in the land office. In none of these cases, however, is the question of whether or not a mere occupancy, with the intention of taking further steps necessary for the completion of title, is sufficient to cut off subsequent rights, involved. While it is true that as against the United States the inception of the right of a settler relates only to the date of filing application, actual settlement gives to such settler a preference as to such filing, so that, as to subsequent parties other than the United States, the inception of the right is the date of settlement. In view of the fact that the rights of both the appropriator and the settler are based upon priority in time of taking the initial step, actual settlement upon the land with the intention of subsequently acquiring a completed title by patent is sufficient, we think, to create an equitable right in the land so settled upon by a bona fide settler as to cut off all intervening rights, including those of a subsequent appropriator. The right acquired by a prior appropriator relates back to the first step taken, and we are of the opinion that the right of a settler should likewise date back to the first step taken, which in this case was actual settlement, rather than to the intermediate step of filing a formal application in the land office. Sturr v. Beck, 133 U. S. 541, 10 Sup. Ct. 350, 33 L. Ed. 761; Faull v. Cooke, 19 Or. 455, 26 Pac. 662, 20 Am. St. Rep. 836; Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. D. 519, 91 N. W. 352; Stenger v. Tharp, 17 S. D. 13, 94 N. W. 402; Redwater Land & Canal Co. v. Jones, 27 S. D. 194, 130 N. W. 85. As to the Grider ditch there is some testimony in support of defendants' contention that a right was gained through such ditch by prior appropriation. Inasmuch, however, as defendants' contention that a right by adverse user to the water of Eagle creek through both the Gee and Grider ditches must be sustained, and the quantity of water to which the defendants are entitled, whether by prior appropriation or by prescription, is limited to the quantity of water actually diverted and beneficially applied to the land in question, the solution of this question is not necessary to a determination of the rights of the parties.

[7] It is the contention of plaintiffs that there was no invasion of plaintiffs' riparian rights by the nonriparian owners of the H. H. Finmand lands by the diversion by such nonriparian owners of water which the riparian owners did not need, and therefore no prescriptive right to the use of the water could be acquired in the absence of a showing of actual damage to the lands of the riparian owners caused by a deprivation of the water. As to a nonriparian owner the riparian owner is under no duty to share the waters of the creek, and the slightest use by such nonriparian owner diminishes to some extent the flow of the stream. Obviously, there is no question of reasonable use in the sense in which that term is applied to the rights of respective riparian owners, since a riparian owner, as against a nonriparian owner, is entitled to the full flow of the stream without the slightest diminution. The initial step in the diversion of the water by the nonriparian owner is therefore an invasion of the right of the lower riparian owner, and every subsequent diversion is a further invasion of that right. Against a person who seeks to divert water to nonriparian lands, the riparian owner is entitled to restrain any diversion, and he is not required to show any damage to his use. Although no damage to the present use of the riparian owner results from the diversion, yet damage to the future use may result, and an injunction will be granted to prevent the diversion from growing into a right by the lapse of the statutory period. Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 Pac. 978, 11 L. R. A. (N. S.) 1062; Miller & Lux v. Madera Canal Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A. (N. S.) 391. In the instant case the adverse use of the water on nonriparian lands was con-

tinued "openly and notoriously" for a period longer than five years, and, the slightest use by the owners of these lands being notice to all the lower riparian owners that a hostile right was being asserted, a prescriptive right was acquired by such adverse use by those lands.

[8, 9] Conceding that a right to the use of a certain quantity of water had been acquired by prescription, it was necessary for defendants to show the quantity of water to which they were entitled. The quantity of water to which a person is entitled by prescription is not determined by the capacity of the ditch, but is limited to the amount applied to a beneficial use; that is, the amount actually used and reasonably necessary for the useful purpose to which the water has been applied. California, etc., Co. v. Madera Irrigation Co., 167 Cal. 78, 138 Pac. 718; Haight v. Costanich, 184 Cal. 426, 194 Pac. 26; Northern Cal. P. Co. v. Flood, 186 Cal. 301, 304, 199 Pac. 315. The amount necessary for a beneficial use is a question of fact in each case. And while, if the entire flow of water in a ditch was being beneficially used all of the time, a right to the entire flow would be acquired if it was continued for five years, manifestly the mere use alone of a definite quantity of water upon a parcel of land is not sufficient proof that the use was beneficial to its fullest extent, since it may be that more water was being used than was required for the irrigation of that particular tract, and, if so, such excess use obviously could not be termed a "beneficial use." California, etc., Co. v. Madera Irr. Co., 167 Cal. 78, 138 Pac. 718; Turner v. East Side Canal, etc., Co., 169 Cal. 652, 147 Pac. 579; Northern California P. Co. v. Flood, supra. Claimants, to gain a right to the use of a definite amount of water, must show that the quantity of water awarded them has been actually diverted, that it was applied to a beneficial use, and that the amount claimed was reasonably necessary for such use. Defendants have attempted to do this by the testimony of a qualified surveyor as to the capacity of the ditches as they enter the lands of defendants, the testimony of other witnesses that the size of the ditches has remained unchanged, testimony that the water in the ditches had run to their full capacity, that crops have been raised by irrigation, and the testimony of two witnesses, one of them the former owner of the H. H. Finmand lands, that the use of the amount diverted was "necessary" for such irrigation. There is, however, uncontradicted testimony that, although at certain seasons of the year the ditches ran to their full capacity, yet at other seasons they ran much lower. Indeed, at the time of the trial the testimony of the surveyor was that there was only 11½ inches running in the two branches of the Grider ditch through which the defendants claim a right to 200 miner's inches. And, although there is testimony that defendants used all they wanted, there is no testimony to prove the use of any specific quantity of water for any particular time. The same witnesses for the defendants, who testified that they used all of the water from the ditch on the lands, also testified that they turned it off and on just as they needed it.

[10, 11] The use of all of the water of a ditch or of a part thereof for only a portion of the time is not sufficient to give title to that quantity of water continuously. Haight v. Costanich, supra. In Northern California Power Co. Consolidated v. Flood, 186 Cal. 301, 199 Pac. 315, it was pointed out that the evidence left the question of the use of the water during the nighttime uncertain, not showing clearly whether the continuous use spoken of was during the day only or both day and night during the irrigating season, and the court, pointing out that the value of the water for irrigation was too great to permit a landowner to gain a right thereto for the entire 24 hours of each day by using the same for only half or any portion of the whole, held that he gained a prescriptive right only for the period during which he had used it continuously. In view of the fact that the judgment of the trial court in the instant case does not limit the use of the water to any particular time or to any season of the year, it must be inferred that the right was given to use the water continuously. There being no evidence of a continuous use, the finding that defendants had diverted and were entitled to 400 miner's inches without limitation as to the time of use cannot be sustained.

[12] Nor can there be said to be substantial evidence in support of the contention of beneficial use—that is, as to the amount reasonably necessary for the irrigation of the tract in question. The question of what quantity of water is reasonably required for irrigation is necessarily a complicated one dependent upon many different facts. The character of the soil, the area sought to be irrigated, the climatic conditions, the location and altitudes of the lands to be irrigated, the kinds of crops to be raised, the length of the irrigation seasons, must all be taken into consideration and weighed as well with such other circumstances as may be peculiar to each particular case. Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728. The only evidence introduced by defendants in support of their contention that the amount diverted by them had been applied to a beneficial use and was reasonably necessary for the cultivation of the said tract of land was the vague and general testimony of the two witnesses that the amount diverted was "necessary." While conceding the difficulty of proving the quantity of water beneficially used, nevertheless, considering the complicated nature of the question and in view of the declared policy

of this state to require the highest and greatest duty of water because of the immense importance to the state of the economical use of water, this testimony is not sufficient to support the finding of the court that 400 inches of water had been used and was reasonably required for the irrigation of the land in question. By mathematical demonstration 400 miner's inches of water measured under a 4-inch pressure applied for a year, which is the amount awarded by the judgment, and which it is claimed by defendants is necessary, would equal approximately 5,760 acre-feet, or over 19 feet for each acre of the 300-acre H. H. Finmand tract of land. That this amount is reasonably necessary for a beneficial use is palpably improbable. Indeed, it is conceded by counsel for defendants that the amount awarded "seems exorbitant." This court is not therefore bound to sustain a finding based on such testimony. Whited v. Calvin, 55 Or. 98, 105 Pac. 396.

[13] It is also insisted by the plaintiffs that the testimony of the surveyor as to the carrying capacity of the Grider ditch measured at the points where the two branches thereof enter the H. H. Finmand lands is not sufficient to support the finding that the amount of water as measured by the capacity of the ditches at those points was the amount of water actually diverted. This contention is based upon the testimony of the same witness to the effect that by measurements taken some distance further up the stream he estimated the maximum carrying capacity of the two ditches which branch off from the Grider ditch to be 100 inches. Obviously the carrying capacity of the ditches is to be tested by its carrying capacity at its smallest point, and not by its carrying capacity at its largest point. It is insisted by defendants that the testimony of the surveyor was in the first instance only an estimate which was corrected by his later testimony based upon actual measurements, and that his testimony in both instances referred to the capacity of the same ditches at the same point. Upon a new trial of this case it would be well to have this point cleared up.

Judgment reversed.

We concur: SHAW, C. J.; WASTE, J.; LAWLOR, J.; SLOANE, J.; WILBUR, J.; SHURTLEFF, J.

On Petition for Rehearing.

PER CURIAM. [14, 15] The sole point presented on the petition for a rehearing, and presented for the first time, is that 160 acres of the 240 acres N. H. Finmand lands is riparian to the north branch of Eagle creek, and that therefore the taking of water from a point on the south fork of the creek below the forks of the creek, by means of a diverting ditch for the irrigation of said 150 acres, has ripened into a prescriptive right to the use of such water. It may be conceded that the 160 acres in question are shown by the record before us to be nonriparian to the south fork of Eagle creek; and it may likewise be conceded that the evidence adduced upon the whole case would support a finding that the said 160 acres are entitled to a prescriptive right to the use, through the medium of the diverting ditch in question, of such an amount of water from the south fork of Eagle creek as was actually and reasonably used and applied to a beneficial purpose.

Evidently the allegation of the defendants' cross-complaint and the finding of the trial court that all of the N. H. Finmand lands, the 160 acres mentioned and 80 acres more, were riparian to Eagle creek was made upon the theory that, inasmuch as the 160 acres were riparian to the north fork and the 80 acres were riparian to the south fork, the whole tract was riparian to the main stream. As pointed out in the original opinion, the trial court ignored the finding that all of the N. H. Finmand lands were riparian to Eagle creek, and did not attempt to base any judgment thereon. Therefore, for the purpose of a new trial, it will suffice to say at this time, upon that phase of the case which involves the issue of the prescriptive right in question raised by the cross-complaint of the defendants, that so far as the diversion of water above the fork of Eagle creek is concerned all of the lands upon both forks should be deemed riparian, and consequently the use of water diverted from above the place where the stream forks is an exercise of riparian ownership. If, however, water is diverted from one fork for use upon lands which are riparian only to the other fork, such diversion is hostile to the riparian rights of lands bordering upon the fork from which the water is taken. That is to say, if the N. H. Finmand 160 acres diverted and used water from the south fork of the creek, and said 160 acres are riparian only to the north fork, then such diversion and use is hostile to the riparian owners on the south fork and an invasion of their rights and may ripen into a prescriptive right. If, on the other hand, water which would normally flow into the north fork was by diverting dams caused to flow into the south fork and then taken therefrom for the purpose of irrigating the N. H. Finmand 160 acres, which were riparian only to the north fork, such use to the extent of the amount of water so taken would be an exercise of the riparian right to the north fork of the creek of the N. H. Finmand 160-acre tract.

[16] It should be noted, however, that the finding of the trial court in response to the issue of the prescriptive right in question grants to the N. H. Finmand lands in their entirety—the upper 160 acres and the lower 80 acres—280 inches of water of Eagle creek measured under a 4-inch pressure. The record shows that only the 160 acres would be

entitled to a prescriptive right to the water of the south fork of Eagle creek, and therefore the finding of the trial court that the entire 240 acres of the N. H. Finmand lands had acquired a prescriptive right to the water of the south fork of Eagle creek is not sustained by the evidence. This is so because it appears from the evidence that 80 inches of the 280 inches of water awarded to the N. H. Finmand lands under a prescriptive right were taken from the south fork of Eagle creek and delivered upon the 80-acre tract through the medium of a second diverting ditch at a point below the ditch which diverted the water of the south fork onto the 160 acres of land. The 80 acres of land are undeniably riparian to the south fork of the creek, and, whether the water used for the irrigation of those particular acres was taken from a point where the creek bordered thereon or from some nearby point, the taking would be that of a riparian owner, and the rights of the respective parties to the water so taken are to be measured and ascertained by the rules covering and controlling the rights of riparian owners.

With reference to the question of whether or not the exercise by an upper riparian owner of his riparian right is to be deemed hostile to those below him, the question is one of fact to be tried and determined by the trial court. The exercise of the mere riparian right can never be hostile to the land below. Where, however, the use is under such circumstances as to be adverse and under a claim of right asserted against lower riparian owners, it may ripen into prescriptive title.

Rehearing denied.

SHAW, C. J., and LENNON, WARD, WASTE, LAWLOR, SLOANE, and WILBUR, JJ., concur.

---

190 Cal. 155

## McCLUNG v. WATT et al. (S. F. 10019.)

(Supreme Court of California. Dec. 5, 1922.)

**1. Venue ⟸41—Individual defendant not entitled to change to county of his residence on joinder of corporation in action in county of latter's place of business.**

Under Code Civ. Proc. § 395, requiring that actions be tried in the county in which defendants, or some of them, reside, an individual defendant, with whom a corporate defendant, against which the complaint states or attempts in good faith to state a cause of action, is joined in an action properly brought in the county of the corporation's principal place of business, is not entitled to a change of venue to the county of his residence; the rule that plaintiff cannot deprive an individual defendant of such right by the joinder of a corporation, which, under Const. art. 12, § 16, may be sued where the contract is made or is to be performed, or where the breach occurs, being applicable only to actions brought in counties in which they could not be maintained except for the fact that one of the defendants is a corporation.

**2. Venue ⟸72—Right to change to county of party's residence must be determined by defendants' status as revealed by pleadings when party claiming right first appeared.**

Since a motion for change of venue to the county of a party's residence must be determined before any other judicial action, the right to such change must be determined by the status of the parties joined as defendants as revealed by the pleadings existing when the party claiming the right first appeared.

**3. Venue ⟸41—Sufficiency of complaint to state cause of action against corporation sued in county of its principal place of business cannot be denied on motion for change of venue to county of individual defendant's residence, unless allegations concerning it are clearly unrelated to cause of action against individual.**

The sufficiency of the complaint, in an action brought against a corporation and an individual defendant in the county of the former's principal place of business, to state a cause of action against the corporation for fraud alleged to have been practiced by the individual, and the pleader's good faith, cannot be denied on motion for change of venue to the county of the individual's residence, unless it can be clearly seen that the allegations of fact concerning the corporation are in no wise related to the facts relied on as a cause of action against the individual, and would not, in any circumstances, warrant the inference that the corporation was a party to the fraud.

**4. Venue ⟸41—Allegations as to corporate defendant's implication in fraud practiced by individual defendant held not so radically insufficient to state cause of action as to entitle individual defendant to change of venue to county of his residence.**

In an action brought against a corporation and an individual defendant in the county of the former's principal place of business for fraud practiced by the latter, a complaint alleging that plaintiff conveyed her property to the corporation in exchange for the individual defendant's property, that the latter was the owner of a large interest in the corporation at the time, and that the corporation obtained all the advantages and benefit of fraudulent acts and representations inducing such exchange, and knew of, ratified, and approved them, *held* not so inherently devoid of merit, when considered with the remaining allegations, as to be radically insufficient to state a cause of action against the corporation, and thus entitle the individual defendant to a change of venue to the county of his residence.

**5. Pleading ⟸358—Allegations merely shadowing forth semblance of cause of action not sham and frivolous.**

Allegations which merely shadow forth the semblance of a cause of action are proof against assault as sham and frivolous.

---

**6. Fraud ⊂=30—Beneficiary of fraud liable.**

The general rule is that one who accepts the fruits of a fraud with knowledge of the misrepresentations or concealments by which it was perpetrated inferentially ratifies it and is liable therefor, apart from any consideration of the theory of agency, though he did not personally participate therein.

**7. Venue ⊂=41—To defeat demand for change of venue to county of individual defendant's residence, cause of action against corporation need only have been apparently pleaded in good faith and be not so glaringly and vitally defective as to be beyond correction by amendment.**

To defeat a demand for a change of venue from the county of a corporate defendant's principal place of business to the county of an individual defendant's residence, it is enough that the cause of action against the corporation was apparently pleaded in good faith, and is not prima facie so glaringly and vitally defective as to be beyond correction by amendment.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Margaret McClung against J. N. Watt and another. From an order denying a motion for change of venue, defendant Watt appeals. Affirmed.

A. E. Shaw, of San Francisco, for appellant.

Fry & Wood, of Oakland, for respondent.

LENNON, J. This is an appeal from an order denying the motion of the individual defendant, Watt, for a change of venue. The city and county of San Francisco is the principal place of business of the corporation defendant, and the action was instituted there. Defendant Watt's residence is in the city of Sacramento. He demanded a change of place of trial from said city and county of San Francisco to the county of Sacramento upon two grounds: (1) That his residence was in Sacramento; and (2) that the corporation defendant was joined as a defendant solely for the purpose of having the action tried in the superior court of the city and county of San Francisco.

[1] It is one of the contentions of the individual defendant, Watt, made in support of the appeal, that, even though a corporation is properly joined as a defendant in the action and sued in the county where its principal place of business is located, nevertheless the individual defendant is entitled, upon demand, to have the action tried in the county of his residence.

In support of this contention defendant Watt cites several cases in which it was held that the privilege given the plaintiff by article 12, § 16, of the state Constitution, of suing a corporation defendant not only in the county of its residence, but also "where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs," was waived by plaintiff if an individual was joined with the corporation as a defendant. Griffin & Skelly Co. v. Magnolia & Healdsburg Fruit Cannery Co., 107 Cal. 378, 40 Pac. 495; Brady v. Times-Mirror Co., 106 Cal. 56, 39 Pac. 209; Nelson v. East Side Grocery, 26 Cal. App. 344, 146 Pac. 1055. These cases held that plaintiff could not by the joinder of a corporation with an individual defendant deprive the individual defendant of his right to demand and have a trial of the action in the county of his residence. This is so because "the plaintiff may at all times avail himself of the privilege given by the section, if the only defendant in the action is the corporation; but, if he chooses to join as defendants others whose residence is in a different county, he waives the benefit of the provision. Such joining of other defendants is his own act, and he cannot in this manner deprive them of a right held by them." Griffin & S. Co. v. Magnolia, etc., Co., supra. It will be noted that in none of these cases cited by defendant in support of his contention in this behalf was the action brought, as in the instant case, in the county where the principal place of business of the corporation defendant was located. They were all cases in which the action was brought against the corporation defendant under the authority of the first two provisions of article 12, § 16, of the state Constitution, which provides that a corporation may be sued "where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs." In other words, the actions were brought in counties in which they could not have been maintained except for the fact that one of the defendants was a corporation, and this court held that the fact that one of the defendants was a corporation should not deprive an individual defendant of his right to have the action tried in the county of his residence. In the instant case, however, the action was commenced in the principal place of business of the corporation—the county of its residence. Jenkins v. California Stage Co., 22 Cal. 538; Buck v. City of Eureka, 97 Cal. 135, 31 Pac. 845; Trezevant v. Strong, 102 Cal. 47, 36 Pac. 395; Gallup v. Sacramento & San Joaquin Drainage District, 171 Cal. 71, 151 Pac. 1142. The plaintiff had a right to bring the action there, irrespective of whether or not one of the defendants was a corporation or an individual defendant. That is to say, the right of the individual defendant in the instant case is not affected by the fact that the defendant joined is a corporation rather than an individual. The rule

enunciated in the cases cited and relied upon by the individual defendant, Watt, has therefore no application to a situation where the action was instituted in the county of the principal place of business of a corporation defendant properly joined with other defendants in the action.

Section 395 of the Code of Civil Procedure, under which the defendant here claims the right to have the action transferred, provides that "the action must be tried in the county in which the defendants, or some of them reside." If under this section an action is commenced in the county of the residence of one of the defendants, another defendant resident of a different county does not have the right to have the action changed to the county of his residence, and this is so even though it may happen that all of the defendants join in the demand. Quint v. Dimond, 135 Cal. 572, 67 Pac. 1034; Hellman v. Logan, 148 Cal. 58, 82 Pac. 848. Concededly the corporation in the instant case, if justly joined, is a defendant in the action, and its principal place of business being, within the meaning of this section, its residence, the action, having been instituted in the county of its principal place of business, was brought "in the county in which the defendants, or some of them reside."

Precisely the same situation was presented to this court in Hellman v. Logan, supra, wherein an individual defendant attempted to have the trial changed from the county of the principal place of business of the corporation, properly joined with him, to the county of his residence. The court held that the motion for a change of venue was properly denied, saying:

"If one of the parties necessary resides in the county in which the action is begun, the action is properly begun and may be tried in that county, although the other and principal defendant resides in another county. C. C. P. 395."

This being so, the individual defendant, Watt, is not privileged to have the trial changed to the county of his residence upon the theory that an individual defendant, merely because he is an individual, has a right superior to a corporation codefendant to have the action tried in the county of his residence. The correctness of the trial court's ruling therefore depends upon a solution of whether or not the corporation, in the instant case, was justly joined as a party defendant or was joined "solely" for the purpose of giving the court jurisdiction; that is to say, whether or not the complaint states, or attempts in good faith to state, a cause of action against the corporation.

[2] The motion for a change of place of trial to the county of the party's residence must be made by the moving party and determined by the court in advance of any other judicial action in the case. Heald v. Hendy, 65 Cal. 321, 4 Pac. 27; Brady v. Times-Mirror, supra. Hence the right to a change of place of trial to the residence of a defendant must necessarily be determined by the status of the parties joined as defendants in the action as revealed by the pleadings existing at the time the party claiming the right first appeared in the action. Buell v. Dodge, 57 Cal. 645; Remington S. M. Co. v. Cole, 62 Cal. 311; Brady v. Times-Mirror Co., supra; Donohoe v. Wooster, 163 Cal. 114, 124 Pac. 730.

[3] If the complaint in the instant case attempts, in apparent good faith, to state a cause of action against the corporation defendant, the individual defendant, Watt, did not have the right to have the place of trial changed to the county of his residence. The sufficiency of the complaint and the good faith of the pleader are not to be denied, upon a motion for a change of venue, unless, at first blush, it can be clearly seen and said that the allegations of fact concerning the corporation defendant are in no wise related to the facts alleged and relied upon as a cause of action against the defendant Watt, and would not, in any event, or in any view of the case, warrant the inference that the corporation was a party to the fraud and deceit alleged to have been practiced upon the plaintiff by the defendant Watt, whereby the plaintiff was induced to exchange certain real property belonging to her for property owned by the defendant Watt.

[4] While the plaintiff's complaint does not purport by direct averments to immediately and intimately connect the corporation defendant with a personal participation in the alleged fraudulent transaction pleaded as a cause of action against the defendant Watt, it does allege:

That "plaintiff conveyed her said property in exchange for said Butte county property * * * to the defendant Valley Bond & Mortgage Company; * * * that said defendant Watt * * * was at the time of said transaction the owner of a large interest in said defendant corporation; that said corporation obtained all the advantages and benefit by reason of the fraudulent acts and representations of said defendant Watt, * * * and at all times knew of the same and ratified and approved of them."

[5] Conceding these allegations to be faulty in form, and in a measure vague and indefinite and somewhat ambiguous, nevertheless, when considered in conjunction with the remaining allegations of the complaint, even though they be strictly construed, it cannot be said that they are so inherently and utterly devoid of merit as to be radically insufficient upon which to found a cause of action. In short, it cannot be held that the allegations of the complaint concerning the corporation defendant are clearly bad and manifestly the making of a sham and frivolous plead-

ing. If the allegations in question did no more than shadow forth the semblance of a cause of action, they would be proof against assault upon the ground that they were sham and frivolous. Giles Lithographic, etc., Printing Co. v. Recamier Mfg. Co., 14 Daly (N. Y.) 475; Winn v. Waring, 2 Brev. (S. C.) 428; Hogencamp v. Ackerman, 24 N. J. Law, 133; Marshal v. Hamilton, 41 Miss. 229, 235; Walter v. Fowler, 85 N. Y. 621; Bradner v. Faulkner, 93 N. Y. 515. The allegations in question, however, make for more than the mere semblance of a cause of action, for they proceed with a degree of certainty and clarity, sufficient at least for the purpose of determining the merits of the motion for a change of venue, upon the theory that the individual defendant, Watt, as the owner of a large interest in the corporation defendant, was acting in behalf of the corporation, as well as for himself, and that said corporation defendant knowingly connived at and ratified the alleged fraudulent conduct of the individual defendant, Watt, and, with knowledge of the fraud alleged to have been perpetrated by him upon the plaintiff, ultimately became the sole beneficiary of the fruits of the fraud.

[6] Even though imperfectly pleaded, it is not difficult to spell out, from the facts alleged against the corporation defendant, a cause of action against said defendant on the ground of fraud and deceit, for the rule generally is that one who accepts the fruits of a fraud, with knowledge of the misrepresentations or concealments by which the fraud was perpetrated, thereby inferentially ratifies the fraud complained of and will be liable therefor, even though he did not personally participate in the fraud, and this is so apart from any consideration of the theory of agency. Baily v. London Guarantee & Accident Co., 72 Ind. App. 84, 121 N. E. 128; Law v. Grant, 37 Wis. 548; Green v. Des Garets, 210 N. Y. 79, 103 N. E. 964.

[7] True it is the complaint as a whole, and the allegations in question in particular, may be susceptible to special demurrer for some insufficiency of fact, as well as ambiguity and uncertainty, but whatever defects there may be in the form and phrasing of the complaint it is not so grievous but that it may be cured by appropriate allegations, founded, of course, in truth, by amendment following a ruling upon demurrer. It is enough, however, upon the hearing and determination of the demand for a change of venue, that the cause of action purported to be stated against the corporation defendant was apparently pleaded in good faith, and is not, prima facie, so glaringly and vitally defective as to be beyond correction by amendment.

We are satisfied that the facts pleaded against the corporation defendant would, in the absence of demurrer, warrant and support a judgment against the corporation defendant for conniving at and knowingly becoming the recipient of the fruits of the fraud complained of against the individual defendant, Watt. This being so, it cannot be held that the defendant Watt is the only defendant against whom the facts pleaded in the complaint would justify a judgment, and consequently it cannot be said that the joining of the corporation as a party defendant in the action was made in bad faith and for the purpose of preventing a transfer of the action to the county of the residence of the defendant Watt.

The order appealed from is affirmed.

We concur: SHAW, C. J.; WILBUR, J.; LAWLOR, J.; WASTE, J.; SLOANE, J.

---

59 Cal. App. 533

## MARTELLO v. BELETICH et ux.
(Civ. 3663.)

(District Court of Appeal, Second District, Division 2, California. Oct. 30, 1922.)

**1. Landlord and tenant ⇐169(10)—Findings held to show negligence in keeping automobile in house other than violation of ordinance.**

In an action for damages resulting from the burning of defendant's house in which plaintiff was a roomer, findings that the house was burned by reason of the negligence of defendant, and that the fire was caused by defendant carelessly and negligently, and in violation of law, keeping an automobile in a room, amount to a determination that defendants were careless in the manner of keeping the automobile, aside from the violation of an ordinance, so that a finding that plaintiff knew it was being kept in violation of the ordinance did not defeat his right to judgment.

**2. Landlord and tenant ⇐169(3)—Pleadings held to raise issue of negligence in keeping automobile in house other than violation of ordinance.**

A complaint alleging that the fire which caused plaintiff's damage was caused by defendants carelessly and negligently keeping an automobile in a room in the dwelling, followed by a paragraph alleging a city ordinance making such keeping unlawful, to which an answer was filed denying the burning was caused by carelessly and negligently keeping the automobile in the room or at all, and alleging that the automobile was kept with due care, raised the issue of negligence in the keeping, aside from the violation of the city ordinance.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Francisco Martello against Tony M. Beletich and wife to recover damages for negligence. Judgment for plaintiff, and defendants appeal. Affirmed.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Albert J. Sherer and Robert Young, both of Los Angeles, for appellants.

Wilbert C. Hamilton and Otto C. Eigholz, both of Los Angeles, for respondent.

WORKS, J. This is an appeal upon a judgment roll alone. The action was one to recover for damages suffered by plaintiff through the burning of a house owned by defendants, they having rented to plaintiff a room in the dwelling, and he having been an occupant of the room at the time of the fire. Plaintiff had judgment, and the defendants appeal.

[1] The sole point made by appellants is that the findings do not support the judgment. The complaint charged in part that appellants kept an automobile under the same roof which covered the dwelling and in a place which was a portion of the building, in defiance of the terms of a city ordinance denouncing the keeping of automobiles in such places. The answers of the appellants alleged affirmatively that respondent knew at all times during his occupancy of the room that appellants kept the automobile in the place mentioned. The trial court found this affirmative allegation to be true, and the contention of appellants is that this finding required a judgment in their favor. Respondent contends, however, that he was entitled to judgment because of other findings made by the trial court. These were to the effect that the house was burned by fire "by reason of the carelessness and negligence of the said defendants herein and each of them," and that the fire was caused by the defendants "carelessly and negligently *and* in violation of law keeping an automobile in a room of said dwelling," the italics being ours. These two findings, it is to be observed, amount to a determination by the trial court on the facts that appellants were careless and negligent in the manner of the keeping of the automobile, entirely aside from the determination that they kept it in a certain place in violation of the terms of the city ordinance.

[2] The only difficulty in this situation is as to whether the two findings are upon issues made by the pleadings, but we have concluded that they are. This matter is not mentioned in the briefs, but we nevertheless feel it necessary to discuss it. The complaint alleges, in a separate paragraph:

"That said dwelling being burned on said date was caused by the defendants * * * carelessly and negligently keeping an automobile in a room in said dwelling."

It is to be observed that this paragraph, standing alone, is a sufficient allegation of general negligence, at least in the absence of a special demurrer. It is, however, followed by a paragraph alleging the existence of the city ordinance to which we have already referred—a circumstance which may give support to the view that the pleader intended to base his charge of negligence only upon a keeping of the car in defiance of the terms of the ordinance. The whole affair, however, is settled by the allegations of the answers. Each of these, the defendants having answered separately, contains the following, italics being ours:

"In answering * * * said complaint, this defendant denies that the burning of the said dwelling * * * *was caused by the carelessly or negligently keeping of an automobile* by the the defendants, in a room of said dwelling, *or at all*; but *this defendant alleges that*, on the contrary, *the automobile* kept upon the premises * * * *was kept with due care.*"

With the pleadings in this condition we are convinced that the question of negligence, aside from the matter of the existence of the city ordinance, was in the case, and that the two findings we have mentioned were responsive to the issues. Respondent was therefore entitled to judgment.

Judgment affirmed.

I concur: CRAIG, J.

FINLAYSON, P. J. I concur. Even if the trial court's findings should be construed as meaning that defendants' sole negligence lay in their violation of the city ordinance, nevertheless plaintiff's knowledge that defendants were violating this police measure would not be a defense to the action. The duty imposed upon defendants by the ordinance to keep their automobile elsewhere than in a part of the rooming house was not a contractual obligation. It was an obligation imposed upon defendants by a salutary police regulation. The doctrine of the assumption of the risk does not apply. Public policy forbids that the duty which defendants owed to plaintiff to keep their automobile out of the rooming house should be waived by plaintiff's mere passive quiescence, even though with knowledge of the infraction of the ordinance. In Adams v. Cumberland Inn Co., 117 Tenn. 470, 101 S. W. 428, it was held that one who continues to occupy a room in a hotel for six months with knowledge that there are no fire escapes on the building as required by ordinance does not thereby waive a compliance with the ordinance. The doctrine is there stated as follows:

"The plaintiff did not waive the duty which the defendant owed to him under the ordinance as an occupant of the hotel, nor assume the risks incident to its occupation in its then condition. The duty of the defendant to place the fire escapes upon its hotel was not a contractual obligation, and the doctrine of assumed risks has no application to this case. The ordinance is a police regulation, made for the protection of human life, and in the interest of that portion of the public occupying hotels and lodging houses. Public policy requires that duties of

this kind be discharged, and that all consequences of a failure to do so shall follow. The individuals who are affected cannot suspend the law by waiver or express contract."

---

59 Cal. App. 381

## PEOPLE v. LIPS. (Cr. 826.)

(District Court of Appeal, Second District, Division 2, California. Oct. 20, 1922. Hearing Denied by Supreme Court, Dec. 18, 1922.)

**1. Bribery ⟸11—Conviction for bribing deputy sheriff sustained.**

In a prosecution of a deputy sheriff for accepting a bribe from a fugitive from justice from another state and his wife to refrain from arresting the fugitive, evidence *held* to sustain conviction.

**2. Criminal law ⟸507(1)—Person paying bribe not accomplice of officer receiving it.**

In prosecution for bribing a deputy sheriff to refrain from apprehending a fugitive from justice from another state, the wife of the fugitive was not an accomplice, although she was a party to the bribery agreement; she not being concerned with the officer in asking, receiving, or agreeing to receive the bribe.

**3. Bribery ⟸1(2)—Deputy sheriff executive officer, within bribery statute.**

Under Pen. Code, § 68, relating to the asking, etc., of bribes by executive officers, a deputy sheriff is to be considered an executive officer.

**4. Criminal law ⟸1169(2)—Erroneous admission of evidence as to corpus delicti held harmless.**

Where, in a bribery case, the corpus delicti was established by other evidence, that testimony of a detective was admitted over objection to establish the corpus delicti was harmless, if erroneous.

**5. Bribery ⟸1(2)—Instruction containing erroneous statements of law properly refused.**

In a prosecution for bribing a deputy sheriff to refrain from apprehending a fugitive from justice from another state, instruction incorrect in part, as stating that it was necessary for the prosecution to prove that an indictment had been returned against the fugitive, or, "if he had been tried, that the time of appeal therefrom had not elapsed," *held* properly refused.

**6. Bribery ⟸1(2)—Charge held not sustainable as to matter which might be brought before deputy sheriff in official capacity.**

Under Pen. Code, § 68, relating to bribery of a deputy sheriff to refrain from arresting a fugitive from justice against whom no warrant had been issued, the charge could not be sustained on the ground that the bribe was to influence the officer in matters which might be brought before him in his official capacity.

**7. Bribery ⟸1(2)—Charge sustained as to matter pending before deputy sheriff in official capacity.**

In prosecution for bribing a deputy sheriff to refrain from arresting a fugitive from another state, no warrant having been issued, conviction might be had under Pen. Code, § 68, as relating to bribery in a matter then pending before him in his official capacity.

**8. Criminal law ⟸1130(5)—Points not supported by argument or citation of authority will not be considered on appeal.**

On appeal from a conviction in a criminal case, points as to rulings on admissibility of evidence, and as to giving or refusing instructions, will not be considered, where not supported by argument or citation of authority.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Walter Lips was convicted of bribery, and he appeals. Affirmed.

Paul W. Schenck and Richard Kittrelle, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch and John W. Maltman, Deputy Attys. Gen., and Lorrin Andrews, of Los Angeles, for the People.

WORKS, J. By indictment it was charged that defendant, jointly with one W. J. Anderson, did "willfully, unlawfully, corruptly, knowingly, and feloniously ask, receive, and agree to receive of and from J. M. Furay and Mrs. Dede Furay" a certain bribe for the purpose of influencing their action officially as deputy sheriffs. The charge was based upon the provisions of section 68 of the Penal Code. Defendant was tried separately, and now appeals from a judgment of conviction rendered against him.

Appellant's first contention for a reversal of the judgment is founded upon the palpable misstatement that—

"The bribery charge in the indictment is based merely upon an agreement between Mrs. Furay and Lips and Anderson, and nowhere in the evidence is there any evidence that Mrs. Furay ever made any agreement with either Lips or Anderson."

Our quotation of a part of the terms of the indictment, made above, will demonstrate how erroneous is counsel's conception of its effect. The agreement mentioned in the charge was said there to have been made between Furay and Mrs. Furay on the one side and Lips and Anderson on the other, not merely between the latter two and Mrs. Furay. The point made by appellant upon his erroneous assumption as to the effect of the indictment is that the evidence fails to show that Mrs. Furay ever agreed to give or the officers to receive from her a bribe. This illusion, for counsel are as far afield in making the point as they are in placing an

estimate upon the effect of the indictment, may be dispelled by a brief recital of salient points in the evidence. As to this question it is to be said, then, that Lips and Anderson, who were deputies of the sheriff of Los Angeles county, were assigned by their superior in the sheriff's office to the duty of locating and apprehending Furay, who was under indictment in the state of Texas for the commission of a crime in that jurisdiction. After some search the deputies found Furay at his home in Glendale. He at once attempted to escape, but was rounded up by a shot from the pistol of one of the deputies and relinquished the effort. He then had a conference with both Lips and Anderson in a room of his house. At its close Anderson came to Mrs. Dede Furay, who is the wife of Furay, and said that the latter wanted to see her. Anderson then returned with Mrs. Furay to the room where Lips and Furay were, when the latter asked Mrs. Furay, according to her testimony, how much money she could raise. She testified further:

"I asked him what he meant, how much money he had to have, and he said he had to have $20,000. He said, if he could raise that much money, they would not put him in jail. * * *"

[1] Mrs. Furay then told the three men how much money she had or could obtain, and Furay said he could borrow enough, in addition, to make up the $20,000. It was a day or two before Mrs. Furay's money could be gotten together; the officers having finally expressed a willingness to accept $10,000 as a consideration for Furay's release. In the meanwhile Lips and Anderson aided Furay to keep out of sight, he and they going to Long Beach and registering at a hotel there under assumed names. On the day when the cash was to be paid over, Lips plainly showed his desire to avoid observation. After observation seemed successfully to have been eluded, Mrs. Furay produced the money which she had said she could obtain, and the payment was made to Lips and Anderson, both Furay and Mrs. Furay being present. Some weeks after the payment was made, Lips reported to his superior officer that he and Anderson have been unable to locate Furay. Under all these circumstances it is puerile to assert that Furay and Mrs. Furay never agreed to pay or that Lips never agreed to receive a bribe. Whether the agreement was made was to be determined by the jury from all the acts of the parties. People v. Powell (Cal. App.) 195 Pac. 456. The evidence was ample upon the question, and we do not see how the jury could have reached a different conclusion.

[2] In discussing the point of which we have just made disposition, we have followed the terminology of the briefs, that point being one involving the question: Between whom was the agreement for a bribe made? In view of the next point, however, it is material to note that the charge was that Lips and Anderson had asked, received, and agreed to receive a bribe. The point to the consideration of which the foregoing statement is a preface is to the effect that, granting that Mrs. Furay was a party to the agreement made by Lips and Anderson, she was an accomplice with them, and her testimony required corroboration. This could not be so, as Mrs. Furay was in no way concerned with the officers in either asking, receiving or agreeing to receive the bribe. She was on the opposite end of the transaction. This point was fully discussed in People v. Powell, supra.

[3] Section 68 of the Penal Code, under which the charge against appellant was made, relates to the asking, etc., of bribes by executive officers, and appellant contends that he, as a deputy sheriff, was not an executive officer. It is insisted that he was a ministerial officer. If it be conceded that he was the latter, it cannot therefore be said that he was not an executive officer. Of our three branches of government, the executive, the legislative, and the judicial, sheriffs and their deputies undoubtedly belong to the first named. See Haynes v. Commonwealth, 104 Va. 854, 52 S. E. 358, and also People v. Salsbury, 134 Mich. 537, 96 N. W. 936.

[4] It is contended by appellant that the trial court erred in permitting a certain detective to testify to a conversation between him and appellant. This testimony was objected to on the ground, among others, that the corpus delicti in a criminal case cannot be established by the statements or declarations of a defendant. If it be granted that the court erred in permitting this evidence to go to the jury, a point, however, which we do not examine, it is enough to say that the corpus delicti in the present case was amply established by the testimony of other witnesses before the detective took the stand. If there was any error in receiving the testimony of the detective it was therefore harmless.

[5] Another contention of appellant is that the trial court erred in refusing to give to the jury the following instruction, a portion of which we italicize:

"I instruct you that proof that an indictment had been returned on a given date against a person in a sister state, and that a warrant of arrest had been issued thereon on a given date, is not proof that the matter was pending on any given date. The prosecution has alleged that on or about the 6th day of December, 1920, there was pending in the state of Texas an indictment against J. M. Furay. To prove this it is necessary for the prosecution to show not only that an indictment had been returned against him, but, in addition thereto, prove to you beyond a reasonable doubt that he had not been tried thereon, *or, if he had been tried, that the time of appeal therefrom had not elapsed.* If you have a reasonable doubt, from all the

evidence, or lack thereof, whether or not an indictment was pending against J. M. Furay in the state of Texas on or about the 6th day of December, 1920, you must acquit the defendant."

This instruction was requested for the reason that the district attorney offered in evidence only the indictment found in Texas, making no showing as to what disposition had been made of it. Waiving other questions, which are worthy of consideration as bearing upon the court's refusal to give the instruction, it is enough to say that a part of it contained a statement of law which is incorrect, and which must have misled the jury if it had been given. We refer to the portion which we have italicized, the clause being based upon the erroneous assumption that an individual is not a fugitive from justice if he departs from a state after a judgment of conviction rendered against him there has become final. It was necessary for the prosecution to show only that he was a fugitive, whether under indictment pending or after final judgment of conviction. It is thoroughly settled that not only convicted persons who flee a state, but those who escape from prison while serving sentence under a judgment of conviction, are fugitives from justice within the meaning of the federal Constitution. 25 C. J. 259; Hughes v. Pflanz, 138 Fed. 980, 71 C. C. A. 234. The injection of this false element into the requested instruction was a sufficient justification of the refusal to give it, for the Supreme Court has said:

"When it is urged here that the court below erred in rejecting an instruction requested, we are justified in reversing the judgment only when it appears that it was the duty of the court to give the instruction exactly as requested. It has been repeatedly held that if any part of a single instruction ought not to have been given, the action of the trial court in rejecting the whole will be affirmed." People v. Davis, 64 Cal. 440, 1 Pac. 889.

The next point to be considered arises upon several instructions which were requested by appellant and which were refused by the trial court. These offered instructions presented the view of appellant that the evidence in the case failed to show that he was guilty of the charge made against him for the reason that there was no legal duty resting upon him to take Furay into custody. This point was made by these proposed instructions in the trial court, and it is made here because of the fact that no warrant had been issued in this state for the apprehension or detention of Furay. The question raised by appellant, to use his own words, is that "in the absence of a legal duty there can be no bribery." While the matter of the extradition of fugitives from justice, as between the states, is basically regulated by the federal Constitution, many of the states have passed laws outlining the procedure to be followed within their borders in bringing about an extradition. Particularly, they have enacted measures providing for the apprehension and detention of alleged fugitives from justice pending an investigation by the executive department of the state and a determination whether extradition shall follow. Our Legislature has passed enactments covering these matters and they are to be found in sections 1548–1556, Penal Code. Under these sections a magistrate is empowered to issue a warrant for the apprehension of a fugitive until the governor shall determine whether his warrant shall issue as a preliminary to the delivery of the fugitive to the authorities of another state. In the present instance no magistrate was asked to issue a warrant for the apprehension and detention of Furay and none was issued. Lips and Anderson were detailed for the purpose of locating and apprehending Furay after a peace officer from Texas had called upon the sheriff here, Lips' and Anderson's superior, and had stated to him that an indictment was pending against Furay in Texas, and that the offender was in California, or would soon be within the state. It was only upon this authority, if such it may be called, that Lips and Anderson acted in their connection with the Furay affair. If we grant for the sake of argument that this "authority" did not empower the officers to take Furay into custody, we are brought to the question made by appellant: Was he guilty of agreeing to receive a bribe from Furay and his wife?

[6] As we have already said, the prosecution of appellant was based upon section 68 of the Penal Code. It is contended by the Attorney General that under this enactment it was not necessary, in order to render appellant guilty of the charge made against him, that at the time his agreement with the Furays was consummated he should have been clothed with a then present authority to take the husband into custody. Not only does section 68 denounce agreements by an officer to receive bribes "upon any agreement or understanding that his vote, opinion, or action upon any matter then pending" before him shall be influenced thereby, but the language which we have quoted is immediately followed by the clause, "*or which may be brought before him* in his official capacity"; the italics being ours. The Attorney General says that if appellant had no authority to apprehend Furay because of the lack of a warrant from a California magistrate, that lack might have been supplied at any moment. It is argued that, if such a warrant were at any time issued and were at any time placed in appellant's hands as a deputy sheriff, the matter would then be "brought before him" in his official capacity, for it would then be his duty to take Furay into custody, and it is said that appellant's agreement to receive a

bribe was therefore within the terms of section 68. Whatever may be said as to the correctness of these views in the abstract, they have no application to the actual conditions in the present case. The indictment here did not charge appellant with having agreed to receive a bribe for the purpose of influencing his action in a matter which might be brought before him. The charge, and it was made against Lips and Anderson together, as we have already remarked, was that the bribe was to be paid to them "upon the agreement and understanding that the action of them, the said defendants, upon a matter then and there pending before them in their official capacity, should be influenced thereby. * * *" We are of the opinion that this charge cannot be sustained under the clause of section 68 to the effect that agreements to receive bribes may not be made by officers when the taking of the bribe is to influence them in matters which may be brought before them in their official capacity, as a matter of that character does not come within the terms of the indictment. See 22 Cyc. 455, 456; People v. Redman, 39 Cal. App. 566, 179 Pac. 725.

[7] There is, however, another view of the Attorney General upon which we think the trial judge's rejection of the proposed instructions now under consideration may be sustained. That view is based upon a part of section 68 of the Penal Code which we have already mentioned—that part which refers to agreements to receive bribes as to matters "then pending" before officers, as distinguished from the clause which was the principal subject of our paragraph last set forth, that is, the clause as to matters which may be "brought before" officers. We think the present case falls within the clause as to matters "then pending," under the decisions of courts of other states which have taken a broad view of the subject. These authorities are substantially to the effect stated in a standard law publication as follows:

"The giving or receiving of money * * * for the purpose of influencing official conduct is not deprived of its criminal character by the fact that the action contemplated is not within the officer's jurisdiction. If he acts in his official capacity—and by this term is meant the doing of such acts as properly belong to the office and are intended by the officer to be official—the offense is complete." 4 R. C. L. p. 183, par. 13.

It is true that this statement, as well as other more specific ones which follow it in the publication mentioned, is principally supported by the citation of cases which relate to the taking of bribes upon a promise to perform some affirmative act believed to be within the line of official duty, as the promise of a legislator to vote for a measure which turns out to be unconstitutional, or void for some other reason, or as the promise of a judge to exercise a jurisdiction which he does not possess. It is true also, however, that there are cases within the broad lines of the quoted statement which are closely akin to the present one. Among these is Moseley v. State, 25 Tex. App. 515, 8 S. W. 652. In that case the accused, a constable, had arrested an individual without a warrant and had allowed him to escape in consideration of a payment of cash. The court said, in disposing of the case:

"It is insisted by counsel for defendant that the arrest and custody of John Gable by the defendant was without authority of law, and that, therefore, it was no offense for the defendant to accept a bribe to release him. We do not so understand the law. It was by virtue of his official authority that the defendant arrested and held John Gable. It matters not whether the arrest and custody were legal or illegal, the said Gable was a prisoner in the custody of the defendant, a peace officer, and was permitted by the defendant to escape, in consideration of money paid him to effect such escape. We are of the opinion that, in a prosecution for this offense, it is not permissible for the defendant to question the legality of his custody of the prisoner. Such an issue is irrelevant and immaterial. The moral obliquity of this offense is the same where the custody of the prisoner is illegal as where it is legal, and the injury to public justice is the same."

Although the Texas statute concerning bribery is different from ours, the appositeness of the above language as applied to the present case appears to us to be striking, especially in view of what the Supreme Court has said in People v. Markham, 64 Cal. 157, 30 Pac. 622, 49 Am. Rep. 700. That case related, it is true, to the part of section 68 of the Penal Code dealing with agreements to accept bribes to influence matters which might be "brought before" an officer, but the language employed by the court in quoting from the opinion of a court of another state nevertheless has a general application to the present situation. A part of the quotation is, italics being ours:

"The Legislature, I think, did not intend that the prosecution should depend upon the fact whether the officer actually had it in his power to carry out the corrupt agreement before the indictment was exhibited. It is sufficient, I think, that the subject-matter upon which the bribe was to operate existed, and could legally be brought before the officer in his official capacity. *The offense consists*, in contemplation of the statute, *in poisoning and corrupting the fountain of justice*, and although the particular deleterious consequence designed to be effected by the parties has not ensued, *the state*, nevertheless, *has an officer corrupted*, and society has lost all protection for its rights, so far as the administration of the law by him is concerned."

So it is here. Appellant had been instructed by his superior to locate and apprehend Furay, and without doubt he believed that he was acting officially as a deputy sheriff in

all that pertained to his activities under the directions of that superior. His action in agreeing to release Furay was corrupt in the last degree, and we find no difficulty under the law in determining that his illicit conduct related to a matter "pending before him" in his official capacity. In penning this paragraph and those which immediately precede it we have not failed to consider People v. Schmitz, 7 Cal. App. 330, 369, 373, 94 Pac. 407, 419, 15 L. R. A. (N. S.) 717. In our opinion that case is readily distinguishable from the present one.

[5] Appellant states various points relating to rulings upon the admissibility of evidence and to rulings giving or refusing instructions. These points are not supported by argument or by the citation of authority. It seems a waste of time to remind appellant, and again to remind the bar, that points so made will not be considered.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

59 Cal. App. 539

## Petition of HARRISON. (Original 250.)

(District Court of Appeal, Second District, Division 2, California. Oct. 31, 1922.)

**Attorney and client ⟸1—Alien cannot have admission to bar granted as of date prior to enactment of statute preventing admission.**

An alien applicant for admission to the bar, who had filed his application and taken his examination before the amendment of Code Civ. Proc. § 275, by St. 1921, p. 538, permitting citizens to be admitted to the bar and providing that aliens previously admitted to practice must complete their naturalization within one year, or have their certificates revoked, became effective on July 29, 1921, is not entitled to have an order entered admitting him as of a day prior to the effective date of the amendment, since the statute covers his case, and the court cannot write exceptions therein.

Petition by Herschel R. Harrison for an order nunc pro tunc admitting petitioner to the bar. Petition denied.

Clark, Law & Clay, of Los Angeles, for petitioner.

WORKS, J. Petitioner who is a British subject, being a native of Canada, in June, 1921, filed with the state board of bar examiners his application for admission to the bar. On June 29 and 30, and on July 1, 1921, he took the examination required by law in the case of such applications; and on or about September 26, 1921, the board of examiners made its orders admitting him to the bar. Unfortunately for petitioner, however, on or about July 29, 1921, there had become effective an amended section 275 of the Code of Civil Procedure. The amended section reads:

"Any citizen of the United States, residing within this state, of the age of twenty-one years, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to admission as attorney and counselor in all of the courts of this state; provided, however, that all persons who are aliens, and who have, at the time of the taking effect of this act, been admitted as attorney and counselor and have not secured their final papers of citizenship, shall within six months after becoming entitled to final papers of citizenship be required to secure final citizenship papers, and in case of their neglect, or failure so to do, any certificate or license to practice law heretofore issued to such alien person shall after one year from date of the taking effect of this act, forfeit and become null and void, and the clerk of the Supreme Court shall forthwith revoke the same." St. 1921, p. 538.

The order of the board of bar examiners admitting petitioner to the bar was of course ineffective under the terms of this enactment, and it is for that reason that petitioner now asks an order admitting him as of a day prior to the effective date of the amendment. The petition cannot be granted. The section is direct and positive in its terms, and there is no doubt that it covers the case of petitioner. It was for the Legislature, and it is not now for us, to write exceptions into the statute, as our power is merely to judge and not to legislate.

Petition denied.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

59 Cal. App. 494

## SILVERTHORNE v. SIMON et al.

(Civ. 2516.)

(District Court of Appeal, Third District, California. Oct. 26, 1922.)

**1. Sales ⟸266—Conditional agreement to sell does not imply warranty.**

An automobile lease contract providing for payment of certain rental, title to vest in lessee after payment of certain amount, does not imply a warranty as to condition of the vehicle, under Civ. Code, § 1764.

**2. Sales ⟸481—Defective condition of automobile held not in issue in action by conditional vendee in default to recover from vendor taking possession.**

In replevin by purchaser under automobile lease contract, whereby he was to be vested with title upon payment of certain rentals, defendants having retaken the vehicle on failure to make payment of installment, the court properly sustained defendants' objections to

plaintiff's offer to prove that there was a defective rim on one wheel, plaintiff not having set up as the basis of his cause of action that the contract was incomplete or did not express the full agreement between the parties, in view of Civ. Code, § 1625, and Code Civ. Proc. § 1856; such matter not being in issue.

**3. Sales ⊂=479(6)—Retaking motor truck on failure to pay rental due held authorized.**

Where time was made of the essence of an automobile lease contract, whereby lessee was to be vested with title on payment of certain rentals, the lessee could not, by unconditionally tendering an amount due on the first installment, defeat lessors' right to retake the truck on default in payment of the installment, in the absence of a waiver of the default by the lessors.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by J. D. Silverthorne against G. Simon and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Thomas B. Leeper and Dunn & Brand, all of Sacramento, for appellant.

Harris & Lewis, of Sacramento, for respondents.

FINCH, P. J. The complaint alleges that the plaintiff entered into an agreement in writing with the defendants to purchase from them a Kissel truck for the sum of $2,820, of which sum $1,215 was paid on the execution of the agreement and the balance was agreed to be paid in monthly installments of $133.75 on the 15th day of each month, commencing with May 15, 1920; that on the 15th and 18th days of May, 1920, plaintiff tendered the amount of the first installment, but that his offer of payment was refused; that on the 18th day of May, 1920, the defendants wrongfully took possession of the truck and ever since have retained possession thereof. The prayer is for a recovery of the truck or its value and damages for its detention. The answer admits the taking of the truck by the defendants and, to justify such taking, alleges that the plaintiff refused to carry out the terms of the contract. The defendants were given judgment for their costs.

The contract designated as an "automobile lease," provides for the payment of a stipulated monthly rental for the use of the truck until such payments equal the balance of the purchase price, thereupon title to vest in the plaintiff. The contract provides that title shall remain in the defendants until payment of all installments; that—

"If said second party shall make default in the payment of any of the several installments of rent when the same shall fall due, * * * then this lease shall terminate and become void, and all payments previously made by said second party hereunder shall be construed to be and applied as rental for the use of said property for the expired portion of said lease, and said second party hereby expressly waives and relinquishes to the said first party all rights to said moneys so paid, and the right of possession in and to said property, and every part thereof, shall revert to, and vest in, said first party, and said first party shall have the right without notice or service, to take said property and every part thereof and anything attached thereto, from said second party, or any other person, without legal process; said retaking, however, shall not discharge said second party from any liabilities or unpaid installments. * * * It is further expressly understood and agreed that time is expressly declared to be of the essence of this lease."

The plaintiff did not pay the first installment May 15th, as required by the contract, although the Sacramento Bank & Trust Company, holding the contract as collateral security, had notified him to make payment, but on May 17th he tendered payment thereof, on condition, however, that defendants furnish a different rim for one of the wheels; the plaintiff contending that when the truck was delivered to him there were straight side rims on three wheels and a clincher rim on the other, and that the clincher rim damaged the tire used thereon. After engaging in a heated conversation with defendant Bell, the plaintiff left without making payment of the installment. The defendants thereupon took possession of the truck. On May 19th the plaintiff made an unconditional offer to pay the first installment, but was informed that the contract had become void by reason of failure to make payment at the time provided and of the fact that defendants had exercised their right to take possession of the truck. It was finally agreed, however, that upon payment by plaintiff of certain small sums claimed by the defendants to be due them, a new contract would be executed providing for payments on the same terms as in the first and that the truck would be again delivered to plaintiff. Defendants signed a new contract, which is not set out in the record but, in legal effect, appears to have been the same as the first, and sent it to the plaintiff for his signature. The plaintiff declined to sign the new contract, but instituted this action instead. The defendants, a few months later, resold the truck for about the amount of the unpaid balance of the sum agreed to be paid by plaintiff after deducting the commissions paid by them for the resale.

[1] In the absence of circumstances excusing plaintiff's default it is very clear from the express terms of the contract that he had forfeited his right to possession of the truck, prior to the time the defendants took it from him. Appellant contends:

"That defendants by their failure to replace the defective rim were thereby first in default, and being first in default they could not forfeit the contract because of plaintiff's failure to pay the first installment."

The contract contains nothing in the nature of a warranty, and the mere conditional agreement to sell does not imply a warranty. Civ. Code, § 1764. The plaintiff introduced an order dated April 8, 1920, reading as follows:

"Customer's Deposit Receipt No. ———. The undersigned hereby orders from Simon & Bell Company one general delivery automobile, Kissel body type, with standard equipment. * * * (Here follows terms of payment, etc., not material to the issues in this case.) There are no understandings, agreements, representations or warranties express or implied, not specified herein respecting the goods hereby ordered. Taken in trade one 1919 Dodge Del. Amount of allowance $1215.

"J. D. Silverthorne.

"* * * This order subject to the approval of sales manager or general manager.

"Salesman: R. U. Spencer."

[2] April 10th the contract alleged in plaintiff's complaint was executed. The contract purports to be a complete agreement respecting the rights of the parties. Plaintiff sets it up as the basis of his cause of action without any allegation that it is incomplete or that it does not express the full agreement between the parties. "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." Civ. Code, § 1625. The order of April 8th was admitted in evidence over defendants' objection. "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: (1) Where a mistake or imperfection of the writing is put in issue by the pleadings; (2) where the validity of the agreement is the fact in dispute. * * *" Code Civ. Proc. § 1856. If the clincher rim was not "standard equipment" as provided in plaintiff's order for the truck, he would have been justified in refusing to accept the truck or to execute the agreement of conditional sale, but having executed the agreement and accepted the truck without any objection on account of the defective rim, he could not, under the facts pleaded, refuse payment because of such defect. The court properly sustained defendants' objections to plaintiff's offer to prove the defective condition of the rim on the ground that such defect was not in issue.

[3] Appellant contends that the defendants did not exercise their option to forfeit plaintiff's rights under the contract and that therefore plaintiff's unconditional tender of the amount due on the first installment, made after the defendants had retaken possession of the truck, was effective to prevent a forfeiture. The contract provides that "said retaking, however, shall not discharge said second party from any liabilities or unpaid installments." Appellant argues that defendants' "election to retake possession merely gave them the possession and did not terminate or forfeit the contract." The contract provides that upon default "in the payment of any of the several installments of rent when the same shall fall due * * * then this lease shall terminate and become void, * * * and said first party shall have the right without notice or service, to take said property and every part thereof and without legal process." As said in Andrews v. Karl, 42 Cal. App. 513, 517, 183 Pac. 838, 840, "where time is made of the essence of the contract, terminating it upon a failure to comply strictly and punctually with its conditions, its effect is to entail a forfeiture by sheer force of the contract itself, upon the mere default of the purchaser by his failure to make payments at the times and in the manner that he obligated himself to, provided, however, that the vendor has not waived the default or consequent forfeiture." Plaintiff was in default at the time he made the conditional tender of payment, and no act of his thereafter, in the absence of a waiver of the default by the defendants, could defeat their right to retake the truck. Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17. Appellant relies on Liver v. Mills, 155 Cal. 459, 101 Pac. 299, and Muncy v. Brain, 158 Cal. 300, 110 Pac. 945, to sustain his contention that he had a right to complete the purchase of the truck, notwithstanding his default. In view of the fact that time is made of the essence of the contract and that defendants did not waive the default, the cases relied on sustain the judgment rather than appellant's contention.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

(59 Cal. App. 536)

## In re KNAUFT'S ESTATE.

## KNAUF et al. v. STAIN et al.

(Civ. 4083.)

(District Court of Appeal, Second District, Division 1, California. Oct. 30, 1922. Hearing Denied by Supreme Court Dec. 28, 1922.)

**1. Judgment ⟸570(3)—Dismissal of proceedings to revoke probate before final submission not bar to new proceeding.**

Code Civ. Proc. § 581, subd. 4, authorizing a party to dismiss his action at any time before final submission of a cause, which judgment of dismissal shall not bar the recommencement of the action on the same cause, applies to proceedings in probate for the revocation of the probate of a will.

**2. Limitation of actions ⟸114—Suspension of limitations against alien enemies during war applies to probate proceedings.**

The provision of Code Civ. Proc. § 354, that, when a party is an alien subject or citizen of a country at war with the United States, the time of the continuance of the war is not part of the period limited for the commencement of the action, though part of the chapter devoted to provisions respecting the time of the commencement of actions, deals with the general subject of disability, and is applicable to proceedings in probate, so that the right to institute proceedings for the revocation of a will is not limited to one year after the order of probate by Code Civ. Proc. § 1333, where the contestants were alien enemies when the order was entered.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

In the matter of the estate of William Knauft, deceased. Proceeding by Carl Knauf and others against Frank Stain and another, individually and as executors, to revoke an order admitting the will to probate. From a judgment dismissing the proceedings at the request of contestants without prejudice, contestees appeal. Affirmed.

D. Joseph Coyne, of Los Angeles, for appellants.

Karl L. Ratzer, Turner & Grainger, and Charles W. Fourl, all of Los Angeles, for respondents.

JAMES, J. In this case the appeal is taken by the defendants from the judgment of dismissal entered on the motion of the plaintiffs. The proceeding was brought by certain alleged heirs of William Knauft, deceased, for the purpose of securing the revocation of an order admitting to probate the will of said deceased. Defendants demurred to the petition and moved to strike it from the files. The demurrer was overruled, and the motion denied.

It is recited in the judgment that the proceeding was called for trial on the 25th day of January, 1922, and that "on the 30th day of January, 1922, when said cause was reconvened for trial, and before the submission thereof, the said plaintiffs, by their counsel, in open court moved for a dismissal of said cause and petition, without prejudice, which said motion of plaintiffs was granted by the court, over the objection of the defendants thereto." The judgment dismissing the action declared such dismissal to be without prejudice to the filing of a new petition, and it is particularly to the latter condition that appellants address their complaint.

[1] It is insisted first that the court had no authority to so qualify the judgment of dismissal as to give to the petitioners the right to further prosecute a proceeding for the revocation of the probate order. It seems to be well settled under our practice that a party may at any time, before final submission of a cause dismiss the same (section 581, Code Civ. Proc. subd. 4), and that the judgment in that case will not operate as a bar to the recommencement of an action based upon the same cause (Merritt v. Campbell, 47 Cal. 542; Westbay v. Gray et al., 116 Cal. 660, 48 Pac. 800), and there seems to be no reason why the same rule is not applicable to proceedings in probate.

[2] This conclusion would seem to put an end to appellants' case here. It is urged, however, that on this appeal the appellants have the right to have considered the rulings of the court made on their demurrer and motion to dismiss. Without admitting that the orders made on the demurrer and motion are subject to review here, the points covered in the argument of appellants under that head may be briefly considered. Their demurrer was on the ground that the proceeding was started too late, having been commenced more than one year after the making of the order admitting the will to probate. Section 1333, Code of Civil Procedure, provides that, if no person within one year after the probate of the will contests the same, the order of probate is conclusive. The section concludes with the following provision:

"Saving to infants and persons of unsound mind, a like period of one year after their respective disabilities are removed."

The petitioners, in the attempt to show that they were not foreclosed from prosecuting their proceeding by reason of the above-mentioned provisions, alleged that at the time the will was admitted to probate they were subjects of and residents in the empire (later the republic) of Germany, and that a state of war then existed between the United States and that country, which war continued up to the 2d day of July, 1921, because of which condition they were unable to sooner present their petition to the court. Section 354 of the Code of Civil Procedure provides as follows:

"When a person is an alien subject, or citizen of a country at war with the United States, the time of the continuance of the war is not part of the period limited for the commencement of the action."

While this section is a part of the chapter devoted to provisions respecting the time of the commencement of actions, in its nature it deals with the general subject of disability within the particular classes defined, and is, for that reason, in its nature applicable to proceedings in probate. In the Estate of Henrichs, 180 Cal. 175, 179 Pac. 883, the Supreme Court held that an alien enemy appearing in a probate proceeding was entitled to a continuance until after peace had been declared between Germany and the United States. The court referred there to provisions of the Trading with the Enemy Act (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3115½a–3115½j), and said:

"It is unnecessary to consider whether or not the alien enemy was a defendant in an action at law or in equity in a technical sense, because it was evidently the purpose of Congress to permit an alien enemy to maintain his rights in the courts of the country against an actual assault thereon, as in this case. (But see Code Civ. Proc. §§ 1063, 1716.)"

The particular provision of the act of Congress referred to declared that—

"Nothing in this act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or an ally of enemy prior to the end of the war. * * * And provided further, that an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him." U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3115½d.

The judgment appealed from is without error and should be affirmed, regardless of the questions suggested as being involved under the rulings on demurrer and motion to strike the petition from the files.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

---

59 Cal. App. 438

## DAVIS v. FELL et al. (Civ. 3933.)

(District Court of Appeal, Second District, Division 1, California. Oct. 23, 1922. Rehearing Denied Nov. 18, 1922. Hearing Denied by Supreme Court Dec. 22, 1922.)

**1. Judgment ⟸829(3)—Judgment of federal court held res judicata as to rights under Desert Land Act.**

Where in ejectment it appeared that defendant's predecessor in interest made entry of the land under the Desert Land Act (U. S. Comp. St. §§ 4674–4678), and after having made improvements contracted to sell the land to defendant, but before patent was issued plaintiff filed a contest, whereupon the entry of defendant's predecessor was declared fraudulent and preference granted to plaintiff, who had filed a homestead claim, a judgment in a suit in equity thereafter brought that the contest made by the land office was incorrectly decided in favor of plaintiff was res judicata as to the rights of the parties, notwithstanding that thereafter a patent had been granted to plaintiff.

On Petition for Rehearing.

**2. Public lands ⟸110—Vested right to patent held equivalent to patent issued.**

The right to a patent once vested is treated by the government when dealing with the public lands as equivalent to a patent issued.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Moses B. Davis against Arthur S. Fell and another. Judgment for plaintiff, and defendant named appeals. Reversed.

L. B. Stanton, of Los Angeles, for appellant.

C. L. Brown, of El Centro, for respondent.

JAMES, J. This action, as the complaint formulated it, was one of ejectment to recover possession of a tract of 160 acres of land in the county of Imperial. Damages in the sum of $3,000 as the value of the rents was also prayed for by the plaintiff. The judgment awarded the relief demanded, including the full amount of damages asked for, from which judgment the defendant A. S. Fell has taken his appeal.

In answer to the plaintiff's complaint, appellant denied the right of the plaintiff to possession of the property and alleged such right to be in appellant as successor in interest of Levi C. Vickrey, deceased. An additional defense was presented by the answer of appellant, to wit, that there had been an adjudication of the matters in controversy in an action brought by the same plaintiff against appellant in the federal District Court.

In a cross-complaint appellant joined Mary L. Vickrey, as administratrix of the estate of Levi C. Vickrey and also as for her own interest, and the prayer of the cross-complaint was that there be a determination made that appellant was entitled to possession of the property as against both the plaintiff and the Vickrey interests. Mary L. Vickrey, in her individual capacity, answered the cross-complaint and on her part asserted a right to have possession of the property. The facts as alleged constituting her defense against the plaintiff's claim were in the main identical with the facts alleged by appellant, except that she did not assert a defense based upon a prior adjudication in the same controversy.

Plaintiff's sole claim of right to possession of the land was based upon patent issued by the government of the United States on January 14, 1919, under an alleged homestead entry made by the said Davis. The further facts in connection with the circumstances under which the paper title was acquired and as they affect the appellant are these: On October 16, 1901, Levi C. Vickrey made entry under the Desert Land Act (U. S. Comp. St. §§ 4674–4678) of 240 acres of land, which was at that time property of the United States and open for entry. On April 25, 1903, Vickrey entered into an agreement with appellant to sell to appellant 160 acres of that land, and at about the same time made a contract with a man named Whipple to sell him the remaining 80 acres. Appellant immediately took possession of the 160 acres, which was arid and worthless except as it might be made productive by irrigation. Appellant made improvements thereon, obtained water, and cultivated the land, expending in such endeavors approximately $5,000. He erected fences and occupied the land as a home for a number of years continuously after receiving his contract from Vickrey, and by 1908 the land had become fully productive and was worth many times the value it had when Vickrey made his entry thereon. Appellant paid the sum of $400 to Vickrey upon receiving his contract, and he had made, in addition thereto, by June, 1909, 36 payments of $15 each. Subsequent payments of other amounts have been made. In July, 1905, Vickrey made final proof under his entry and final payment of all moneys due the government, which moneys were accepted and receipt issued. His proof as to improvements was based upon appellant's expenditures and labor. In November, 1908, plaintiff Davis filed in a local land office a contest by which he sought to have nullified the right of Vickrey to a patent, upon the ground that the entryman, before making final proof, had made an unlawful contract to sell the land to appellant. The decision of the officers of the local land office, and the decision of the commissioner on appeal, and also the decision of the Secretary of the Interior, sustained the contest, declared the Vickrey entry to be fraudulent and unlawful, and granted the right of preference to make entry to plaintiff, Davis, who on January 30, 1913, filed homestead claim. The property being occupied by appellant, Davis was unable to secure possession in order to satisy the homestead requirements, and on October 27, 1915, he commenced an action in equity against this appellant and his wife and daughter in the District Court of the United States for the Southern District of California. In that action this plaintiff alleged the necessary jurisdictional facts showing the case involved a construction of the land laws of the United States so as to entitle the complainant there to pursue the remedy asked for. In that action a mandatory injunction was asked for requiring the defendant A. S. Fell (appellant here) to cease holding possession of the property. The right of the complainant in the equity suit was based wholly upon the proceedings had in connection with and subsequent to the contest made of the Vickrey entry. That action necessarily involved a consideration of the acts and decisions of the land officials which have hereinbefore been referred to. All of those things clearly appeared from the evidence heard, and the certified record of the proceedings had in the federal court, which record was offered in evidence in this action by the appellant. The court refused to admit the evidence to show the making of the former judgment, and for that error the appellant first claims the right to a new trial.

[1] It seems fairly to be inferred from the judgment of the court as made in the present case that the trial judge concluded that because the government in January, 1919 (a little more than a year after the date of the federal decree), issued its patent to plaintiff, Davis, the judgment in the federal case was not res adjudicata because the granting of the patent evidenced a new and different right in Davis from that which was considered by the federal court. In taking that position we think the trial court was in error. The effect of the federal decision was to hold that the land officials incorrectly decided the contest made by Davis, and held that the Vickrey entry and the contract of appellant were good. The court had jurisdiction to review the action of the officers of the Land Department. Gage v. Gunther, 136 Cal. 338, 68 Pac. 710; 89 Am. St. Rep. 141; Sanders v. Dutcher, 168 Cal. 353, 143 Pac. 599; McLaren v. Fleischer, 181 Cal. 607, 185 Pac. 967. Whether the questions were correctly decided is not open to discussion here. The judgment of the federal court, rendered within its jurisdiction, was subject to direct attack only. As Davis' right to a patent depended solely upon the correctness of the decision made in the contest proceeding, once those decisions were adjudicated to be null there would be no basis for the issuance of the Davis patent; hence the acquiring of such a patent would give no new right of action from that possessed by Davis when the judgment was rendered in the equity suit by the federal court. Byers v. Neal, 43 Cal. 210; Shinn v. Young, 57 Cal. 525; Thrift v. Delaney, 69 Cal. 188, 10 Pac. 475; Phelan v. Tyler, 64 Cal. 80, 28 Pac. 114. Under the federal court decree, as it related to the facts concerning the Vickrey entry, a patent should have been issued in conformity with law. It was admitted that final proof as well as money payments had been made by Vickrey; hence nothing remained in the government but the naked legal title; there was no beneficial interest left which governmental agen-

cies had the right to control. The required act of issuing a patent was a ministerial one only and devolved as a mandatory duty upon the officers charged with the administration of the Land Department. U. S. v. Grover (D. C.) 227 Fed. 181; Witcher v. Conklin, 84 Cal. 499, 24 Pac. 302; Graves v. Hebbron, 125 Cal. 400, 58 Pac. 12; Merrill v. Clark, 103 Cal. 367, 37 Pac. 238; Sanders v. Dutcher, supra.

The question of any reciprocal rights or equities existing between appellant Fell and Mrs. Vickrey would be immaterial to the plaintiff. The whole foundation of plaintiff's right to possession of the land utterly failed when the federal court determined that his contest made as against the Vickrey entry was wrongly decided. It seems unnecessary to go to any greater length in a discussion of questions argued in the briefs as between Davis and Fell. For the error in refusing to admit the judgment records, a new trial must be ordered. At that trial it may be assumed that such record will be introduced, and that the evidence will show plaintiff to be without right to the remedy sought in this action. The case as between A. S. Fell and Mrs. Vickrey will need further attention at the hands of the trial court. It appeared here in evidence that A. S. Fell had offered to pay the remaining portion of the price agreed to be rendered to Mrs. Vickrey upon condition that she secure to him title to the land. He offers in his cross-complaint to do equity toward Mrs. Vickrey as the court may decree. It was defendant A. S. Fell's contention that he had been compelled to purchase water stock in lieu of that agreed to be delivered by his vendor. If such was the case, a proper allowance should be made as a credit. As between A. S. Fell and Mrs. Vickrey the court should adjust the account. Upon the adjustment figures being arrived at, decree should be rendered requiring the transfer of title to the land by plaintiff and Mrs. Vickrey to said A. S. Fell upon the condition that Fell should first pay to Mrs. Vickrey any amounts of money found due to her.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

On Petition for Rehearing.

PER CURIAM. [2] In his petition for rehearing filed herein respondent specially insists that the decree of the federal District Court pleaded in bar by defendant A. S. Fell was rendered without jurisdiction because the action was brought there before patent issued, and cites an opinion of a District Court judge in Northern Lumber Co. v. O'Brien et al. (C. C.) 124 Fed. 819. In that case the action was brought while the controversy as between different claimants was still pending and undetermined before the Commissioner of the Land Office. This case differs from that, for final decision had been made in the Land Department adverse to the Fell interests before the action was brought in the District Court by respondent, resulting in the decree which was pleaded in bar. As to the Fell interests, the right to a patent had accrued prior to the bringing of that action. We cite two decisions of the United States Supreme Court which are applicable and fully answer the contention made by respondent. In Stark v. Starr et al., 6 Wall. 402, 18 L. Ed. 925, the court said:

"The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued."

And in Barney v. Dolph, 97 U. S. 652, 24 L. Ed. 1063:

"When the right to a patent once became vested in a settler under the law, it was equivalent, so far as the government was concerned, to a patent actually issued."

The petition for rehearing is denied.

---

59 Cal. App. 499

## Ex parte TUNG FONG. (Cr. 664.)

(District Court of Appeal, Third District, California. Oct. 26, 1922.)

**1. Criminal law ⇐996(1)—Police court can amend minutes to conform to sentence pronounced.**

The police court of the city of Sacramento had authority to amend its minutes to make them recite that a judgment of guilty was rendered against defendant prior to the time sentence was pronounced against him in another case, so as to make the minutes conform to the sentence actually pronounced, whether the police court is considered as a court of record or not.

**2. Criminal law ⇐1210—Police court can impose cumulative sentences under statute.**

There is nothing in Pen. Code, § 669, providing for cumulative sentences under certain circumstances, which would deprive police courts of power to impose cumulative sentences within the limitation of the section.

**3. Criminal law ⇐1210—Power to impose cumulative sentences given without regard to nature of offense.**

The power to impose cumulative sentences is given generally, without regard to the nature of the offense of which a defendant stands convicted, and the crimes punished need not be under the same, but may be under entirely different statutes.

**4. Criminal law ⇐1210—Cumulative sentence statute construed.**

Pen. Code, § 669, providing for cumulative sentences under certain circumstances does not purport to prescribe the procedure for

prosecutions thereunder, but merely defines and forbids certain acts and prescribes penalties for their commission.

**5. Criminal law ⟸1210—To justify cumulative sentences, a second offense must have been committed after conviction of first.**

Under Pen. Code, § 669, providing for cumulative sentences in order to justify a heavier penalty, the second offense must have been committed after conviction of the first.

Application by Tung Fong, also known as Tong Fong, for a writ of habeas corpus to be directed to the sheriff of Sacramento county, to secure release after conviction for violation of the state poison law. Writ denied.

Frank L. Gafney and H. T. Hiatt, both of Sacramento, for petitioner.

Hugh B. Bradford, Dist. Atty., and Markham Johnston, Asst. Dist. Atty., both of Sacramento, for respondent.

FINCH, P. J. June 5, 1922, in the police court of the city of Sacramento, in case No. 1227, the petitioner was adjudged guilty of having had a preparation of morphine in his possession on the 1st day of June, 1922, contrary to the provisions of the act of 1907 and amendments thereto, regulating the sale and use of poisons. Stats. 1907, p. 124. Thereafter on the same day, in case No. 1228, he was adjudged guilty of having had a preparation of cocaine in his possession on the 1st day of June, 1922, contrary to the provisions of the act. After both convictions he was sentenced under the first charge to pay a fine of $100 and to be imprisoned in the county jail for the term of 90 days, and under the second charge he was sentenced to imprisonment in the county jail for 90 days. The judgment in the latter case provided:

"The term of imprisonment herein to commence at the expiration of the term of imprisonment imposed upon said defendant in the case of The People v. Tong Fong, No. 1227."

The court minutes of June 5th did not recite that the judgment of guilty in case No. 1228 was rendered prior to the time sentence was pronounced in case No. 1227, and October 4, 1922, on motion of the prosecution, the court amended its minutes of June 5th to recite that sentence was not imposed in case No. 1227 until after judgment of guilty was rendered in case No. 1228. Petitioner served the full term of imprisonment imposed in case No. 1227, and then filed his petition herein for a writ of habeas corpus.

Petitioner contends that the order of the police court purporting to amend its minutes is null and void. In Wildenhayn v. Justice Court, 34 Cal. App. 306, 167 Pac. 305, it was held that a justice's court, as well as a court of record, has the inherent power to amend its records so as to make them speak the truth with respect to the actual orders it has made. Article 6, § 12, of the state Constitution provides:

"The Supreme Court, the District Courts of Appeal, the superior courts, and such other courts as the Legislature shall prescribe, shall be courts of record."

[1] The Sacramento city charter, duly approved by the Legislature, provides that the police court "shall be considered a court of record, and shall have a seal." The court had authority to amend its minutes to conform to the sentence actually pronounced, whether considered as a court of record or not.

[2] It is argued that section 669 of the Penal Code, providing for cumulative sentences under certain circumstances, is not applicable to cases tried in police courts. Prior to the enactment of that section it was held that police courts had jurisdiction to impose cumulative sentences. People v. Forbes, 22 Cal. 136. Whether applicable to proceedings in police courts or not, there is nothing in section 669 which would deprive such courts of power to impose cumulative sentences within the limitations of that section. If it does not apply to such courts, then manifestly it does not curtail the powers exercised by them prior to its enactment, while if it does so apply, then it merely limits the jurisdiction of such courts to impose cumulative sentences to the cases therein mentioned, just as it does that of superior courts.

[3, 4] It is claimed that the act under which petitioner was prosecuted is a special statute containing a complete system of procedure, and that, since the act does not provide for cumulative sentences, the court had no jurisdiction to impose such. No reason appears why this act should have so provided any more than any other penal statute. The power to impose cumulative sentences is given generally, without regard to the nature of the offenses of which a defendant stands convicted. The two or more crimes referred to in section 669 need not be of the same character. The prosecutions therefor may be under entirely different statutes. The statute in question here does not purport to prescribe the procedure for prosecutions thereunder, but merely defines and forbids certain acts and prescribes penalties for their commission.

It is suggested that the offenses charged in the two complaints were in fact but a single act of possession of the two forbidden drugs at the same time, and therefore constituted but a single offense. It is not necessary to decide whether the possession of the two drugs at one time would constitute a single offense or two offenses, because the record does not show but that the defendant may have had possession of one drug at one

time during the day and the other at another time.

The statute (St. 1921, p. 978, § 1) provides:

"Any person convicted under section eight of this act for having in possession any of the narcotic drugs or their derivatives mentioned therein, shall upon the first conviction be deemed guilty of a misdemeanor, and punished by a fine of not more than two hundred dollars, or not more than ninety days imprisonment in the city or county jail, or by both such fine and imprisonment; for the second and each subsequent offense of which said person so convicted shall be found guilty, said person shall be deemed guilty of a felony and punished by imprisonment in the state prison for not less than one year, nor more than five years."

[5] Some authorities hold that under such a statute the heavier penalty is to be imposed, although the second offense was committed before the defendant was convicted of the first. 8 R. C. L. 275. If that rule is to prevail here, then the second offense of which petitioner was convicted was a felony of which the police court had no jurisdiction. It is thought, however, that the correct rule, and the one sustained by the greater weight of authority, is that in order to justify the heavier penalty the second offense must have been committed after conviction of the first. In city of Mt. Sterling v. Buss, 216 Ill. App. 6, the ordinance under consideration provided that any person convicted of violating its provisions "shall forfeit and pay to said city the sum of twenty-five dollars for each first offense, and the sum of two hundred dollars for each and every offense thereafter." The court said:

"The words 'each first offense' include all violations of the ordinance proven on the first prosecution of a person charged with having violated it. The words 'each and every offense thereafter' have reference to subsequent violations. * * * A second offense, carrying with it a severer penalty, is not committed in law until there has been a conviction for a first offense."

In State v. Savage, 86 W. Va. 655, 104 S. E. 153, the court said:

"A defendant cannot be guilty of a second offense until it has been judicially determined that he has sinned once before."

In Commonwealth v. McDermott, 224 Pa. 363, 73 Atl. 427, it is said:

"The severer penalty is imposed by the Legislature because that imposed for the first offense was ineffectual. The second offense, carrying with it severer penalties, is therefore not committed in law until there has been judgment for the first."

See, also, People v. Bergman, 176 App. Div. 318, 162 N. Y. Supp. 443; Kinney v. State, 45 Tex. Cr. R. 500, 78 S. W. 225, 79 S. W. 570; Muckenfuss v. State, 55 Tex. Cr. R. 216, 117 S. W. 853; Hyser v. Commonwealth, 116 Ky. 410, 76 S. W. 174; Brown v. Commonwealth, 119 Ky. 670, 61 S. W. 4.

The writ is discharged, and the petition denied.

We concur: HART, J.; BURNETT, J.

---

(59 Cal. App. 396)

## PEOPLE ex rel. DEVINE v. ELKUS et al.
(Civ. 2448.)

(District Court of Appeal, Third District, California. Oct. 23, 1922. Hearing Denied by Supreme Court Dec. 22, 1922.)

**1. Municipal corporations ⇐56—Specific provision in Constitution controls general as to municipal powers.**

The provision of Const. art. 11, § 8, providing that a municipality containing a population of more than 3,500 inhabitants may frame a charter for its own government consistent with and subject to the Constitution, applies to and qualifies every power conferred upon the chartered city; but, notwithstanding such restriction, if the municipality is given express authority by the Constitution to do a particular thing contrary to some general provision thereof, the more specific provision controls the general.

**2. Elections ⇐7 — Surrender or abridgment of right to vote must clearly appear.**

To justify a court in holding that the people of the state have surrendered or abridged their right to vote at all elections, their intent to do so must appear with great certainty and clearness.

**3. Elections ⇐15 — Proportional representation system of voting violative of Constitution.**

The provision of the Sacramento Charter adopting the Hare system of voting, that is, the proportional representation system of voting, is violative of the elector's constitutional right to vote at all elections, under Const. art. 11, § 8½; sections 6 and 8 being inapplicable.

**4. Municipal corporations ⇐147—Members of city council elected by invalid method de facto officers.**

Members of the city council of Sacramento elected under the proportional representation system of voting, which method of election is unconstitutional, became de facto officers whose official acts within the scope of their authority, as defined by the Charter, are and will continue to be valid until they are legally deposed from office; former officers having voluntarily surrendered their offices.

**5. Municipal corporations ⇐149(1) — Offices held to become vacant after surrender.**

Where members of city commission of Sacramento voluntarily surrendered their offices at the time a new charter went into effect and thereafter for a period of three consecutive months ceased to discharge the duties of their offices, the same became vacant under Pol. Code, § 996.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Proceeding by the People of the State of California, on the complaint and relation of James H. Devine, a private party, for the removal of Albert Elkus and others from office. Judgment for defendants, and relator appeals. Reversed, with directions.

U. S. Webb, Atty. Gen., G. W. Bedeau, of Marysville, and Ray T. Coughlin, of Sacramento, for appellant.

R. L. Shinn, Devlin & Devlin, Elliott & Atkinson, and Clinton E. Harber, all of Sacramento, for respondents.

FINCH, P. J. As the result of an election held on the 3d day of May, 1921, the defendants were declared elected members of the city council of the city of Sacramento. They entered upon the discharge of their duties as such and have continuously thereafter acted as such city council. This suit was instituted to oust them from office on the ground that the charter provisions under which they were elected are unconstitutional. The defendants' demurrer to the complaint was sustained, and, the plaintiff declining to amend, judgment was entered for the defendants.

The Sacramento charter provides for the election of the city council "by the proportional representation system" known as the Hare system of voting. The only question presented by this appeal is whether such proportional representation system is constitutional. Section 273 of the charter provides:

"The full name of all regularly nominated candidates shall be printed on the official ballots in the alphabetical order of the surnames. The ballots shall be marked according to the following instructions, which shall be printed at the top of each ballot under the heading of 'Directions to Voters.' Put the figure 1 opposite the name of your first choice. If you want to express also second, third, and other choices, do so by putting the figure 2 opposite the name of your second choice, the figure 3 opposite the name of your third choice, and so on. In this way you may express as many choices as you please. The more choices you express, the surer you are to make your ballot count for one of the candidates you favor. This ballot will not be counted for your second choice, unless it is found that it cannot help your first; it will not be counted for your third choice unless it is found that it cannot help either your first or your second, etc. A ballot is spoiled if the figure 1 is put opposite more than one name."

The complicated system of counting the votes and ascertaining the result of the election under the Hare system, as provided by the charter, is substantially set forth in detail in Wattles v. Upjohn, 211 Mich. 514, 179 N. W. 335, and need not be here repeated. For the purposes of this opinion it is sufficient to say that, though nine members of the city council were to be elected at large, no ballot could be or was counted for more than one candidate, whether counted as the elector's first, second, or additional choice. In the language of counsel for appellant, "when once counted it becomes dead." Candidates are elected, not by a majority or a plurality, but by a "quota or constituency" of votes. Section 274 of the charter directs the separation of the ballots into "valid" and "invalid" lots, and provides:

"(d) The whole number of valid ballots shall then be divided by a number greater by 1 than the number of seats to be filled. The next whole number larger than the resulting quotient is the quota or constituency that suffices to elect a member. (e) All candidates the number of whose votes on the first count equal or exceed the quota shall then be declared elected. (f) All votes obtained by any candidate in excess the quota shall be termed his surplus."

Elaborate provision is made for the count of second choice votes appearing on "transferable ballots," viz. surplus ballots, if any, and ballots containing first choice votes for "the candidate lowest on the poll," who is declared defeated. Third and additional choice votes are then successively counted by a similar process, where necessary to determine the result of the election, each candidate being declared elected when the number of his votes equals the quota. The count ends "when candidates to the number of seats to be filled have received a quota, * * * or when the number of continuing candidates is reduced to the number of seats still to be filled," such continuing candidates then being declared elected whether they have received the full quota or not.

Appellant contends that the charter provisions in question are in conflict with section 1, art. 2, of the state Constitution, which provides that every qualified elector "shall be entitled to vote at all elections which are now or may hereafter be authorized by law." No one would contend that a law would be valid which deprived a qualified elector of the right to vote at an election. "In this country, the right to vote is recognized as one of the highest privileges of the citizen. It is so recognized not only by the citizen, but by the law; and any attempted infringement by legislative power upon that right as granted by the constitution is idle legislation." Spier v. Baker, 120 Cal. 370, 375, 52 Pac. 659, 661 (41 L. R. A. 196). The constitutional right to vote would be a barren privilege if the Legislature could limit its exercise to one office or one proposition to be voted on. The right to vote "at all elections" includes the right to vote for a candidate for every office to be filled and on every proposition submitted. The election of nine members of the city council is the election of persons to nine offices as fully as if the offices were distinct in name and in the duties

to be discharged, and it is as far beyond the legislative power to limit the elector to the right of voting for one candidate therefor as it would be in the election of state or county officers. In State v. Constantine, 42 Ohio St. 437, 51 Am. Rep. 833, the statute under consideration authorized the election of four commissioners, and provided that—

"No elector shall at any election vote for more than two persons for such commissioners, and any ballot containing the names of more than two persons for said office shall not be counted for any of the names thereon, and the four persons receiving the highest number of votes shall be declared elected."

The Constitution provided that "the election and appointment of all officers * * * not otherwise provided for by this Constitution * * * shall be made in such manner as may be directed by law" (Const. Ohio, art. 2, § 27), and that every qualified elector "shall be entitled to vote at all elections" (article 5, § 1). In holding the statute unconstitutional, the court said:

"By this article we have no doubt that each elector is entitled to vote for each officer, whose election is submitted to the electors, as well as on each question that is submitted."

In the similar case of McArdle v. Mayor, etc., of Jersey City, 66 N. J. Law, 590, 49 Atl. 1013, 88 Am. St. Rep. 496, it is said:

"On its face, this act is plainly an infringement of that constitutional provision which secures to qualified voters the elective franchise."

Like conclusions were reached in Bowden v. Bedell, 68 N. J. Law, 451, 53 Atl. 198, and In re Opinion of Judges, 21 R. I. 579, 41 Atl. 1009. In apparent conflict with the foregoing authorities is the case of Commonwealth v. Redder, 171 Pa. 505, 33 Atl. 67, 33 L. R. A. 141. The statute there held constitutional directed the election of seven judges of the superior court, and provided that "no elector may vote * * * for more than six candidates upon one ballot for the said office." Act June 24, 1895 (P. L. 212). The Constitution provided that every elector "shall be entitled to vote at all elections." Article 8, § 1. The act was upheld, by a divided court, on the ground that similar statutes in that state had been in force and undisputed for many years. In the majority opinion it is said that the construction therein given the constitutional provision "was acquiesced in by the bar, the courts, and the Legislature for a period of 35 years. * * * In view of this long-continued interpretation of our Constitution, we do not think it necessary to discuss the authorities cited from other states." In view of the grounds on which the decision was based, the case cannot be considered authority where such grounds do not exist.

The statutes considered in the foregoing cases provided for minority representation by limiting the elector's right to vote. In furtherance of the same object, some states have provided for cumulative voting by allowing the elector to cast as many votes for one candidate as there are persons to be elected, or to distribute the same among the candidates as he may see fit. The Constitution of Illinois so provides, and, of course, the provision is upheld by the courts of that state. People v. Deneen, 247 Ill. 289, 93 N. E. 437. The Constitution of this state provides for cumulative voting in the election of directors of corporations. Const. art. 12, § 12. In the absence of constitutional authorization, statutes permitting cumulative voting in public elections have been held invalid. Maynard v. Board of Canvassers, 84 Mich. 228, 47 N. W. 756, 11 L. R. A. 332; concurring opinion in State v. Thompson, 21 N. D. 426, 131 N. W. 231. In Maynard v. Board of Canvassers, the court said:

"No reason can be given why, under our Constitution, one elector should be entitled to vote twice or seven times for any particular person to represent him in the Legislature, when any other elector, who desires to exercise the right which the Constitution gives him to vote for every person allowed by law to represent him in the Legislature, is permitted to vote but once. * * * It is no answer to say that he, too, may forego the right of an elector to vote for the number of representatives which the law permits in cities entitled to more than one representative; for to do so he is compelled to relinquish a constitutional right, and his right as an elector is in this respect abridged."

Preferential systems of voting have been upheld where the elector is permitted to vote his first choice for as many candidates as there are offices to be filled, in the following cases: Adams v. Lansdon, 18 Idaho, 483, 110 Pac. 280, where the statute provided that electors must "vote for both first and second choice if there are more than twice as many candidates as there are positions"; State v. Nichols, 50 Wash. 508, 97 Pac. 728, where the elector could cast as many first-choice votes as there were positions to be filled; Farrell v. Hicken, 125 Minn. 407, 147 N. W. 815, L. R. A. 1915B, 401, where the statute provided that "no vote shall be counted on the election of commissioners unless the voters mark as many first choices as there are commissioners to be elected"; and Orpen v. Watson, 87 N. J. Law, 69, 93 Atl. 853, where the statute provided for the election of five commissioners at large and required every elector to express a first choice for each office to be filled under penalty of having his ballot declared void. In State v. City of Portland, 65 Or. 273, 133 Pac. 62, the city charter provided for the election of commissioners at large and that—

"When the number of candidates is more than three times the number of offices to be filled, each voter shall have the right to vote for as many first choice candidates as there are offices to be filled, and as many second choice candidates as there are offices to be

filled, and as many third choice candidates as there are offices to be filled."

The system was upheld under a constitutional provision as follows:

"Provisions may be made by law for the voter's direct or indirect expression of his first, second or additional choices among the candidates for any office." Const. art. 11, § 16.

A statute similar to the foregoing charter provisions of the city of Portland was held unconstitutional in Brown v. Smallwood, 130 Minn. 492, 153 N. W. 953, L. R. A. 1916B, 931, Ann. Cas. 1917C, 474. The court said:

"The preferential system directly diminishes the right of an elector to give an effective vote for the candidate of his choice. If he votes for him once, his power to help him is exhausted. If he votes for other candidates he may harm his choice, but cannot help him. * * * A qualified voter has the constitutional right to record one vote for the candidate of his choice, and have it counted one. This right is not infringed by giving the same right to another qualified voter opposed to him. It is infringed if such other voter is permitted to vote for three opposing candidates."

In Wattles v. Upjohn, 211 Mich. 514, 179 N. W. 335, the Hare system of voting, substantially as provided in the Sacramento charter, is declared unconstitutional. The court said:

"The Hare system limits his [the voter's] power to express his preference 'in this manner' to but one candidate of the seven, only permitting him to express a second choice for one other, and so on by numerically dwindling and weakening choices until the elector has expressed thus 'as many choices as you (he) please.' As said in the Maynard Case, 'it is not in the power of the Legislature (nor a city adopting a charter under the Home Rule Act) to give his preference or choice, without conflicting with these provisions of the Constitution, more than a single expression of opinion or choice'; and he has the right to express that single choice as to each of the officers to be elected in his district. While each voter can under the Hare system vote for all candidates to express sequential choices as provided, it is evident that his vote is primarily and positively effective for only one candidate."

At the oral argument, counsel for respondents filed a typewritten copy of the decision of the Court of Appeals of the Eighth District of Ohio, rendered May 6, 1922, in the case of Reutener v. City of Cleveland, upholding the Hare system as embodied in the Cleveland charter. The Constitution of Ohio provides that all qualified electors shall be "entitled to vote at all elections." Section 3 of article 18 of the Constitution provides: "Municipalities shall have authority to exercise all powers of local self-government." Section 7 provides: "Any municipality may frame and adopt a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government." The court said:

"A code city may become a charter city only by determining its desires so to do by electing a commission to frame a charter under the method provided by section 8, art. 18, of the Constitution, and by ratifying at an election the plans submitted to it by such commission. When it has so adopted a charter such city has become a self-governing municipality and is henceforth constitutionally qualified to make such changes as experience suggests and in such manner as is provided by section 9 of article 18. * * * If this fifth article of the Constitution stood alone and was the sole measure of constitutional power in the case at bar, the Constantine Case might be deemed authoritative. The fifth article of the Constitution, however, is not operative when it comes in conflict with article 18."

The decision thus seems to be based upon the proposition that the chartered cities of Ohio are given the right of local self-government in the broadest sense. The foregoing authorities uniformly sustain the declaration found in section 212 of McCrary on Elections (4th Ed.) "that minority representation and cumulative voting can be provided for only by constitutional provision."

Respondents contend that chartered cities have been granted plenary authority to adopt the Hare system of voting by section 6 of article 11 of the Constitution, which empowers them "to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters"; section 8, providing that such cities "may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters"; and section 8½, which provides:

"It shall be competent in any charter framed in accordance with the provisions of this section, or section eight of this article, for any city or consolidated city and county, and plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several county and municipal officers and employees whose compensation is paid by such city or city and county, excepting judges of the superior court, shall be elected or appointed, and for their recall and removal."

[1] It seems plain that sections 6 and 8 are inapplicable. They relate to the powers of chartered cities, through their councils or by initiative measures, to adopt "laws and regulations in respect to municipal affairs." The power of municipalities to adopt or amend charter provisions is not subject to "the restrictions and limitations provided in their several charters" any more than the power of the Legislature to enact a law is

limited by prior legislative acts, or than the power of the people to change the Constitution is restricted by existing constitutional provisions. Municipal authority to adopt the voting system in question must be found, if at all, in the provisions of section 8½. Since the authority conferred by section 8½ is made "subject only to restrictions of this article" (art. 11) it is pertinent to inquire what those restrictions are. Section 8 of article 11 provides that a municipality "containing a population of more than three thousand five hundred inhabitants * * * may frame a charter for its own government, consistent with and subject to this Constitution." This restriction applies to and qualifies every power conferred upon the chartered city. Notwithstanding such restriction, however, if the municipality is given express authority by the Constitution to do a particular thing contrary to some general provision thereof, "the more specific provision controls the general." Martin v. Election Commissioners, 126 Cal. 404, 411, 58 Pac. 932, 935.

[2] The right of qualified citizens to vote at all elections is the fundamental right upon which our government is founded. To justify a court in holding that the people of the state have surrendered or abridged that right, their intent to do so must appear with great certainty and clearness. In construing the constitutional provision under consideration, the forceful language of Chief Justice Marshall in United States v. Fisher, 2 Cranch. 358, 2 L. Ed. 304, is particularly applicable:

"Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects."

The determination of the issue in this case must depend upon the construction of the provision of section 8½, empowering cities to provide in their charters for "the manner in which" and "the method by which" their officers shall be elected. In Coffin v. Board of Election, Com'rs, 97 Mich. 188, 56 N. W. 567, 21 L. R. A. 662, the court said:

"The authority to direct the time and manner in which judicial officers shall be elected and the other officers elected or appointed, does not involve the power to determine who shall constitute the electorate. The word 'manner,' it is true, is one of large signification, but it is clear that it cannot exceed the subject to which it belongs. It relates to the word 'elected.' The Constitution had already provided for electors, and when it provides that an officer shall be elected, it certainly contemplates an election by the electorate which it has constituted. No other election is known to the Constitution, and, when it provides that the Legislature may direct the manner in which an officer shall be elected, it simply empowers the Legislature to provide the details for the holding of such election."

In People v. English, 139 Ill. 622, 29 N. E. 678, 15 L. R. A. 131, in construing a section of the Constitution providing that "there may be a county superintendent of schools in each county, whose qualifications, powers, duties, compensation, and time and manner of election, and term of office, shall be prescribed by law" (Const. art. 8, § 5), the court said that the word "manner" as used in the constitutional provision "indicates merely that the Legislature may provide by law the usual, ordinary, or necessary details required for the holding of the election," and not that it may determine the qualifications of voters. The term "manner of election" has been given the same interpretation by other courts. Board of Election Commissioners v. Knight, 187 Ind. 108, 117 N. E. 565, 650; Livesley v. Litchfield, 47 Or. 248, 83 Pac. 142, 114 Am. St. Rep. 920; People v. Guden (Sup.) 75 N. Y. Supp. 347; State v. Adams, 2 Stew. (Ala.) 231. The word "manner" is more comprehensive than "method." Webster says:

"Manner is literally the handling of a thing, and has a wider sense, embracing both method and mode."

The addition of the word "method" by the amendment of 1914 cannot be held to have broadened the meaning of the word "manner" as used in section 8½. If the power given municipalities to provide for the manner of electing officers does not authorize them to prescribe the qualifications of voters, it cannot be held that it empowers them to deny electors the right to vote. Certainly, by the adoption of section 8½, the people have not "expressed with irresistible clearness" an intention to infringe and overthrow the fundamental right guaranteed by the Constitution to every qualified elector of voting at all elections. Many authorities are cited to show that the election of municipal officers is a municipal affair, but none of them go to the extent of holding that the municipality can prescribe the qualifications of voters or abridge the constitutional right of qualified electors to vote.

Counsel for respondents say, "An examination of 'Debates and Proceedings of the Constitutional Convention of 1879,' is interesting in showing the intention of the framers thereof," and then proceed to set forth in their brief parts of such proceedings, showing an intent to give municipalities a large measure of local self-government. It is equally interesting to examine the arguments for and against the adoption of the initiative amendment of 1914 to section 8½, containing the provisions on which respondents rely, and mailed to all the voters of the state, as required by law, shortly prior to the election of that year. The arguments were entirely silent as to the possibility of adopting a preferential or proportional representation sys-

tem of voting under the provisions of the amendment, and it is fair to assume that the voters did not have such possibility in mind. At the same election there was submitted proposed Assembly Constitutional Amendment 19, amending section 13 of article 20, in which the following appeared:

"Provision may be made in such charters (of cities, counties or cities and counties), and by general laws in the case of other counties and municipalities, for either or both nomination for and election to office at a primary election of all or any portion of the candidates voted for at such primary election and for a preferential system of voting at any county, city and county, or municipal primary or other election. Provision for a preferential system of voting at any other primary election may also be made by general laws."

Arguments in favor of the adoption of the proposed amendment were devoted exclusively to the merits of the preferential system; but, notwithstanding the fact that no counter argument was made, the people defeated the proposed amendment by a large majority.

It would have been competent to provide in the charter for the division of the city into nine districts and the election of one member of the council from each district Had that been done, no elector would have had a right to vote for more than one candidate to represent him. The Hare system cannot, however, be upheld on the theory that, in legal effect, it divides the electorate into as many districts or constituencies as there are offices to be filled, "based on common opinion instead of arbitrary geographical lines," and that "every man's ballot is counted for one man who is his representative among the candidates on the legislative body," which would be all he could do were the city divided into nine districts, and "that therefore it cannot be said his right of elective franchise has been abridged." In Wattles v. Upjohn, supra, from which the foregoing quotations are made, the court said:

"Counsel very interestingly discusses the advantages of that theoretical method of distributing constituencies by boundary lines of opinion, belief or policy, but, however alluring in theory, such intangible, undefined theoretical demarcation by similar thought or views is not a legal substitute for what is in law recognized to be a voting constituency or geographically defined representation district, as the right of franchise has become established under our Constitution."

Counsel for respondents argue that "the right of defendants to hold office is justified also under the power of appointment." It seems so clear that the selection of the defendants was, and was intended to be, by election and not by appointment, that it is deemed sufficient to quote the language of the court in McArdle v. Mayor, etc., of Jersey City, supra, as follows:

"The argument of the counsel for the defendants in error that this is not an election, but an appointment by the Legislature of persons to perform the duties of excise commissioners, who shall be selected in the manner pointed out by the act, if sound (which it is not), would enable the Legislature to tamper with the elective franchise at its will, and the constitutional provision which was designed to secure to the qualified voters of the state the elective franchise would be made a nullity."

[3-5] It must be held that the proportional representation system of voting provided for in the charter is violative of the elector's constitutional right to vote at all elections. The power of the people of the state, by constitutional amendment, to authorize municipalities to adopt the Hare system of voting is not doubted, but it is clear that they have not done so. In reaching this conclusion, full consideration has been given to the principle that all laws are presumed to be constitutional and that they are to be declared invalid only when they clearly appear to be so. The court has also given consideration to the practical effect of holding the proportional representation system of voting unconstitutional. Having been elected and acting under color of legal authority, the defendants were and are de facto officers whose official acts, within the scope of their authority as defined by the charter, are and will continue to be valid until they are legally deposed from office. It is fairly inferable from the allegations of the complaint that the members of the former city commission voluntarily surrendered their offices at the time the new charter went into effect. If they did so and thereafter, for a period of three consecutive months, ceased to discharge the duties of their offices, the same became vacant. Pol. Code, § 996; People v. Hartwell, 67 Cal. 11, 6 Pac. 873; People v. Rodgers, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668; People v. Rea, 2 Cal. App. 109, 83 Pac. 165. The affairs of the city will not be disturbed, other than such disturbance as may arise from a change of policies, if any, in the event that persons other than the defendants are selected to succeed them. Future elections of council members may be conducted under the general laws of the state, if the charter be not amended to provide a different procedure, section 2 of the charter providing that—

"Where the general laws of the state provide a procedure for the carrying out and enforcement of any rights or powers belonging to the city, said procedure shall control and be followed unless a different procedure shall have been provided in this charter or by ordinance."

The judgment is reversed, with directions to the trial court to overrule the demurrer and grant the defendants a reasonable time to answer.

We concur: HART, J.; BURNETT, J.

59 Cal. App. 375

## SHIMIZU v. NOJIRI. (Civ. 2521.)

(District Court of Appeal, Third District, California. Oct. 19, 1922. Rehearing Denied Nov. 18, 1922. Hearing Denied by Supreme Court. Dec. 18, 1922.)

**1. Appeal and error ⊂⊃673(2)—Record held to show contention that written contract had been modified.**

On appeal in action on contract for price of goods sold and delivered, record *held* to show that defendant contended below that the written contract between the parties had been modified by an executed oral agreement whereby the goods were shipped on consignment.

**2. Evidence ⊂⊃445(2)—Sales ⊂⊃93—Evidence held to show abandonment of written contract, and evidence of different oral contract was admissible.**

In action under written contract for goods delivered, evidence *held* sufficient to show an abandonment of the written contract and the substitution of an oral agreement in its stead, whereby the goods were shipped on consignment and handled on commission, and parol evidence rule did not prevent proof of a contract differing from the written contract.

**3. Sales ⊂⊃358(4)—Evidence of net returns held admissible in action for price on defense of shipment on commission.**

In action on written contract for price of goods delivered, evidence having been produced from which the jury were warranted in finding that the parties had agreed prior to the deliveries of the goods that the same should be shipped on a commission basis, the written contract providing no price, and that it was so shipped, the defendant should have been permitted to prove the net returns from such shipments.

**4. Sales ⊂⊃358(4)—Evidence bearing on market price held admissible where contract stated no price.**

In action under written contract for price of goods delivered where the written contract stated no price for the goods, and plaintiff testified that it was orally agreed at the time of the execution of the contract that he was to receive the daily market price at the time of the shipments, and there was no substantial evidence showing the market price, and it was therefore necessary to determine the price to which plaintiff was entitled from evidence of later agreements and understandings of the parties, each party was entitled to produce evidence bearing upon that question.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by K. Shimizu against N. Nojiri, doing business under the firm name and style of Sacramento Distributors. Judgment for plaintiff and defendant appeals. Reversed.

White, Miller, Needham & Harber, of Sacramento, for appellant.

Robert H. Schwab, of Sacramento, for respondent.

FINCH, P. J. The complaint alleges that the defendant became indebted to the plaintiff in the sum of $7,750.35 for goods sold and delivered; that the defendant had paid $3,000 on account, and prayed for judgment in the sum of $4,750.35, the alleged balance remaining unpaid. The answer denies the allegations of the complaint, and avers that the cause of action set forth in the complaint arose out of an alleged sale of celery; that the celery was not sold to the defendant, but that "the only celery handled by the defendant for the plaintiff was on consignment and not by way of purchase"; that the plaintiff delivered to the defendant 4,618 crates of celery "on consignment to be sold on account of plaintiff on commission"; that "the defendant sold the said celery for the plaintiff on commission, and the net proceeds thereof, after deducting freight and commission, aggregated the sum of $1,311"; that the defendant paid in the plaintiff's behalf for labor, materials, and cash advanced the sum of $6,819.19. The same facts were alleged by way of cross-complaint, and the defendant prayed for judgment for the difference between the alleged amount paid out for the plaintiff and the net receipts from the sale of the celery. Verdict and judgment went for plaintiff in the sum demanded in the complaint.

There was admitted in evidence an agreement between the parties, dated January 24, 1920, containing the following provisions:

"That the buyer hereby agrees to buy and does buy from the seller, who hereby agrees to sell and does sell to the buyer the seller's entire crop of golden yellow celery, estimated to be approximately 20 acres grown upon the land situated in Sacramento township, state of California, during the entire season of 1920 and 1921. * * * Until the complete delivery of the entire crop * * * the seller * * * agrees to assume all risks of injury to or the loss of the above mentioned crop, and further agrees to pick carefully all of said crop * * * at such time as may be designated by the said buyer, and before the 15th day of February, 1921, at his entire expense, and the above said buyer agrees to pay for the above-mentioned crop on delivery at car door or platform in Sacramento City or loading station. * * * It is further agreed by both the buyer and seller that all the above crop is to be of merchantable quality and suitable for eastern shipments, free of all defects, and subject to the inspection of the said buyer who will have the right and authority to reject or accept the above crop or any part thereof. * * * This contract is hereby agreed to by both buyer and seller to pass title and constitute an absolute sale of the above crop and that no other agreement or understanding be necessary or shall in any way modify this contract, and that the money paid as part payment on this contract is to be credited when final settlement is made."

The contract is silent as to the price to be paid for the celery.

Plaintiff testified that the agreement was executed on the day it bears date; that after it was signed the defendant suggested that the price to be paid for the celery be inserted in the agreement, but that plaintiff said he wanted the daily Sacramento market price prevailing at the time deliveries were made, to which defendant orally agreed; that early in November, immediately prior to the first shipment, the parties orally agreed upon a price of $2 a crate, and that eight carloads were delivered pursuant to that understanding; that thereafter, on account of a weak market, shipments were discontinued for a time; that prior to the resumption of shipments, the parties agreed upon a price of 35 cents a dozen for the remainder of the celery and it was delivered under that agreement.

The defendant testified that early in the year 1920 the plaintiff asked the defendant to handle the former's crop of celery, and that defendant replied that he would do so, but that there was at that time no agreement made as to a sale or the terms on which the crop would be handled; that the written agreement was executed in June, at plaintiff's request, for the purpose of showing the men working for him that he had a contract for the sale of his crop; that the defendant did not have any marketing forms at the time, and therefore "used that grapevine contract"; that in August plaintiff asked $3 a crate net for the celery and defendant made inquiries personally by telephone and telegraph in an effort to find a buyer at that price but without success; that plaintiff later reduced the price to $2 and the defendant agreed to endeavor to market the celery at that price, but at no time agreed to pay $2 a crate, or any other price therefor; that the defendant told plaintiff he would handle it for plaintiff's account; that after eight cars had been shipped he advised plaintiff not to ship any more until the market improved, that there was no demand for the celery at that time; that later the plaintiff asked him to market the remainder of the crop, and defendant replied that there was no market in the east for it, but that he was willing to handle it for plaintiff; that the parties then agreed that the defendant should offer the celery at 35 cents a dozen; that thereupon shipments were resumed; that, after all the celery in controversy had been shipped, the plaintiff requested a loan of money from defendant and, upon defendant replying that no returns had been coming in and that he could not pay him, plaintiff for the first time made the claim that the celery had been sold to defendant. At the request of defendant's counsel, the plaintiff produced receipts given him for all deliveries made to defendant. They are all alike except as to dates and quantities. The following is a copy of one of them:

"Consigned Growers Receipt, No. 12307.

"Cal., Nov. 9, 1920.

"Received from K. Shimizu grower, 160 crates of celery, P. F. E. 3878. Notice. This receipt is issued to the grower for fruit delivered to N. Nojiri Fruit Company to be handled on consignment for his account.

"N. Nojiri Fruit Company."

The plaintiff testified that he could not read English and did not read any of the receipts, though he did not say that he did not know the contents thereof.

The written agreement shows that the celery was intended for the eastern market. The plaintiff made no attempt to prove the market value of the celery, relying entirely on his own testimony to establish oral agreements fixing the prices to be paid. Uncontradicted testimony produced by defendant shows that white celery is sold in the local markets and that there was no cash market value in Sacramento for golden yellow celery while deliveries were being made; that as a rule celery is not sold for cash in Sacramento, but that it is turned over by the growers to various marketing organizations on consignment; and that they sell it to the eastern trade at a "price subject to inspection and acceptance upon arrival." On cross-examination the plaintiff said that some "fellow" told him that the market price of celery was $2 a crate about the time of the first delivery. It does not appear whether such price was for white or yellow celery. It may fairly be said that there is no substantial evidence establishing the market price of celery at the times deliveries were made. The plaintiff's case, therefore, rested entirely upon his testimony to the effect that prices had been fixed by agreement of the parties. Such testimony was squarely contradicted by the defendant. The defendant further testified that the parties agreed orally upon a sale on commission. Such testimony is corroborated by the receipts given by defendant and accepted by the plaintiff, reciting that all shipments of celery were delivered to defendant "to be handled on consignment" for plaintiff's account. If the allegations of defendant's answer, which he was not permitted to prove, are true, then he had paid plaintiff more than was due him for his crop of celery, and it follows that all the terms of the oral agreement to ship on consignment had been fully performed. Such executed oral agreement, if made, whether considered as a modification of the written contract, a substitution therefor, or a method agreed upon by the parties for determining the price to be paid, was valid and binding upon the plaintiff.

The defendant offered evidence to show the amounts received by him for the celery sold and the amounts properly expended by him in marketing the same. The court sustained plaintiff's objections to the admission of such

evidence. It seems clear that such rulings were erroneous and highly prejudicial. It may be true that, if such evidence had been admitted, the jury would have believed plaintiff's testimony rather than that of defendant; but the defendant had the right to introduce the evidence and have the jury pass upon it. If the evidence thus excluded be true, then the moneys expended by the defendant in marketing the celery, together with the advances made to plaintiff, exceeded the total receipts from all celery sold, and the defendant was entitled to judgment against the plaintiff. The other errors complained of, in so far as they have merit, are similar to that considered, and no useful purpose would be subserved by a detailed discussion thereof, as it is not probable that they will be repeated at the retrial of the case.

The judgment is reversed.

We concur: BURNETT, J.; HART, J.

On Petition for Rehearing.

PER CURIAM. The respondent states in his petition for a rehearing that the defendant never contended that the written contract between the parties had been modified by an executed oral agreement and that there is no evidence of such modification.

[1] At page 21 of the reporter's transcript appears the following statement made by counsel for defendant during the progress of the trial:

"The question before the jury will be whether or not this first contract was made, and, if it was made, whether the parties acted under a separate agreement, because of the condition of the market—abandoned and handled this celery wholly on a commission basis. And if the contract was made and abandoned, the question is: what was the market price of the celery?"

The court said: "Any subsequent agreement showing the price will be admissible." Again (page 53), counsel for defendant said:

"I wish to call your honor's attention to the fact that the evidence shows that * * * he (defendant) told the plaintiff that he would * * * ship this celery for him and would try to get him $2 per crate; that the celery was shipped; that presents the matter of an executed oral contract. * * * If that be true, then the matter comes within the abandonment of the contract; it is for the jury to determine whether or not they abandoned the other contract. It seems to me it is wholly up to the jury to determine."

[2-4] The defendant testified that a few days prior to the first shipment the plaintiff said "he wanted to market his celery. * * * I asked him: 'What price do you want for it?' I think he said he wanted to get $2 net to him. I told him that I will try to get, see if I can get, try to get that market price for him." That he never promised to pay $2 a crate for the celery; that he told plaintiff at that time that he would try to find a market for him, that he would handle the celery for plaintiff's account. After the shipment of eight carloads, the defendant advised plaintiff not to make further shipments until the market improved. The defendant testified that some days later the plaintiff said he desired to make further shipments of two cars a day, and "I told him if he wanted me to market them, I was willing to handle them for him. * * * He asked me how much, what price will be. I told him I will offer it 35c a dozen, just offer, is not sale—quotation, just quotation." and that the plaintiff agreed to it. As stated in the opinion, plaintiff accepted receipts for all shipments as made, reciting that the celery was "to be handled on consignment for his (plaintiff's) account." The defendant had advanced to plaintiff more than the net receipts for all the celery, according to the facts which defendant attempted to prove, and hence the oral agreement, made subsequent to the written contract, had been fully executed. The foregoing evidence was sufficient, if believed by the jury, to show an abandonment of the written contract and the substitution of an oral agreement in its stead. The written contract is silent as to the price to be paid for the celery. Plaintiff testified that it was orally agreed at the time of its execution that he was to receive the daily market price at the time of the shipments. Respondent admits in his petition that there is no substantial evidence showing the market price. Defendant produced evidence to the effect that there was no market for yellow celery. It was necessary, therefore, to determine the price to which plaintiff was entitled from evidence of the later agreements and understandings of the parties. Each party was entitled to produce evidence bearing upon that question. Having produced evidence from which the jury would have been warranted in finding that the parties had agreed, prior to the deliveries of the celery, that the same should be shipped on a commission basis, and that it was so shipped, the defendant should have been permitted to prove the net returns from such shipments.

The petition for a rehearing is denied.

59 Cal. App. 555

## KALL v. CARRUTHERS et al. (Civ. 2479.)

(District Court of Appeal, Third District, California. Nov. 3, 1922.)

**Waters and water courses ⊜262—Damages caused by percolation from rice lands to adjoining landowners recoverable.**

A rice grower, who keeps water upon his lands for many months in the year, and thus causes damage by percolation to adjoining landowners, is liable as for maintaining a nuisance, under Civ. Code, § 3479.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Frederick Kall against William M. Carruthers and another. Judgment for plaintiff, and defendants appeal. Affirmed.

W. H. Carlin and Ray Manwell, both of Marysville, for appellants.

Lawrence Schillig, of Yuba City, and Richard Belcher, of Marysville, for respondent.

ANDERSON, Justice pro tem. This is an action brought by the plaintiff against defendants, for the purpose of obtaining an injunction restraining defendants from permitting water brought from defendants' land for the purpose of irrigating rice thereon to escape by percolation or otherwise upon the lands of plaintiff. Damages are also asked for the injury.

The trial court found in favor of the plaintiff upon both issues, granting the injunction and assessing damages to the amount of $1,600.

We do not understand that appellant Carruthers (Mohomed did not file a brief) seriously contends that the evidence is not ample in support of the findings of the court. We have read the record and cannot doubt that the plaintiff was substantially damaged by reason of the escaping irrigation water; neither can we doubt that the escaping irrigation water came from defendants' lands. We think the destructive agency was clearly traceable to defendants' act in raising the water table by percolation upon adjacent lands.

The mode of establishing this fact is somewhat difficult, though interesting, but the means and methods of demonstration were placed in the hands of an expert, and were convincing to the trial court, who also viewed the lands, and, so far as we can observe, they do not call for criticism here. If more satisfactory methods existed for tracing the underground flow of the water, certainly they were not suggested to the trial court.

The main question which we are called upon to consider here is stated in appellant Carruthers' opening brief, at page 2, and is as follows:

"The point involved upon the appeal and the only one which is necessary to discuss is a rather vital one to farmers in Sutter county in the vicinity of the lands in question. Appellant owns a tract of land which is quite well adapted to the growing of rice, and he grew rice thereon during the year 1920. Respondent's land joins that of appellant, but he had growing on his land an orchard of trees and vines. Both parties irrigated their lands from water taken from the Sutter Butte Canal Company, a public utility irrigation company serving land in that vicinity. Necessarily the amount of water required by respondent for his fruit orchard was less than that required by appellant for his rice crop. As we understand the case, there is no claim made anywhere in the pleadings or findings that appellant was guilty of any negligence or wrongdoing except in so far as irrigating his land may be claimed to be a wrongful act."

Within the last decade an industry has sprung up in this state, and particularly in the Sacramento valley, which has attained such proportions that it is recognized as one of the leading agricultural enterprises of the state. It has made such strides that it is already guarded and protected by strong organizations. Millions of pounds of rice are now produced, whereas but a few years ago it was foreign to the soil. An industry which has thus made such rapid and powerful advancement for supremacy in the field of agriculture must necessarily have come into conflict with and challenged at times the enforcement of certain well-known and well-settled legal rules. In consequence of the extraordinary and unprecedented growth of this industry there is much activity in passing ordinances and seeking restraining orders, agreements, and other ways and means to control or minimize the effect of the encroachments of the operation of this industry upon the established rights of other industries.

Some of the evils complained of are the scattering of seed of obnoxious weeds, raising the water table—resulting in the destruction of all tree and plant life known as "nonwater-growing" vegetation; also causing minerals, such as alkali, to rise to or near the surface of the ground, thus destroying all plant and tree life; and the destruction of the public highways of the most permanent nature being also involved. Some of the objections to the effect of the industry have found expression in rules made for the benefit of the public health, such as rules prohibiting the collection of foul, polluted, swampy, mosquito-breeding pools.

The quantity of water used in the industry has greatly taxed the capacity of the streams and other sources of water supply; so great indeed has this become that it has been claimed that the principal waterway of the state has been so reduced at times that the ocean waters have found entrance so far up into the mouth of the channel as to affect the water for general domestic purposes, ren-

dering it unfit for use for large numbers of the inhabitants along the river. In addition to this, further new and unprecedented conditions have arisen when the rice has matured and the time come for discharging the great volume of water, known as drainage water, which has accumulated during the rice season.

That the industry is an important one none can doubt; that it has added greatly to the material wealth of the state has been abundantly proven; and yet it may be added that the industry is only in its infancy, with a field of future development before it which is almost limitless. From what has been stated it will readily be seen that we have most unusual conditions to deal with by reason of this new industry. There can be no proper comparison made of the conditions resulting from the growing of rice with those arising from the irrigation of any other well-known product, such as alfalfa, trees, grain, etc. For the rice industry a large volume of water must be held on the ground for five or six months continuously.

The precise obligation imposed by law upon one who collects waters in an artificial reservoir is a subject of grave dispute. In Fletcher v. Rylands, L. R. 1, Ex. 265, L. R. 3, Eng. & Ir. App. 330, it was declared that no amount of diligence is a legal excuse if such water escapes and damages another. The effect of this doctrine is everywhere conceded to make every person who brings a foreign substance upon his property an insurer against all damage that may result by reason of its presence on his property.

The soundness of this doctrine has been much discussed by law writers and courts in England and in this country, and there is no case on the subject in either country so much cited and considered. This doctrine is frequently applied to other subjects, for example, the handling of explosives, setting of fires, keeping wild animals, alkali works, and numerous other subjects. But confining ourselves for the present to its relation to the water question, we think we may say the doctrine is generally accepted both here and in England, with the modification that an act of God may be interposed as a defense, such as extraordinary disturbances of the elements resulting in floods and earthquakes, in the breaking of ditches, reservoirs, etc., and this exception was declared in the recent case of Sutliff v. Sweetwater Water Co., 182 Cal. 34, 186 Pac. 766.

We find the tendency among the courts in a great majority of the cases to give effect to the rule by finding negligence in some form and putting the decision on that ground. Others give effect by characterizing the result as a nuisance, but declaring some of the acts appearing in such cases to be negligence. Still others give effect on the ground of "absolute liability," or hold the party impounding the water as an "insurer." The tendency of the courts is to avoid resting the decision upon the two latter grounds.

The great majority of the cases arise from seepage, from overflowing or breaking of ditches, reservoirs or dams; comparatively few arise from percolating or overflowing water from adjoining lands.

No essential difference is usually recognized between damages caused from surface overflow and damages caused by direct percolation, reasonably traceable, whether the construction was apparently reasonably sound originally, or apparently originally imperfect. Whether the seeping nature of the soil is known or unknown at the time of construction, the responsibility is usually held to be the same; it must be remedied by effectual intercepting trenches, by cementing, or by other means known to science. In other words, the artificial receptacle for holding the liquid, be it of whatever form or nature, must be made and maintained as nearly waterproof as human agency can reasonably and prudently make it. Otherwise, if the escaping water results injuriously by reason of the receptable failing to properly hold the water, it then falls within the category of nuisances, or under the condemnation of negligence.

The principle of negligence in some form is most frequently interwoven in the decided cases. In some of the cases it is at times difficult to determine whether it would be more accurate to say that it is not a question of negligence, and that the defendant is liable, even in case of latent defect, than it would be to say that the escape of the injurious water, in the absence of proof of inevitable accident or of the wrongful act of a third person, or of an act of God, is in itself sufficient evidence to prove negligence.

In the case now under consideration we may very properly liken the receptable holding the water on the rice to a large reservoir (or to a "pool," as described in the case of Parker v. Larsen, 86 Cal. 236, 24 Pac. 989, 21 Am. St. Rep. 30) in area, though not in depth, but being one constantly replenished in order to maintain a even depth for many months, thus keeping a perfect saturating medium on the ground to run or seep into the ground any place or anywhere that water will naturally flow; the sides and bottom of this receptable having the usual defects common to uncemented ditches, reservoirs, dams, and drains, in being not waterproof or sufficiently so to reasonably retain the impounded water.

The liability of the water to do injury if allowed to escape must be continually borne in mind by the one attempting to make artificial use of it, and his failure to bear that fact in mind may be material upon the question of his liability.

The fact that water in small quantities may be handled without doing material injury to adjoining property brings such cases

"peculiarly" under "the application of the principle that the injury itself is evidence of negligence." This is well stated in a note in 1 L. R. A. (N. S.) 596, as follows:

"The persistence with which water will seek its level renders the artificial accumulation of it above the ordinary level of the surrounding country more or less dangerous, according to the quantity of water accumulated and the susceptibility of adjoining property to injury in case of its escape. The result is that there has been some tendency on the part of the courts, as represented in the case of Rylands v. Fletcher, L. R. 3, H. L. 330, 37 L. J. Exch. (N. S.) 161, 19 L. T. (N. S.) 220, to hold one who accumulates water in large quantities as an insurer. On the other hand, water may be accumulated in small quantites without material danger to adjoining property. At the same time, the very facts that that is so, and that ordinary precaution will prevent injury from the accumulated water, render the case peculiarly one for the application of the principle that the injury itself is evidence of negligence."

It will be noted in the decisions of our own state that the old maxim, "So use your own as not to injure another's property," has been so often approved in cases similar to the one at bar, and such cases have been decided by this maxim so many times, that the maxim should be decisive of this case.

"The law," says Chief Justice Parker in Thurston v. Hancock, 12 Mass. 220, 7 Am. Dec. 57, "founded upon principles of reason and common utility, has admitted a qualification to" the absolute dominion of the proprietor of lands over it, restricting him "so to use his own as not to injure the property or impair any actual existing rights of another."

Under the subject of Nuisances, Judge Cooley, in his work on Torts, says:

"If the water is so raised that by percolation the land of another is injured, the party raising it is responsible, not because he has unreasonably, negligently, intentionally, or unexpectedly flowed the land of another for his own benefit, but because he has done it in fact. The right of one to be secure against the undermining of his buildings by water, or the destruction of his crops, or the poisoning of the air by the stealthy attacks of an unseen element, is as complete as his right to be protected against open personal assaults or the more demonstrative but not more destructive, trespass of animals."

See, also, Pixley v. Clark, 35 N. Y. 520, 91 Am. Dec. 81.

Wood on Nuisances says:

"The thing done or maintained may be injurious to property, and affect the free use of it, and in that way be a nuisance."

It is stated in Cyc., under the head of Nuisances:

"Every enjoyment by one of his own property which violates the rights of another in an essential degree, constitutes a nuisance."

Section 3479 of the Civil Code of the state of California declares, among other things, that "an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property," is a nuisance.

In the case of Paolini v. Fresno Canal, etc., Co., 9 Cal. App. at page 8, 97 Pac. at page 1130, it is said:

"There may be as direct damage by this means as by overflowing the banks of a ditch, and the law will as readily redress injury resulting from the one cause as by the other when the facts satisfactorily locate the cause. The case of Shields v. Orr Extension Ditch Co., 23 Nev. 349, 47 Pac. 194, is illustrative of the principle, and was a case where the injury was caused wholly by percolating water coming from a ditch. So, also, is the case of Parker v. Larsen, 86 Cal. 236, 21 Am. St. Rep. 30, 24 Pac. 989. It was there said, '*Where one brings a foreign substance on his land he must take care of it, and not permit it to injure his neighbor. The law on the subject is tersely expressed in the maxim, "Sic utere tuo ut alienum non laedas."*'" (Italics ours.)

The foregoing case fully approves the doctrine declared in the case of Parker v. Larsen, supra. The case of Parker v. Larsen, supra, was not predicated upon a finding of negligence in so many words, as an examination of the original record will reveal, but there was a finding of damage. Speaking of this case in Sutliff v. Sweetwater Water Co., 182 Cal. 37, 186 Pac. 767, the court, speaking through Mr. Justice Olney, says:

"The case was one coming directly within the maxim, 'Sic utere tuo ut alienum non lædas.' Of this character, also, is Parker v. Larsen, 86 Cal. 236, 21 Am. St. Rep. 30, 24 Pac. 989, where the defendant permitted the water in a ditch which he had constructed on his land to percolate through the ground from the ditch on to his neighbor's land, saturating and injuring it."

The case of Parker v. Larsen is cited with approval in Mallett v. Taylor, 78 Or. 208, 152 Pac. 873. The syllabus of the Oregon case declares:

"A person who by artificial means causes water to *percolate* through the soil to the injury of his neighbor, does so at his peril, and is legally responsible therefor *irrespective of negligence.*" (Italics ours.)

The conditions denounced by our Supreme Court in Parker v. Larsen, supra, while identical with the case here on principle, were much less aggravated and damaging than are those of the case under consideration; there the water was permitted to stand "two or three times each summer," whereas in this case it is allowed to stand continuously part of the spring, all of the summer, and part of the autumn season.

Other decisions bearing upon the question are: Howell v. Big Horn Basin Colonization Co., 14 Wyo. 14, 81 Pac. 785, 1 L. R. A. (N. S.) 596; Reed v State, 108 N. Y. 407, 15 N.

E. 725; Scott v. Longwell, 139 Mich. 12, 102 N. W. 230, 5 Ann. Cas. 679; Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 226; Pixley v. Clark, 35 N. Y. 520, 91 Am. Dec. 72; Richardson v. Kier, 34 Cal. 63, 91 Am. Dec. 681; Tormey v. Anderson-Cottonwood Irrigation District (Cal. App.) 200 Pac. 814; Galbreath v. Hopkins, 159 Cal. 297, 113 Pac. 174; Hoffman v. Tuolumne County Water Co., 10 Cal. 416; North Point Consolidated Irrigation Co. v. Utah & Salt Lake Canal Co., 16 Utah, 246, 52 Pac. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607; Wilson v. New Bedford, 108 Mass. 261, 11 Am. Rep. 352; Sylvester v. Jerome, 19 Colo. 128, 34 Pac. 760; Esson v. Wattier, 25 Or. 7, 34 Pac. 756; Shields v. Orr. Extension Ditch Co., 23 Nev. 349, 47 Pac. 194.

Mr. Justice Peckham in one of the leading cases (Pixley v. Clark, supra) ably states the rights of adjoining property owners and their reciprocal duties in the development of their respective interests, as follows:

"The defendants' counsel says that the defendants had the right * * * to use this dam to use their water power, 'and all that can be legally required of them is, that they shall exercise it so as not to injure directly or unnecessarily the lands of their neighbor'; also, he says, that 'if one do a lawful act on his own premises, he cannot be held for the injurious consequences unless it was so done as to constitute actionable negligence.' These, like many general propositions, are plausible; but as applied to this case in the sense they are sought to be used, neither of them is law, and never was. Take the first. Is any such principle found in any case, or stated by any elementary writer, as that you have a right to use your water power, and build a dam for that purpose, and if necessary to that end, you may flow and drown your neighbor's land provided you do not do so 'unnecessarily,' that you may do it so far as is necessary to the full and profitable enjoyment of your water power, even though you flow and destroy his farm?

"The other proposition is very similar. Was it ever held or pretended that you might build a dam and flow another's land provided you were guilty of no want of care or skill in its construction? In fact, the better dam you make, the more skillful and perfect its construction, the more water you restrain and throw back, the greater the damage to the adjoining landowner. These are sound maxims, applied to many cases, but not to all. The latter may be admitted and applied here. The act of the defendants was lawful in building their dam so long as they did not injure their neighbor's land; the moment they so interfered by their dam as to flow his land to his injury, the act was unlawful."

We are of the opinion that to permit the defendant to make his lands profitable though it result in the utter destruction of the usefulness of plaintiff's lands, would violate every principle of natural right and justice, and cannot be supported by judicial authority.

It follows that the judgment should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; BURNETT, J.

---

59 Cal. App. 464

## BATEMAN v. KELLOGG et al. (Civ. 3854.)

(District Court of Appeal, Second District, Division 2, California. Oct. 24, 1922.)

**1. Appeal and error ⊂⊃870(6)—Order granting new trial not reviewable on appeal from second judgment.**

An order granting a new trial after judgment, thereby vacating that judgment, is not reviewable on appeal from the second judgment.

**2. Execution ⊂⊃268—Purchaser receives legal title subject to incumbrances.**

When property is sold to judgment creditor at sheriff's sale under his judgment, he receives the legal title to the property subject to prior mortgages and prior judgment liens and subject to be defeated by a redemption under Code Civ. Proc. § 700.

**3. Execution ⊂⊃264, 319—Purchaser acquires legal title of judgment debtor; sheriff's deed does not create new title.**

Purchaser under execution sale acquires the legal title of the judgment debtor defeasible upon condition subsequent, and the effect of the sheriff's deed is not to create a new title, but is merely evidence that the title of the purchaser has become absolute under Code Civ. Proc. § 700.

**4. Execution ⊂⊃353—Lien satisfied by sale of land under execution.**

When land is sold to judgment creditor under execution for the full amount of the judgment, the lien created by the levy is thereby extinguished.

**5. Mortgages ⊂⊃594(4)—"Redemptioner" and "successor in interest" defined and distinguished.**

A "redemptioner," as that word is used in Code Civ. Proc. § 701 et seq., is a creditor having a lien by judgment or mortgage on the property sold subsequent to that on which the property was sold, and a judgment creditor purchasing under a judgment antedating the mortgage was not a redemptioner, but was a "successor in interest" of the judgment debtor, and entitled to redeem under subdivision 1 of section 701.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Redemptioner; Successor in Interest.]

**6. Mortgages ⊂⊃151(5)—Sale under subsequent trust deed held not to divest purchaser under judgment of legal title.**

Sheriff's sale of land to judgment creditor under execution gave him the title of the judgment debtor as of the date of his judgment lien, and a subsequent sale under a trust deed executed subsequent to the judgment's becoming a lien did not divest him of his legal title.

**7. Mortgages ⊂⊃586 — Effect of foreclosure sale.**

Subject to right of redemption, the effect of a foreclosure sale is of itself to extinguish the right and claim of all the defendants in the action acquired subsequent to the date of the mortgage, and to vest in the purchaser the title of the mortgagor at the date of the mortgage discharged of all such right and claim.

**8. Mortgages ⊂⊃624(1)—Effect of redemption by successor in interest.**

A redemption by the "successor in interest" of a judgment debtor under Code Civ. Proc. § 701, subd. 1, terminates the sale and vests the title in such "successor in interest."

**9. Mortgages ⊂⊃608—Purchaser at foreclosure estopped to deny validity of redemption.**

If the person from whom redemption is made after mortgage foreclosure sale consents and accepts payment of the redemption money, it is as to him a valid redemption, even though the person making it be not qualified to redeem, upon principles of estoppel.

**10. Estoppel ⊂⊃68(3)—Parties asserting validity of mortgage redemption as basis of claim estopped to deny validity.**

No party to an action to quiet title can be heard to question the validity of a redemption under mortgage foreclosure where each is asserting its validity as the basis of his claim of title.

**11. Execution ⊂⊃302—Effect of redemption from execution sale.**

One who redeems from an execution sale as a "redemptioner" under Code Civ. Proc. § 701, subd. 2, succeeds to the interests of the purchaser at the execution sale as fully as if he had purchased the certificate of sale, and if lienors, whether by judgment or mortgage, redeem, the course of the sale is not thereby impeded or precluded, but finally culminates in a deed to the redemptioner, who will succeed to all the rights which the purchaser at the execution sale would have possessed had no redemption been made.

**12. Mortgages ⊂⊃594(1)—"Judgment debtor" in statute relating to redemption from judicial sale held to include "successor in interest."**

While the words "successor in interest" are mentioned in Code of Civil Procedure, § 701, and the succeeding sections refer exclusively to the judgment debtor and to redemptioners, still, when in these succeeding sections the Code uses the term "judgment debtor" as contradistinguished from "redemptioners," the words must be construed broadly enough to include "successors in interest" of the judgment debtor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judgment Debtor.]

**13. Mortgages ⊂⊃372(2) — Trust deed and mortgage distinguished.**

The result of the enforcement of a trust deed may be for all practical purposes the same as the enforcement of a mortgage with power of sale, but a trust deed is not a mortgage, and does not create a lien, and a purchaser at trustee's sale takes the title subject to all prior rights, interests, liens, and titles.

**14. Mortgages ⊂⊃624(2) — Purchaser under trust deed not a "redemptioner" under statute.**

Purchaser at trustee's sale under a trust deed was not a "redemptioner" as that word is used in Code Civ. Proc. § 701, subd. 2, but became by the purchase only the "successor in interest" of the judgment debtors so far as there remained in the latter any interest subsequent to the sheriff's sale under a prior judgment, and his redemption extinguished mortgage foreclosure sale under a mortgage antedating the judgment and restored the title under section 703.

**15. Mortgages ⊂⊃596, 597—Failure of purchaser at sale under judgment to redeem from mortgage foreclosure did not forfeit right.**

Where land was sold to judgment creditor at sheriff's sale, and thereafter a prior mortgage was foreclosed, the purchaser under the judgment did not lose his right of redemption and forfeit his interest in the land by failing to redeem the property and permitting another to redeem who was not a "redemptioner," but a "successor in interest" under Code Civ. Proc. §§ 701, 703.

**16. Mortgages ⊂⊃594(1) — Judgment debtor may redeem, though estate has been transferred to another.**

A judgment debtor named in mortgage foreclosure decree had the right to redeem from the foreclosure sale, even though a judgment creditor had succeeded to all of his title to the premises at a sheriff's sale under the judgment.

**17. Equity ⊂⊃66—"Successor in interest" redeeming entitled to return of money paid, on owner of legal title bringing suit to quiet title under maxim that he who seeks equity must do equity.**

Where the effect of "successor in interest's" redemption from mortgage foreclosure sale was to revest a purchaser at a sheriff's sale under a judgment with the legal title so that he could successfully maintain a suit to quiet title, still, in seeking equity, the purchaser under the judgment must do equity and pay to the "successor in interest" the amount paid by him to redeem the property from mortgage foreclosure sale.

**18. Mortgages ⊂⊃594(4)—Decree in mortgage foreclosure sale held not to bar right of prior purchaser under judgment to legal title on redemption by "successor in interest."**

A decree in mortgage foreclosure that purchaser under judgment had a "lien" against the property "by reason of a certain sheriff's certificate of sale," etc., *held* not to establish the fact that plaintiff was the holder of a judgment lien only which was foreclosed by such decree, in view of pleadings and issues, in a subsequent suit to quiet title as against a "successor in interest" of the mortgagor who redeemed from the mortgage foreclosure sale.

**19. Judgment ⊂⊃728—Incidental questions not concluded by judgment.**

A question which is only incidentally involved and which is not actually litigated—that is, made the subject of trial and pressed upon the consideration of the court—is not concluded by the judgment so as to be res adjudicata in a subsequent suit on a different cause of action.

**20. Execution ⊂⊃241—Property held sufficiently described in notice and certificate.**

Sale of land under execution was valid though two calls were omitted from the description of the property in the sheriff's certificate of sale and in the notices of the sale where the description given was sufficient to identify the land.

**21. Execution ⊂⊃312—Sufficiency of description of land sold.**

A description which would be sufficient for a voluntary conveyance of land sufficed for a conveyance by the sheriff after an execution sale.

**22. Execution ⊂⊃310—Error in date of sheriff's deed held not fatal to purchaser's claim of title.**

Error in the date of sheriff's deed was not fatal to purchaser's claim of title, as the recording of the sheriff's certificate of sale was alone sufficient to charge all subsequent purchasers with notice of purchaser's rights, in view of Code Civ. Proc. § 700a, and Pol. Code, § 4159.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by C. W. Bateman against Fred R. Kellogg and others. From an adverse judgment, plaintiff appeals. Reversed.

Turner & Grainger, of Los Angeles, for appellant.

Robert M. Clarke and Henry L. Knoop, both of Los Angeles, for respondents.

FINLAYSON, P. J. This is an appeal by plaintiff from a judgment in favor of defendants in an action to quiet title to a parcel of land in Los Angeles county.

[1] There were two trials of the case. Upon the first, which was without a jury, findings on all the material issues were made in favor of plaintiff, and the court gave judgment for plaintiff accordingly. Thereafter an order was made granting defendants' motion for a new trial. The order, which was general in its terms, reopened the case for a new trial on all the issues. A retrial was had, at the conclusion of which the court rendered and entered its judgment in favor of defendants. It is from that judgment that plaintiff now appeals. One of the points urged by plaintiff upon this appeal is that the trial court erred in making its order granting defendants' motion for a new trial after the first judgment in the case, and that therefore that order should be set aside and the first judgment reinstated and affirmed. That, however, is not a question which may be considered on this appeal. For the reasons set forth in Furlow Pressed Brick Co. v. Balboa L. & W. Co., 186 Cal. 754, 200 Pac. 625, the order granting a new trial after the first judgment, thereby vacating that judgment, is not reviewable on this appeal from the second judgment. See, also, Schomaker v. Roemer (Cal. App.) 201 Pac. 803.

On the second trial the court found that plaintiff is not the owner of or entitled to the possession of the real property in controversy, and that it is not true that defendants, who are in possession, are without right or title to the land. The alleged insufficiency of the evidence to support these findings is the sole contention made by appellant with respect to the result of that trial.

The facts shown on the second trial, in so far as they are necessary to an understanding of the questions presented by this appeal, are substantially as follows: Both sides claim through L. A. Walker and Mary J. Walker, husband and wife, as the common source of title. It was stipulated that the Walkers owned the property on June 5, 1912. On that date they executed a mortgage to Walter P. Temple. This mortgage, by two assignments, was finally held by John L. Boals. On March 8, 1915, Boals commenced a foreclosure action, and on the same day caused a notice of lis pendens to be filed in the office of the county recorder.

On June 6, 1912, the Walkers executed to Catherine Seccombe, as trustee, a deed of trust covering the same property. On April 11, 1914, a sale was had under this deed of trust, and on September 14, 1914, the purchaser at that sale reconveyed the property to L. A. Walker. On the day that this reconveyance was made to Walker, appellant, as will hereafter appear, acquired a judgment lien on the property. By the reconveyance to L. A. Walker the whole title was vested in him, subject only to the mortgage which he and his wife had given to Temple, and subject also to appellant's judgment lien and to a judgment lien in favor of the Grange Company—the next-mentioned incumbrance. In other words, Mary J. Walker ceased to have any interest in the land after its sale under the Seccombe deed of trust and the reconveyance to her husband.

Following the Temple mortgage, in point of time, was the lien of a judgment of a justice's court in favor of the Grange Company against L. A. Walker. That judgment became a lien on the property on February 21, 1914, on which day an abstract of the judgment was recorded in the office of the county recorder. Subsequently this judgment was assigned to F. G. Stickney.

Next in point of time was the lien of C. W.

Bateman, the plaintiff and appellant in the present action. His was the lien of a judgment for $103.75 which, on September 3, 1914, was rendered by the justice's court of Los Nietos township in favor of Bateman and against L. A. Walker, and an abstract thereof was recorded September 14, 1914, in the office of the county recorder. On the day when this judgment became a lien on the property, the legal title, as has been shown, was in L. A. Walker, subject only to the Temple mortgage and the Grange Company's judgment lien. Execution was issued on appellant's judgment against Walker, and on March 9, 1915, which was the day following the commencement of the action by Boals to foreclose the Temple mortgage, appellant caused the writ of execution to be levied by the sheriff of Los Angeles county on the property in controversy. On May 3, 1915, the property was sold to appellant at sheriff's sale for $135.35, and a sheriff's certificate of sale was issued to him. It is under this execution sale that appellant claims title to the land. On May 4, 1916, appellant received a sheriff's deed to the property.

Next in point of time succeeding the accrual of appellant's judgment lien was a trust deed to L. O. Hatch, as trustee. That instrument, executed by the Walkers on October 16, 1914, was given to secure an indebtedness of L. A. Walker to George H. Woodruff, named as the beneficiary in the trust deed. On August 18, 1915, the trustee in this deed of trust caused the premises to be sold to Woodruff to satisfy L. A. Walker's obligation to him. It is under this deed of trust and the trustee's sale thereunder to Woodruff, and the latter's redemption from the sale which was had under the decree foreclosing the Temple mortgage, that respondents make their claim of title.

As will be noticed, when Boals commenced his action on March 8, 1915, to foreclose the Temple mortgage, Bateman, the appellant here, had not caused execution to be issued on his judgment against Walker, nor had the sale to Woodruff been made by Hatch under the deed of trust which the Walkers had executed to secure L. A. Walker's indebtedness to Woodruff. Among the defendants in the action by Boals to foreclose the Temple mortgage were the mortgagors, Mr. and Mrs. Walker, Bateman (the plaintiff and appellant here), Woodruff (under whom respondents claim title), L. O. Hatch (the trustee in the trust deed given for the benefit of Woodruff), and the Grange Company; the assignment of its judgment to Stickney not having been made when the foreclosure action was commenced. Later Stickney appeared as a defendant, substituted for one of the fictitious defendants.

Bateman filed an answer in the mortgage foreclosure action. He alleged in his answer in that action that, by recording the abstract of the judgment which he had obtained in the justice's court against L. A. Walker, he acquired a lien on the land, and that on May 3, 1915, he purchased the premises at sheriff's sale under the writ of execution issued on his judgment against Walker. He prayed that the court, in its decree foreclosing the mortgage, fix the manner of the distribution of the proceeds from the foreclosure sale, and that such proceeds, after their application to the expenses of the sale, be applied to the payment of the prior liens against the property, and that he receive from the residue, if any should remain, the amount necessary to redeem the property from the sale which the sheriff had made to him on May 3, 1915.

In its decree foreclosing the Temple mortgage the court, after declaring that the Walkers owed Boals $3,387.01, secured by the mortgage, and that Bateman had a lien for $144.40 subject to the Temple mortgage and to the judgment lien held by Stickney, decreed that the property be sold, and that after paying all the costs incidental to the sale the proceeds be applied: (1) To the satisfaction of the Temple mortgage; (2) to the satisfaction of the Stickney lien, if there should be any surplus available therefor; and (3) if there still remained a surplus, that it be paid to Bateman to the amount of his justice's judgment and costs.

On February 1, 1916, the property was sold by the sheriff to Stickney under the decree foreclosing the Temple mortgage. Stickney paid a sum sufficient to satisfy the judgment of the Grange Company against L. A. Walker, as well as the amount decreed to be due to Boals under the mortgage.

On February 1, 1917, Woodruff, who, it will be recalled, had purchased the property at the trustee's sale which was had under the Walkers' deed of trust to L. O. Hatch, redeemed the property from Stickney by paying to the sheriff the sum of $4,212.35, that sum being in full payment of the purchase price which had been paid by Stickney as the purchaser at the foreclosure sale on February 1, 1916, together with interest at the rate of 1 per cent. per month to the time of redemption.

No one redeemed from Woodruff, and the sheriff, on April 6, 1917, executed a deed to him. Thereafter Woodruff conveyed the property to one Birch, who later conveyed it to the defendants Kellogg, McCray, and McBurney. The defendant Montgomery is a lessee of his codefendants.

Appellant's argument may be summarized substantially as follows: The lien of appellant's judgment against L. A. Walker antedated the trust deed which had been given by the Walkers to Hatch to secure L. A. Walker's indebtedness to Woodruff. Mrs. Walker had ceased to have any interest in the land after April 11, 1914, on which day it was sold under the trust deed which she and her husband had executed to Catherine

Seccombe, as trustee, and later was reconveyed to her husband by the one who had purchased at that trustee's sale. Therefore, when appellant purchased the property at sheriff's sale on May 3, 1915, under the execution which had been issued on his judgment against L. A. Walker, the legal title immediately vested in him as such purchaser, subject only to the prior mortgage to Temple, then in process of being foreclosed by Boals, and subject likewise to the prior judgment lien in favor of the Grange Company—later assigned to Stickney—as well as to L. A. Walker's right to redeem the property from the sheriff's sale to appellant. Upon Woodruff's redemption of the property from the foreclosure sale to Stickney, the effect of that sale was terminated. Thereupon, so the argument runs, the legal title revested in appellant, and he is now the unconditional holder thereof. The logic of this contention seems irrefutable.

It will be conduce to a readier understanding of the respective rights of the parties on and after Woodruff's redemption from the mortgage foreclosure sale if we consider the effect on the title of each successive step from and after the sheriff's sale to appellant on May 3, 1915.

[2, 3] Without doubt appellant is correct in his contention that when the property was sold to him at sheriff's sale on May 3, 1915, under his judgment against L. A. Walker, he received the legal title to the property. He received a qualified legal title, but the legal title nevertheless. It was a title that was subject to the prior mortgage to Temple and to the prior judgment lien in favor of the Grange Company—subsequently held by Stickney—and subject to be defeated by a redemption by L. A. Walker at any time within 12 months from the sheriff's sale to appellant, and subject also to L. A. Walker's right to remain in possession until such time as the sheriff's deed should be executed to appellant.

"If the judgment is a lien upon the real property the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor on or at any time after the day such judgment became a lien on such property." Code Civ. Proc. § 700.

"The execution of the [sheriff's] deed gave to the purchaser at the sale no new title to the land purchased by him, but was merely evidence that his title had become absolute. Upon the sale he acquired 'all the right, title, interest, and claim of the judgment debtors thereto' (Code Civ. Proc. § 700), subject to be defeated by a redemption within six months, and to the right of the judgment debtors to remain in the possession of the land until the execution of the sheriff's deed." Robinson v. Thornton, 102 Cal. 680, 34 Pac. 120.

To the same effect are Pollard v. Harlow, 138 Cal. 390, 71 Pac. 454, 648, and Leet v. Armbruster, 143 Cal. 666, 77 Pac. 653. In the Pollard Case it was held that the purchaser under execution sale acquires the legal title of the judgment debtor, defeasible upon condition subsequent, and that the effect of the sheriff's deed is not to create a new title, but is merely evidence that the title of the purchaser has become absolute.

[4] By the sheriff's sale to appellant on May 3, 1915, his judgment against L. A. Walker was satisfied, and his judgment lien thereupon ceased to exist. When property is sold under execution for the full amount of the judgment, the lien created by the levy is thereby extinguished.

[5] A "redemptioner," as that word is used in section 701 et seq. of the Code of Civil Procedure, is a creditor "having a lien by judgment or mortgage on the property sold," subsequent to that on which the property was sold. Code Civ. Proc. § 701, subd. 2. Appellant therefore, whose judgment was extinguished by the sheriff's sale to him, was not a "redemptioner" within the Code meaning of that word, and therefore he was not entitled to redeem as a "redemptioner" from the subsequent mortgage foreclosure sale to Stickney. But, though not entitled to redeem from that sale as a "redemptioner" under subdivision 2 of section 701, appellant did become and was the "successor in interest" of L. A. Walker, the principal judgment debtor in the mortgage foreclosure suit and the sole holder of the legal title immediately prior to the sheriff's sale to him; and therefore, as such "successor in interest" of L. A. Walker, he was entitled to redeem from the foreclosure sale to Stickney under subdivision 1 of section 701. Pollard v. Harlow, supra.

[6] Such was the condition of the title on August 18, 1915, when Woodruff, under whom respondents claim, purchased at the trustee's sale held under the deed of trust which the Walkers had executed to Hatch, as trustee, on October 16, 1914. This trustee's sale to Woodruff did not divest appellant of the legal title which had come to him through the sheriff's sale of May 3, 1915. The sheriff's sale to appellant gave him the title as of the date of his judgment lien, September 14, 1914, which was prior to the execution of the trust deed to Hatch. By the trustee's sale to Woodruff the latter may have become the "successor in interest" of L. A. Walker, and as such may have been entitled to redeem the property from the execution sale to appellant. This, however, Woodruff never did. Indeed, no attempt to redeem the property from the sheriff's sale to appellant ever was made by any one. It follows, therefore, that the title which vested in appellant on May 3, 1915, when the property was sold to him at sheriff's sale, is still in him, save in so far as it may have been divested by the subsequent foreclosure sale to Stickney under the Temple mortgage and

by Woodruff's redemption from that sale. The next question, therefore, is: What effect did the mortgage foreclosure sale to Stickney have upon appellant's title?

[7] The Temple mortgage, it will be recalled, antedated the judgment lien which appellant acquired upon recording the abstract of his judgment against Walker. It follows, therefore, that when the property was sold to Stickney on February 11, 1916, under the mortgage foreclosure sale, Stickney received the legal title subject only to the right of the judgment debtor L. A. Walker to remain in possession pending the time allowed for redemption and to defeasance upon redemption by any person qualified to redeem from the foreclosure sale. As has been stated, Hatch, as trustee under the trust deed, Woodruff, the purchaser from the trustee L. O. Hatch, and C. W. Bateman, the appellant here, each of whom had acquired his interest subsequent to the date of the Temple mortgage, and Mr. and Mrs. Walker, were made defendants to the suit which Boals brought to foreclose that mortgage. Therefore, subject to the right of L. A. Walker to remain in possession pending the time allowed for redemption, the foreclosure sale to Stickney extinguished all the rights and claims of the above-named defendants in the mortgage foreclosure action, save that there was left in the mortgagors and judgment debtors L. A. Walker and Mary J. Walker, and in appellant, as the successor in interest of L. A. Walker, and possibly also in Woodruff, as a "successor in interest" of the judgment debtors L. A. and Mary J. Walker, the right to redeem from the foreclosure sale. The effect of a foreclosure sale "is of itself to extinguish the right and claim of all the defendants in the action acquired subsequent to the date of the mortgage, and to vest in the purchaser the title of the mortgagor at the date of the mortgage, discharged of all such right and claim." Sichler v. Look, 93 Cal. 600, 610, 29 Pac. 220, 222; McNutt v. Nuevo L. Co., 167 Cal. 459, 464, 465, 140 Pac. 6. See, also, Duff v. Randall, 116 Cal. 229–230, 48 Pac. 66, 58 Am. St. Rep. 158; Pollard v. Harlow, supra; and Leet v. Armbruster, supra.

[8] As we presently shall show, a redemption by the "successor in interest" of a judgment debtor terminates the sale and vests the title in such "successor in interest." From this it follows that if appellant, as the "successor in interest" of L. A. Walker, had redeemed the property from the foreclosure sale to Stickney, such redemption would have terminated the sale to Stickney and would have revested the title in appellant. But, though appellant did not exercise his right to redeem from the foreclosure sale, Woodruff did, and Stickney, as the purchaser at that sale—of the sheriff for Stickney—accepted from Woodruff the amount necessary to effect a redemption, namely, the sum of $4,214.23. The next question, therefore, which presents itself for consideration is: What effect did Woodruff's redemption from the foreclosure sale have on the title to the property? This is, indeed, the ultimate question presented for our determination on this appeal.

[9, 10] Regardless of any question as to Woodruff's right to redeem the property from the mortgage foreclosure sale to Stickney, there can be no question here as to the validity of that redemption. It is the effect of that redemption, not its validity, that confronts us. Stickney, from whom the redemption was made, cannot question its validity, even though appellant, and not Woodruff, was Walker's "successor in interest" by virtue of the sheriff's sale made to him under a judgment lien that antedated the trust deed under which Woodruff deraigned his claim of title. Stickney accepted payment of the redemption money. And the rule is that, if the person from whom the redemption is made consents and accepts payment of the redemption money, it is as to him a valid redemption, even though the person making it be not qualified to redeem. Upon principles of estoppel, the person from whom the redemption is thus made will be precluded from questioning it. Freeman on Execution (3d Ed.) vol. 3, p. 1885. Nor can any party to this action be heard to question the validity of Woodruff's redemption, since each is asserting its validity as the basis of his claim of title. What, then, was the effect upon the title of the redemption made by Woodruff?

[11, 12] In order to determine the effect of Woodruff's redemption upon the title to the property it is necessary to consider the capacity in which Woodruff made his redemption from the foreclosure sale. If he made it as the "successor in interest" of the judgment debtors and mortgagors, L. A. and Mary J. Walker, the effect of the foreclosure sale to Stickney was terminated; whereas, if Woodruff can be deemed to have made the redemption in the character of a "redemptioner," within the technical meaning of that term as used in subdivision 2 of section 701 of the Code of Civil Procedure, he succeeded to the rights of the purchaser, Stickney; for the rule is that one who redeems from an execution sale as a "redemptioner" succeeds to the interests of the purchaser at the execution sale as fully as if he had purchased the certificate of sale. If lienors, whether by judgment or mortgage, redeem, the course of the sale is not thereby impeded or precluded, but finally culminates in a deed to the redemptioner, who will succeed to all the rights which the purchaser at the execution sale would have possessed had no redemption been made. But a redemption by the judgment debtor has a very different effect. It terminates the sale, and

restores the estate. The statute has provided for a redemption by but two classes of persons—the judgment debtor (or his successor in interest) and creditors having liens by judgment or mortgage. A redemption by the latter class is for the purpose of securing a sheriff's deed in pursuance of the sale; a redemption by the former class is inimical to the sale, and puts an end to it. "If the [judgment] debtor redeem, the effect of the sale is terminated, and he is restored to his estate." Code Civ. Proc. § 703. And such also is the effect of a redemption by the judgment debtor's "successor in interest." The term "judgment debtor," as used in these Code sections, includes the words "successor in interest" of the judgment debtor. While the words "successor in interest" are mentioned in section 701 only, and the succeeding sections refer exclusively to the judgment debtor and to redemptioners, still, when in these succeeding sections the Code uses the term "judgment debtor," as contradistinguished from "redemptioners," the words must be construed broadly enough to include "successors in interest" of the judgment debtor. Phillips v. Hagart, 113 Cal. 555, 45 Pac. 843, 54 Am. St. Rep. 369. For these reasons it must be held that, if Woodruff redeemed in the character of a "successor in interest" of L. A. Walker or of L. A. and Mary J. Walker, the judgment debtors in the mortgage foreclosure suit, the effect of the redemption was to terminate the sale and to revest the title in L. A. Walker or in the person who had succeeded to that judgment debtor's estate, i. e., the person in whom the legal title would be had there been no foreclosure sale under the Temple mortgage.

[13] That Woodruff could redeem only in the capacity of a "successor in interest," and not as a "redemptioner," is manifest. A "redemptioner," as we have seen, is one who is a creditor of the judgment debtor "having a lien by judgment or mortgage." Subdivision 2, § 701, Code Civ. Proc. But Woodruff was not "a creditor having a lien by judgment or mortgage." The trust deed under which he purchased at the trustee's sale conveyed to his grantor, the trustee L. O. Hatch, the legal title so far as was necessary to the execution of the trust. That is, though the trust deed carried with it none of the incidents of ownership other than the right to convey the title upon default on the part of the trustors, it did pass the legal title. The result of the enforcement of a trust deed may be, for all practical purposes, the same as the enforcement of a mortgage with power of sale; but a trust deed is not a mortgage and does not create a lien. Weber v. McCleverty, 149 Cal. 316, 86 Pac. 706; MacLeod v. Moran, 153 Cal. 97, 94 Pac. 604; Athearn v. Ryan, 154 Cal. 554, 98 Pac. 390; Bryant v. Hobart, 44 Cal. App. 315, 186 Pac. 379. The effect of such a deed, says the court in the Weber Case, is to convey the legal title to the trustee, who is thereby vested with the absolute legal title to the premises so far as is necessary to enable him to convey it to the purchaser at the trustee's sale free of all right, title, interest, or estate of the trustors, or of any one claiming under or through them by subsequent conveyance. Moreover, even if the trust deed to Hatch, instead of passing the legal title to him as trustee, had created but a "lien" for the security of the indebtedness due by L. A. Walker to Woodruff, nevertheless, when Woodruff purchased at his trustee's sale, it would be the title which, subject to all prior rights, interests, liens, and titles, would pass to him as purchaser at that sale. So that, if it were true that prior to his purchase he had possessed but a lien for his security, such lien would have been merged in the title which he would have purchased at his trustee's sale. Therefore, in any view of the case, Woodruff cannot be regarded as a lienor at the time when he redeemed the property from the mortgage foreclosure sale to Stickney.

[14] It follows, therefore, that Woodruff was not a "redemptioner," as that word is used in subdivision 2 of section 701 of the Code of Civil Procedure and in the subsequent sections, but that by his purchase at the trustee's sale, he became the "successor in interest" of the judgment debtors or mortgagors, so far as there remained in the latter any interest subsequent to the sheriff's sale to appellant on May 3, 1915. And since Woodruff could redeem from the foreclosure sale, if at all, only in the capacity of a "successor in interest," his redemption extinguished that sale—annulled it—and restored the title. Code Civ. Proc. § 703.

[15, 16] But, though the effect of Woodruff's redemption was to terminate the foreclosure sale to Stickney, which ordinarily would leave the legal title in appellant as the original successor in interest of L. A. Walker just as though the property never had been sold under the mortgage foreclosure decree, respondents seem to think, simply because the redemption from that sale was made by Woodruff, and not by appellant, that the title was diverted from appellant to Woodruff. The basis for this claim seems to lie in the assumption that the only right to which appellant succeeded as the purchaser of L. A. Walker's estate at the sheriff's sale on May 3, 1915, was Walker's right to redeem the property from the foreclosure sale to Stickney. Upon this assumption it is argued that because appellant did not redeem the property from the sale to Stickney he lost his right of redemption and now is left with nothing. But respondents are in error when they assume that appellant succeeded only to Walker's right to redeem the property from the foreclosure sale.

Appellant, it is true, by his purchase at the sheriff's sale did acquire the right to redeem from the mortgage foreclosure sale to Stickney, but he also acquired something very much greater than the mere statutory right to redeem. He succeeded to all of Walker's title and estate. Before the foreclosure sale to Stickney, appellant, as the purchaser at the sheriff's sale under his judgment against Walker, held the legal title—a qualified and conditional legal title, it is true, but a legal title which, subject to the effect of the mortgage foreclosure sale, became absolute on receipt of the sheriff's deed executed to appellant on May 4, 1916.

L. A. Walker, as one of the judgment debtors named in the mortgage foreclosure decree, had the right to redeem from the foreclosure sale, even though appellant had succeeded to all of his title to the premises. The statutory right of a judgment debtor to redeem is not affected by the fact that, by the transfer of his estate to another, he no longer has the title. Yoakum v. Bower, 51 Cal. 539; Southern California L. Co. v. McDowell, 105 Cal. 99, 38 Pac. 627. If Walker had exercised the right given him by the statute to redeem from the foreclosure sale to Stickney, not only would the effect of that sale have been terminated—save in so far as it had completely satisfied the mortgage lien and the Grange Company's judgment lien—but the title would have been revested immediately in appellant, as Walker's successor in interest. The same result must follow the redemption made by Woodruff; for Woodruff, as the purchaser under the deed of trust which the Walkers had made to Hatch as trustee, possessed no right that was superior to any of the rights held by his predecessor, L. A. Walker.

Mrs. Walker, it will be recalled, was divested of all interest in the property on April 11, 1914, when it was sold under the trust deed which she and her husband previously had executed to Catherine Seccombe. And though the purchaser at that trustee's sale later reconveyed the property to the husband, L. A. Walker, the trust deed to Hatch, under which Woodruff, the predecessor of respondents here, claimed title, was executed after Mrs. Walker had been divested of all interest in the land. It follows, therefore, that Woodruff, if he possessed any right of redemption whatever, was only entitled to redeem as a "successor in interest" of L. A. Walker, or, if you please, as a "successor in interest" of L. A. and Mary J. Walker—Mary J. Walker having been named as a grantor in the truth deed to Hatch—and that, for all the purposes of a redemption from the foreclosure sale to Stickney, Woodruff possessed no right that was superior to those possessed by L. A. Walker, and hence a redemption by him had no other effect than a redemption by L. A. Walker would have had.

A somewhat similar question was considered by the Minnesota Supreme Court in a case involving an analogous, though not an identical, situation. That case arose under statutory provisions quite similar to our own with respect to the effect of a redemption by a judgment debtor or his successor in interest. In the case referred to, Kopp v. Thele, 104 Minn. 267, 116 N. W. 472, 17 L. R. A. (N. S.) 981, 15 Ann. Cas. 313, the plaintiff, Carolina Kopp, and the defendant, Louis C. Kopp, as husband and wife, had executed a mortgage on the husband's land, which was foreclosed. The husband did not redeem from the foreclosure sale, but the plaintiff, as his wife, did, and thereupon went into possession. Thereafter Mr. and Mrs. Kopp were divorced, and subsequently Kopp conveyed his interest in the land to the defendant, Thele. Upon this state of facts the Minnesota court held that the plaintiff, by virtue of her statutory interest in the land as the wife of the owner, had a right to redeem the mortgaged premises from the foreclosure sale, and that such redemption annulled the sale, but that, notwithstanding such redemption by the wife, Thele, the husband's grantor, owned the land, subject only to a lien in favor of the plaintiff for the amount she had paid to redeem, with interest, less the net value of the use of the land while in her possession. After stating that the Minnesota statute provides that the mortgagor, his personal representative or assigns, may within 12 months redeem the land sold on foreclosure sale, and that if any of them does the redemption annuls the sale, the court said:

"It follows that, when the plaintiff redeemed in this case, the foreclosure sale was annulled, leaving the legal title to the land the same as if the mortgage had never been given. Therefore her redemption could not have the effect, either in law or equity, of transferring the husband's title to the land to her. But, she having redeemed for the protection of her own interest in the premises, which necessarily resulted in protecting her husband's title, she was not a mere volunteer. Hence she is entitled, by subrogation, to an equitable lien upon the land for the amount paid on the redemption."

The reasoning of the Minnesota court is equally applicable here. When Woodruff redeemed, the foreclosure sale to Stickney was terminated (Code Civ. Proc. § 703), thereby leaving the legal title to the land the same as if no mortgage had been given. Therefore his redemption could not have the effect, either in law or in equity, of transferring appellant's title to him.

[17] But, though the effect of Woodruff's redemption from the foreclosure sale was to revest appellant with the legal title, so that he may successfully maintain this suit to quiet title, still, in seeking equity, he must do equity. Appellant's title escaped the consequences of the mortgage foreclosure sale

to Stickney only because Woodruff, for whose supposed title the respondents paid the sum of $5,103, redeemed the land by paying to Stickney $4,212.35. Appellant cannot come into a court of equity asking to have his title quieted without doing equity. And we think it but equity that he should pay to respondents, as Woodruff's successors in interest, the amount which was paid by Woodruff—a payment which has made it possible for appellant to regain his title—with legal interest thereon from the date of Woodruff's redemption, less, of course, the net value of the use of the land while in the possession of Woodruff and his successors. For this purpose respondents, upon the going down of the remittitur, should be given permission, if so advised, to amend their answer by setting up their equities and praying for relief accordingly.

For the foregoing reasons the judgment must be reversed, and the case remanded for retrial, unless we can say that there is merit in certain points raised by respondents and now about to be considered.

[18] It is claimed by respondents that the decree foreclosing the Temple mortgage established the fact that appellant was the holder of a judgment lien only, not that he acquired the title as a purchaser at execution sale, and that by that decree the court foreclosed appellant's judgment lien. The record of the foreclosure proceedings does not bear out this contention. In his answer in that case appellant set up more than a claim to a mere judgment lien. His answer set forth, briefly but chronologically, the recovery of his judgment against Walker in the justice's court, the filing of an abstract of that judgment in the office of the county recorder, the issuance of a writ of execution on that judgment, the sheriff's sale of the premises to him as the purchaser at execution sale, and the issuance to him of the sheriff's certificate of sale; and he prayed that he receive from any surplus remaining from the proceeds of the foreclosure sale "the amount necessary to redeem said property from the sale to him." From this it will be seen that appellant did not claim to be a mere lienor, but that, on the contrary, by alleging a sheriff's sale of the premises to him under execution, he in effect alleged facts which showed that the judgment lien once held by him was entirely satisfied and extinguished. And the decree in that case, though it recites that formal findings were waived, declares that "all the allegations of * * * the answer of the defendant C. W. Bateman [the appellant here] * * * are true." While it is true that the prayer of Bateman's answer in that case asks that, if any surplus should remain after satisfying all prior claims, he might receive therefrom "the amount necessary to redeem said property" from execution sale to him, still the fact is that there was no surplus available for the purpose, and hence no such forced redemption of the land from the execution sale to appellant ever was effected. Bateman therefore, according to the averments of his answer in the mortgage foreclosure case, remained in the position in which he was immediately prior to the entry of the mortgage foreclosure decree, namely, the holder of the title under execution sale, subject only to the prior incumbrances and to the right of his judgment debtor to remain in possession and to redeem from the execution sale to him at any time prior to the expiration of the 12 months.

[19] Nor did the foreclosure decree adjudge that appellant is merely the holder of a judgment lien. The language of the decree is:

"* * * The said C. A. Bateman has a lien against the property herein mentioned in the sum of $144, and also for his costs herein laid out and expended, taxed at $———, *by reason of a certain sheriff's certificate of sale*, under execution which was issued on a judgment given and made on September 3, 1914, in the justice's court of Los Nietos township."

The words which we have italicized show the precise nature of Bateman's interest. By the sheriff's certificate of sale, the execution of which is found by the foreclosure decree, Bateman acquired the legal title—a qualified and conditional legal title, but the legal title nevertheless, and not a mere lien. It is true that the foreclosure decree designates Bateman's interest, erroneously, as a "lien." The error in thus denominating appellant's interest appears on the face of the decree itself, since it expressly finds that the interest, whatever it was, existed "by reason of a certain sheriff's certificate of sale." This erroneous designation of appellant's interest is not conclusive in the present action. For whether his interest in the land was merely that of a lienor or whether it was that of the holder of the legal title is a question the determination of which was not necessary to the relief prayed for by appellant in the answer filed by him in the mortgage foreclosure action. Nor was the determination of that question necessary to the relief which was awarded by the decree in that action. A determination of that question one way or the other would not and could not have affected the court's decision and the relief awarded by its decree. The precise technical character of the interest which Bateman acquired by his purchase under the execution on his judgment against Walker was not a matter that was tendered for litigation in the mortgage foreclosure suit, nor was it actually litigated therein. A question which is only incidentally involved and which is not actually litigated—that is, made the subject of trial and pressed upon the consideration of the court—is not concluded by the judgment so as to be res adjudicata in a subsequent suit on a different cause of action.

Fulton v. Hanlow, 20 Cal. 450, 486–489; Ferrea v. Chabot, 63 Cal. 564, 567, et seq.; Chapman v. Hughes, 134 Cal. 655, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982.

[20] Finally, it is contended by respondents that the execution sale under which appellant claims title was fatally defective in certain particulars. It seems that two calls were omitted from the description of the property in the sheriff's certificate of sale to Bateman and likewise in the notices of that sale. But this notwithstanding, the remaining calls in the description as given in the certificate of sale and in the notices were sufficient to describe the property and to identify it as the land in controversy. This was clearly shown by the testimony of an experienced surveyor. The land is described in the certificate of sale as a part of a larger tract—as a part of lot 11 of tract No. 688, as per map recorded in Book 15, page 171, of Maps, Records of Los Angeles County. Lot 11, as shown by the map referred to in the description, contains 19.49 acres. One of the calls in the description as given in the sheriff's certificate is a line which bisects lot 11. It is a line which runs northerly from a fixed point in the southerly boundary line of the lot to a fixed point in the northerly boundary line. It clearly appears from the description as given in the certificate of sale that the property intended to be sold by the sheriff lies to the east of this bisecting line. The certificate of sale and the notices give the area of the land sold as 14.58 acres. By a simple arithmetical calculation based on the data afforded by the description given in the notices and in the certificate of sale, including the map referred to therein, it can readily be ascertained that 14.58 acres is the exact area of all of that part of lot 11 which lies east of the above-mentioned line. It necessarily follows, therefore, that the land intended to be sold and which was sold was all of that part of lot 11 which lies to the east of that call in the description which describes the line that bisects the lot—the line which begins at a definite point in the southern boundary of the lot and extends to a definite point in the northern boundary. The description was therefore sufficient to enable bidders at the sale to ascertain the precise parcel of land to be sold.

[21] The description would certainly have been sufficient for a voluntary conveyance; and what is sufficient for such a conveyance will suffice for an involuntary conveyance. There is high authority for so holding. In White v. Luning, 93 U. S. 514, 23 L. Ed. 938, the court says that in many respects the rules of construction are different, but this difference does not extend to the description of the property conveyed. In this regard "the rules are the same, whether the deed be made by a party in his own right, or by an officer of the court. The policy of the law does not require courts to scrutinize the proceedings of a judicial sale with a view to defeat them. On the contrary, every reasonable intendment will be made in their favor so as to secure, if it can be done consistently with legal rules, the object they were intended to accomplish." To the same effect is Hermann v. Likens, 90 Tex. 448, 39 S. W. 282.

[22] There is no merit in respondents' claim that the error in the date of the sheriff's deed to appellant is fatal to the latter's claim of title. It seems that the deed bears date "May 4, 1914," instead of "May 4, 1916," and respondents suggest that, because delivery is presumed to have been made at the date which a deed bears, the recording of a sheriff's deed bearing such an erroneous date as the one in question here can afford no notice to subsequent purchasers that the property was sold to appellant on May 3, 1915—a year later than the date which the deed bears. But the sheriff's deed to appellant gave him no new title; it was simply evidence that the title which he had acquired at the sheriff's sale had become absolute. Robinson v. Thornton, supra. The recording of the sheriff's certificate of sale to appellant was alone sufficient to charge Woodruff and all other subsequent purchasers with notice of appellant's title. The sheriff is required to file a duplicate of the certificate of purchase in the office of the county recorded for record (Code Civ. Proc. § 700a); and his return on the writ of execution is prima facie evidence of the facts stated therein (Pol. Code, § 4159). His return on the execution pursuant to which he sold the property to appellant, dated May 3, 1915—the date of the sale—states that a duplicate of the certificate had been filed for record with the county recorder. This, therefore, is prima facie evidence that on the date of the sale to appellant a duplicate of the certificate of sale was duly recorded. Woodruff, therefore, and his successors in interest, the respondents here, had notice that the property was sold by the sheriff to appellant on May 3, 1915, regardless of any error in the date of the subsequently executed sheriff's deed to appellant.

The judgment is reversed, with directions to permit respondents to amend their answer, if so advised, by alleging any facts showing them or any of them to be possessed of equities entitling them or any of them to reimbursement for outlays and to an equitable lien therefor.

We concur: WORKS, J.; CRAIG, J.

59 Cal. App. 541

## GOLDEN EAGLE MILLING CO. v. OLD HOMESTEAD BAKERY. (Civ. 4275.)

(District Court of Appeal, First District, Division 1. California. Nov. 2, 1922.)

1. **Frauds, statute of ⟸83 — Contract for manufacture and sale of flour held within statute.**

A contract whereby a milling company sold to a bakery 1,000 barrels of flour, which was to be manufactured not especially for the bakery but in the usual course of business as part of a larger quantity, *held* within the statute.

2. **Frauds, statute of ⟸89(3)—Acceptance of part of shipment of flour held not to take contract for a larger amount out of operation of statute.**

Where plaintiff sold under oral contract to defendant 1,000 barrels of flour at $11.75 a barrel, that defendant accepted 20 barrels as part of a larger shipment of other goods but retained them only after plaintiff had reduced the price to $11.30 a barrel, did not take the case out of the operation of the statute of frauds, the refusal to take the 20 barrels at the price named being in effect a repudiation of the order.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by the Golden Eagle Milling Company against the Old Homestead Bakery. Judgment for defendant, and plaintiff appeals. Affirmed.

Fred S. Howell, of Petaluma, for appellant.

John O'Donnell, of San Francisco, for respondent.

KERRIGAN, J. Action to recover the sum of $3,234 damages for the breach of a contract to receive and pay for 1,000 barrels of barley flour sold to the defendant at the agreed price of $11.30 per barrel, only 20 barrels of which were accepted and paid for, the remainder refused, and sold by the plaintiff in the nearest market at the best price obtainable, the price thus realized being less than the contract price by the said sum of $3,234.

The plaintiff is a corporation engaged in the manufacture of flour and feed. The defendant is a corporation engaged in the bakery business. On September 11, 1918, the plaintiff, through its salesman, Howe, sold to the defendant, through its agent and officer, Banzaf, 1,000 barrels of barley flour, to be ground from barley, sample of which had been previously furnished to the defendant, at the price of $11.75 per barrel. It was known to the defendant that the flour was not yet manufactured. While the particular brand and quality of flour so sold was not kept in stock by the plaintiff, it was manufactured according to its own formula and was sold to other customers than the defendant. The sale was effected by telephone conversation between Howe and Banzaf. The former entered the order in his memorandum book, and on the same day wrote a letter to the defendant confirming the order. No reply to this letter was received. A few days thereafter the manager of the plaintiff acknowledged the receipt of the order in a letter also dealing with other matters, but received no reply to this letter, although it is admitted that the letter was received by the defendant.

About November 10, 1918, the plaintiff shipped to the defendant 20 barrels of barley flour on account of this order, they going forward as a part of a larger shipment furnished in fulfillment of a previous order. Invoices for the entire shipment were sent to the defendant, the 20 barrels being charged at $11.75 per barrel, and the remainder at $11.30. Mr. Banzaf, upon observing this, called the plaintiff by telephone to inquire the reason for the difference, and was then informed that the 20 barrels was part of defendant's order for 1,000 barrels given at the price of $11.75 per barrel, whereas the remainder constituted part of a previous order given at a lower price. Banzaf at this time informed the plaintiff that he had no recollection of giving this order for 1,000, and refused to pay more for the 20 barrels than it had been theretofore paying for the same brand and quality of flour. The plaintiff, through its manager, thereupon agreed to reduce the price to $11.30—the old price—and the defendant received and retained the 20 barrels and paid therefor at said reduced rate. Thereafter, in due time, the plaintiff tendered the remaining 980 barrels, but the defendant refused to accept or pay for the same.

The evidence offered by the plaintiff as to the whole transaction was objected to by the defendant upon the ground that the contract, being one for the sale of goods and chattels at a price of $200 and over, was invalid if not in writing signed by the defendant, and that the parol evidence offered by the plaintiff for the purpose of establishing it was incompetent. The evidence was admitted by the court, subject to a motion to strike it out in the event that the plaintiff's evidence did not take the contract out of the operation of the statute of frauds. This the plaintiff endeavored to do by proof of the receipt and acceptance by the defendant of the aforementioned 20 barrels. At the conclusion of the evidence the motion to strike out was renewed by the defendant and granted. Thereupon the defendant moved for a nonsuit, which also was granted, and the plaintiff's motion for a new trial being also de-

nied, was followed by judgment in favor of the defendant, dismissing the action.

The plaintiff appeals and makes two points for the reversal of the judgment, namely: That the contract in question was not a sale of personal property within the meaning of the statute requiring it to be in writing, but comes within the provisions of section 1740 of the Civil Code relating to agreements to manufacture; and, second, that even if it be held to be a sale of personal property there was a delivery and acceptance of part of the goods, the effect of which was to dispense with the necessity of a writing signed by the defendant.

There has been considerable diversity of opinion as to whether a contract, although in terms a sale, comes within the statute of frauds requiring it to be evidenced by a writing, if the goods purporting to be sold are not yet in existence and are to be thereafter manufactured by the vendor; and in a number of early cases in the state of New York it was held that such contracts are not within the statute. Thus it was held that a sale of flour to be thereafter milled was a contract to manufacture rather than a sale (Bronson v. Wiman, 10 Barb. [N. Y.] 406); similarly of a contract to deliver monthly thereafter during a certain period a number of barrels of beer not yet brewed (Donovan v. Willson, 26 Barb. [N. Y.] 138). Later cases have not followed that rule, but have adopted the rule followed in other states holding such a contract to be a sale within the statute of frauds; and that in order to be classed as an agreement to manufacture, the article must be made for the vendee according to his special design or requirements, so that when made it would not be suitable for the general trade of the vendor. The general question is discussed at length in the case of In re Gies, 160 Mich. 502, 125 N. W. 420, 30 L. R. A. (N. S.) 318, 19 Ann. Cas. 1288. The Supreme Court of Michigan, after reviewing a number of cases decided in various jurisdictions, said:

"The effect of these decisions we understand to be this, namely: That a contract for the sale of articles then existing, or such as the vendor, in the ordinary course of his business, manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But, on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute. Spencer v. Cone, 1 Metc. (Mass.) 283. 'The distinction,' says Chief Justice Shaw, in Lamb v. Crafts, 12 Metc. (Mass.) 353, 'we believe is now well understood. When a person stipulates for the future sale of articles which he is habitually making, and which, at the time, are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise, when the article is made pursuant to the agreement.' In Gardner v. Joy, 9 Metc. (Mass.) 177, a contract to buy a certain number of boxes of candles at a fixed rate per pound, which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale and within the statute. To the same general effect are Waterman v. Meigs, 4 Cush. (Mass.) 497, and Clark v. Nichols, 107 Mass. 547. It is true that 'in the infinitely various shades of different contracts' there is some practical difficulty in disposing of the questions that arise under that section of the statute. General Stat. [1860] c. 105, § 5. But we see no ground for holding that there is any uncertainty in the rule itself. On the contrary, its correctness and justice are clearly implied or expressly affirmed in all of our decisions upon the subject-matter. * * * An instructive case is Roubicek & Zobel v. Haddad, 67 N. J. Law, 522, 51 Atl. 938. The contract was a New York contract, and the rule in that state was applied. A defendant, who was doing a retail trade in Atlantic City, N. J., ordered from the plaintiffs, who were importers and manufacturers of Bohemian glass novelties, etc., in New York City, an assortment of watch cases and Cologne articles, to be thereafter manufactured in Europe, with the words 'Atlantic City' thereon, for the special use of defendant's trade; and it was held, following the decisions of the state of New York, that this was not a contract of sale, but for work, labor, and materials, and hence not a contract within the statute. After stating the New York rule, the court said: 'It should be stated, however, that the courts of the state of New York have more recently shown a disposition to qualify the rule thus stated to some extent, and to make it conform more closely to the rule as adopted in the later English and American cases. Thus, in Passaic Mfg. Co. v. Hoffman, 3 Daly (N. Y.) 495, it is held that if the article to be manufactured to fill the order was one that was manufactured and supplied to the trade generally, it would be a sale within the statute; but, if it was specially manufactured for the trade of the person ordering it, then the contract would be one for work and labor, and not within the statute.'"

[1] In this state the question was touched upon in the case of Flynn v. Dougherty, 91 Cal. 671, 27 Pac. 1080, 14 L. R. A. 230, and the contract there held to be one of manufacture coming under section 1740 of the Civil Code, but the facts of that case were such as to clearly exclude it from the operation of the statute of frauds. The court, however, in that case, seems to accept the so-called Massachusetts rule as having the weight of authority, and we think the present case comes clearly within that rule. It cannot be fairly said that the plaintiff in the case at bar manufactured the flour specially for the defendant and that it was not an article suitable for its general trade. The fact that the plaintiff, owing to the uncertainty of the demand for this particular flour, took the precaution of procuring orders before milling it makes no essential difference. It had bought a quantity of barley sufficient to make 3,000 barrels of flour, and its salesman was soliciting orders for the sale of

this quantity, and sold to the defendant 1,000 barrels thereof. It was an article manufactured by the plaintiff according to its own formula and for the general market; and if in the present instance the armistice of November 11, 1918, had not intervened the plaintiff could have readily disposed of the flour to other customers. We conclude that the trial court correctly held the contract in question to be a sale within the statute of frauds.

[2] By its ruling on the motion to strike out the evidence the trial court also held that the transaction by which the defendant accepted the 20 barrels constituting part of a larger shipment, the remainder of the shipment being the completion of a previous order, was not such acceptance of part of the goods as to obviate the necessity of a writing signed by the defendant. The trial court took the view that the defendant's refusal to pay for these 20 barrels at the price named in the order was in effect a repudiation of the order, and that its consent to retain them and pay for them at a reduced price could not be construed as an acceptance under the terms of the original order. As an inference to this effect might well be drawn from the testimony, it follows that the lack of a writing signed by the party to be charged was not cured by its retention of the 20 barrels, and the trial court was therefore justified in its ruling striking out the evidence. The ruling of the court to this effect left the record in such condition that it could not do otherwise than grant the defendant's motion for a nonsuit.

It results from the foregoing that the judgment should be affirmed, and it is so ordered.

We concur: TYLER, P. J.; ST. SURE, Justice pro tem.

---

59 Cal. App. 457

## PEOPLE v. GARCIA. (Cr. 920.)

(District Court of Appeal, Second District, Division 1, California. Oct. 24, 1922. Hearing Denied by Supreme Court Dec. 22, 1922.)

**1. Criminal law ⟸1166½(5)—Accused cannot secure reversal because of manner of summoning jurors unless prejudiced thereby.**

Accused cannot secure reversal because of form of order for summoning jurors where it is not shown how he was or could have been prejudiced at all.

**2. Jury ⟸82(2)—Substantial compliance with statutory requirements as to summoning jurors held sufficient.**

There is no constitutional right in an accused to have procedure respecting the summoning of a jury which may sit at his trial strictly and exactly followed; for the procedure is statutory, and substantial compliance therewith is all that the parties are entitled to insist upon.

**3. Criminal law ⟸1163(2)—Prejudice not presumed from departure from statutory mode of summoning jurors.**

Prejudice will not be presumed from a departure from the statutory procedure of summoning jurors.

**4. Jury ⟸82(2)—Order requiring jurors to be selected from body of county held not erroneous.**

In kidnapping prosecution, where, at the time the cause came on for trial, there was no regular panel of jurors in attendance, and the court ordered a special venire to be summoned by the sheriff, and in the order required that the jurors be selected "from the body of the county, and not from the bystanders," the court properly denied challenge to the panel on the ground that the quoted language in the order is authorized only where the object is to complete a panel, as in a case covered by Code Civ. Proc. § 227, while the court's action was taken under section 226, as amended by St. 1917, p. 1284.

**5. Jury ⟸82(2)—That deputy summoning jurors, and jurors, were applicants for membership or members of secret organization held not ground for challenge.**

In kidnapping prosecution, *held*, that the fact that a deputy sheriff who summoned the jurors and certain jurors were applicants for membership in, or members of, an organization called the "K. K. K.," was not ground for challenge to the panel or individual members selected to compose the jury, where examination did not disclose that their action would be influenced by their obligation.

**6. Criminal law ⟸594(3) — Continuance for absence of accused's wife in Mexico held properly refused.**

In kidnapping prosecution, continuance for illness and absence of accused's wife in Mexico *held* properly refused, it not appearing that she had been or could be subpœnaed, or that her attendance could be secured if continuance were granted, and the district attorney announcing himself as being willing that her testimony recorded at a former trial be read to the jury.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Susano Garcia was convicted of kidnapping, and from the judgment and from order denying his motion for new trial, he appeals. Judgment and order affirmed.

Frank Birkhauser, of El Centro, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of the crime of kidnapping. A motion for a new trial was denied. Defendant has appealed from the judgment and from the order denying the motion.

It may be stated at the outset that not only was the evidence showing the guilt of the defendant most ample and complete, but it showed further that the crime was accomplished in a particularly cruel and brutal manner. The facts may be briefly adverted to: About the 1st of June, 1921, Cruz Moreno Singh resided with her husband, Dewan Singh, at a point in Imperial county about 600 feet from the Mexican border. She was a young woman, and had been married about a month at the time of the occurrence hereinafter referred to. With her resided her young sister, aged 16 years. The husband was engaged in farming, and on the day in question was at work a mile or more from his home. Late in the afternoon the appellant herein, in company with another man (both being Mexicans), entered the house where Mrs. Singh and her sister were, exhibited revolvers and a knife, seized Mrs. Singh and the girl, and proceeded to drag them out of the house. The latter resisted to the utmost of their strength, until finally one of the men struck Mrs. Singh a hard blow on the head with a revolver, and she became unconscious. The men then carried and dragged their victims across the line into Mexico. From that point they were compelled to walk to a Mexican settlement some 8 or 9 miles toward the interior of the country. They were placed in a house occupied by a Mexican family, from which, the second night thereafter, with the aid of a Mexican whose assistance they procured with an offer of $50, they escaped and returned to the house of friends on the American side. The appellant here was not arrested for some months afterwards, although his identity was known to the officers, for he remained on Mexican ground. He was finally caught after having driven an automobile across the line, and his trial and conviction followed.

[1-5] Appellant's claims for reversal are based upon highly technical grounds, and after a careful examination of each of them we are convinced that they have no substantial merit. At the time the cause came on for trial there was no regular panel of jurors in attendance, and the court ordered a special venire to be summoned by the sheriff, and in the order required that the jurors be selected "from the body of the county and not from the bystanders." Appellant insists that such language in the order is only authorized where the object is to complete a panel where a sufficient number of persons have not been summoned, as in a case covered by the provisions of section 227, Code of Civil Procedure. The action taken by the court was under the provisions of section 226, Code of Civil Procedure, as amended by St. 1917, p. 1284, which provides that, where no jurors are drawn or summoned to attend, or a sufficient number fail to appear, the court may direct the sheriff to summon, "so many good and lawful persons of the county, * * * as may be required." Assuming that under the latter provisions the order would not exclude bystanders from selection, it is not shown how the appellant was or could have been prejudiced at all. There is no constitutional right in a defendant to have procedure respecting the summoning of a jury which may sit at his trial strictly and exactly followed. The procedure is statutory, and a substantial compliance therewith is all that the parties are entitled to insist upon. People v. Nakis, 184 Cal. 105, 193 Pac. 92. Prejudice will not be presumed from a departure from the statutory procedure. Moreover, the language of section 226, Code of Civil Procedure, imports in its requirement as to the summoning of jurors that the selection shall not be made from bystanders. In People v. Vincent, 95 Cal. 426, 30 Pac. 582, the court said:

"* * * The court, under section 226 of the Code of Civil Procedure, may at any time direct the sheriff to summon jurors from the body of the county, although there be names of properly selected regular jurors in the jury box; and when, from any cause, there are no regular jurors to be drawn from, the very case arises where the court may, without any doubt whatever, exercise the power granted by said section 226."

See, also, Leahy v. Southern Pacific Railroad Co., 65 Cal. 150, 3 Pac. 622; Levy v. Wilson, 69 Cal. 105, 10 Pac. 272.

The challenge to the panel on the ground indicated was properly denied. The further challenge to the panel on the ground that the deputy sheriffs who summoned the jurymen were biased was not well grounded. Appellant both in his examination of the deputy sheriffs and of the jurors sought to show that such officers and jurors were members of an organization called the "K. K. K.'s," and that under the obligation taken as such members of such organization they could not do justice in a cause where a defendant was a foreigner or was of a particular religious faith. One of the deputy sheriffs who summoned the jurymen admitted that he had made application for membership in an organization known under the style of "K. K. K.'s," but stated that he had taken no obligation thereunder. Several of the jurymen admitted that they were members of the organization referred to, and that they had taken an obligation as such members, but each and all of the persons examined as to that subject positively stated that such obligation was not of a character as would influence them in considering fairly the case between the people and the defendant, or in rendering an impartial verdict thereon, and that it would not have that effect. Just what that obligation was appellant's counsel made no attempt to show,

except that he offered in evidence an article printed in a magazine which purported to set forth the aims, objects, and purposes of the K. K. K. organization. One of the errors claimed is the ruling of the court in refusing to admit the magazine article in evidence. Such matter was hearsay twice removed and was most properly ruled out. Full scope was given to the examination of the jurors as conducted by appellant's counsel, and the challenges made, both as to the panel and individual members selected to compose the jury, were properly denied.

[6] Appellant complains that the court erred in refusing to grant his motion for a continuance of the trial. The motion was an oral one, unsupported by any other showing whatsoever, and referred to the fact that the wife of the defendant, who was then in Mexico, was ill and could not attend at the day fixed for the hearing. In the first place, a prima facie showing was not made to support the motion. The witness had never been subpœnaed, so far as appears, and was out of the jurisdiction of the court; hence beyond the reach of a subpœna, had one been issued. The court could not have fairly concluded from the oral statement of counsel that there was any probability that the attendance of the witness could be obtained in the event a continuance was granted. It appeared further that the witness had testified at a former trial, and the district attorney announced himself as being willing that her testimony so recorded be read to the jury.

The instructions given by the trial judge were full and fair, and every right which the law accords to a defendant was secured to appellant.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

190 Cal. 201

## TRIPP v. TRIPP. (L. A. 7308.)

(Supreme Court of California. Dec. 15, 1922.)

**1. Contempt ⟸66(2)—No appeal from order adjudging one in contempt in refusing to make payments due under divorce decree.**

In view of Code Civ. Proc. § 1222, declaring the court's judgment and orders in contempt cases final and conclusive, no appeal lies from an order adjudging one guilty of contempt in refusing to make payments due under the terms of a final divorce decree.

**2. Contempt ⟸67—Order in contempt may be annulled on certiorari only if in excess of court's jurisdiction.**

An order in a contempt case may be annulled on certiorari only when made in excess of the court's jurisdiction.

**3. Appeal and error ⟸82(1)—General law controlled by special law making judgment of contempt final.**

Code Civ. Proc. § 963, authorizing appeals from special orders after final judgment, is general in character, and controlled by the special law (section 1222), making a judgment of contempt final and conclusive.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas O. Toland, Judge.

Action by Amelia P. Tripp against E. E. Tripp. From an order adjudging defendant guilty of contempt of court, he appeals. On motion to dismiss appeal. Motion granted, and appeal dismissed.

D. Joseph Coyne and Joseph M. Suttner, both of Los Angeles, for appellant.

Griffith Jones and John J. Craig, both of Los Angeles, for respondent.

WASTE, J. [1, 2] The defendant has attempted to appeal from an order adjudging him guilty of contempt of court in refusing to make certain payments alleged to be due under the terms of a final decree of divorce. The law does not authorize an appeal in such matters. It is expressly provided in section 1222 of the Code of Civil Procedure that—

"The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive."

It is only when an order so made is in excess of the jurisdiction of the court making it that it may be annulled on certiorari. People v. Latimer, 160 Cal. 716, 720, 117 Pac. 1051.

[3] If it be contended that the order adjudging defendant guilty of contempt was one made after final judgment, from which an appeal may ordinarily be taken under section 963 of the Code of Civil Procedure, it is now settled that this provision is general in character, and is controlled by the special law contained in section 1222 of the Code of Civil Procedure, which makes a judgment of contempt final and conclusive, and therefore nonappealable. Gale v. Tuolumne Water Co., 169 Cal. 46, 51, 145 Pac. 532.

The appeal is dismissed.

We concur: SHAW, C. J.; SLOANE, J.; SHURTLEFF, J.; LENNON, J.; WILBUR, J.; LAWLOR, J.

190 Cal. 180

## PHILLIPS et al. v. LAGUNA BEACH CO. et al. (L. A. 6642.)

(Supreme Court of California. Dec. 8, 1922, as amended Dec. 21, 1922. Rehearing Denied Jan. 4, 1923.)

**1. Dedication ⟸17—Resolution in minutes of meeting of land company held present offer to dedicate land for park.**

A resolution in the minutes of a meeting of the directors of a land company, wherein it was "resolved that all property south and west of * * * shall be reserved for park purposes and not sold by anybody at any time, * * *" *held* a present offer to dedicate the land described, rather than a statement that the land would be dedicated at some future time, particularly in view of the fact that advertisements were printed containing the statement that the land had been reserved for park purposes and some slight improvements to fit it for public use had been erected.

**2. Dedication ⟸37—General use by public held acceptance in pais of offer to dedicate land for "park."**

Entry and general use by the public of property which a land company had offered to dedicate to the public use as a park *held* sufficient to establish an acceptance in pais of the offer, though no extensive improvements were made thereon, since a "park" does not have to be laid off in paths or planted with flowers, but may be merely an open space which the public may use for any purpose it sees fit of a public nature.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Park.]

**3. Dedication ⟸16(1)—Public use of land never offered for dedication creates no obligation to dedicate.**

Public entry upon and use of land adjoining a park which had been dedicated to public does not impose any obligation on the owner of such property, where no offer of dedication has ever been made.

**4. Dedication ⟸48—When unrecorded, held invalid as to persons taking trust deed to property without notice.**

An unrecorded dedication of property to the public and an acceptance by user *held* in-

valid as to a college and bank who had made a loan on and accepted a deed of trust to the property, notwithstanding that a lot adjoining the property dedicated contained a recital of the dedication; such deed being the only instrument of record indicating the dedication.

In Bank.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by Mrs. Frank A. Phillips, plaintiff, and Amelia B. Keech and others, interveners, against the Laguna Beach Company, a corporation, and others. From a judgment in favor of plaintiff and interveners, defendants appeal. Affirmed as to the named defendant; reversed as to the others.

James S. Bennett, of Los Angeles, for appellants.

Hahn & Hahn, of Pasadena, for defendant and appellant Pomona College.

John A. Harvey, of Santa Ana, for respondents.

S. M. Davis, of Santa Ana, for interveners and respondents.

SHAW, C. J. The appeal is from the judgment.

The plaintiff filed her complaint asking for an injunction to prevent the defendants from selling, transferring, or incumbering the land comprising a part of the tract known as "Laguna Cliffs." The part of the tract which the defendants were to be enjoined from selling is described as blocks 34, 25, 17, and 1, and lot 37 in block 2, comprising the ocean frontage of the subdivision of the land according to the map made by the Laguna Beach Company, filed in the recorder's office, and designated as "Laguna Cliffs." The contention of the plaintiff was that the land so described had been dedicated to the use of the public for park purposes. It is claimed that the defendant Laguna Beach Company made a formal dedication of the tract by resolution entered upon their minutes and that there was a subsequent acceptance thereof by the public.

The plaintiff is the owner of lot 4, block 18, of Laguna Cliffs. The interveners own lot 4 of block 8, lot 5 of block 17, and lot 1 of block 18, in said subdivision, and they join in the prayer of the complaint that the defendants be enjoined from selling, disposing, or incumbering the part of the tract which it is claimed the defendant Laguna Beach Company dedicated to the public for park purposes.

[1] The plat was filed on April 19, 1906. On September 20, 1906, the board of directors of the Laguna Beach Company passed a resolution in the following words:

"On motion made by Leonard Merrill and seconded by Ferdinand Thum, it was resolved that all property south and west of the street marked 'Cliff drive,' and the street marked 'Spring street,' as shown on a map of Laguna Cliffs, between the east line and Boat Canyon, shall be reserved for park purposes and not sold by anybody at any time, except such part of block one as lies south of the south line of Spring street and running parallel thereto 100 feet south of said south line, and excepting also lot 1 in block 3, Laguna Cliffs."

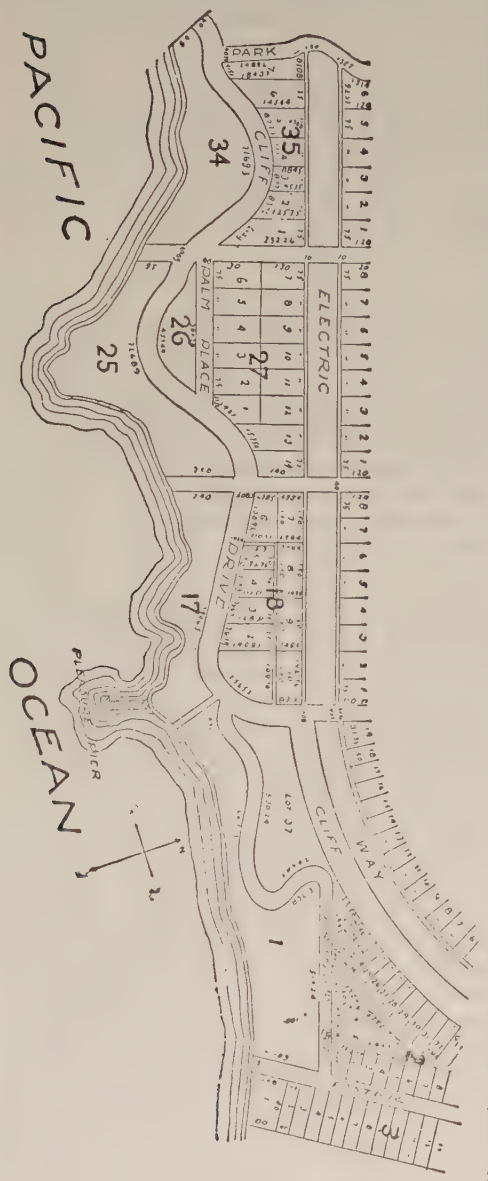
This, it is contended, constitutes the proposal to dedicate the property therein for park purposes. They also printed advertisements containing the statement that the entire ocean frontage had been reserved for park purposes, and made some slight improvements to fit it for public use, consisting of erecting two small pavilions, and placing steps in two places where the land was steep. We regard this resolution as a present offer to dedicate the land described, and not as a statement that the land shall be dedicated at some future time. Hence it is sufficient in and of itself so far as the mere offer is concerned. The other acts and declaration are, of course, additional evidence of the intention to that effect.

[2] To make the dedication there must have been additional evidence of acceptance by the public. Laguna Beach was not incorporated and the county of Orange did not pay any attention to the matter, so there was no official acceptance. It is claimed there was an acceptance in pais; that the public accepted the lots so dedicated by going on the premises and occupying the same for camping purposes and using the same for that purpose, and also by using the same for other purposes and by making use of the small pavilions and other improvements thereon.

We think there is sufficient evidence of use by the general public to sustain the finding of dedication. There was evidence that the public soon began to occupy the property by camping thereon, and by parking their automobiles and other vehicles thereon, eating their lunches and viewing the ocean, and divers other uses that the property was adapted for of a public nature. The two pavilions, while not large, were used as places to rest, or in which to sit, and eat lunches and view the ocean. An improvement association, for a number of years, recognized the property as a park and kept it clean from weeds and waste papers and placed garbage cans thereon. The use was not constant. Such uses are seldom of that character, but the use was such as the public was likely to make of such a dedication. A park does not have to be laid off in paths or planted with flowers. It may be merely an open space which the public may use for any purpose it sees fit of a public nature. Such use was made of that land, and as constantly as could be expected under the circumstances.

The real question at issue is how much land was included in the dedication. We do not think the dedication included as much

land as is now claimed. Lot 37 of block 2 was not included in the description in the resolution, and the strip 100 feet wide of block 1 was expressly excepted from the dedication, also lot 1 of block 3. The following part of the plat shows how the land claimed to be dedicated is situated with relation to the other parts of the subdivision:




[3] It will be observed that the description of the property dedicated includes "all property south and west of the street marked 'Cliff drive' and the street marked 'Spring street.'" This cannot be held to include lot 37 of block 2, for that block was situated northerly of Spring street. Appellants contend that the line of the land dedicated should follow the line of "Cliff drive" beyond the point of its interesection with Spring street to the point opposite where Spring street curves sharply and extends easterly for a distance of 519 feet; it being opposite the point at the westerly end of lot 21 of block 2, thus making the land dedicated include the whole of lot 37 of block 2. We think the correct solution of the problem is that the line should take the course of the south line of "Spring street" from the place where it intersects with "Cliff drive," immediately opposite lot 1 of block 18 of the tract, and continue on that line around lot 37, block 2, to a point which will make it connect with the line running parallel with the south line of "Spring street" and 100 feet southerly thereof, along that part of said street running easterly from the westerly end of lot 21 of block 2. The fact that the public went upon lot 37 and camped there is of no consequence, since the lots were never offered to the public. Some claim is made that a tennis court was maintained upon lot 37, but the record shows that a special lease was made to the tennis club by Mr. Heisler, the president of the company, and that said tennis club was maintained in pursuance of the lease. We find no reason for including lot 37 in the dedication. The resolution expressly excepted the following portion:

"Such part of block one as lies south of the south line of Spring street and running parallel thereto 100 feet south of said south line."

This could not have been intended to have been included in the dedication. That 100-foot strip therefore must be excluded from the portion of the tract set appart to the public use.

[4] We do not think the judgment can be sustained as to the Pomona College and the Orange County Trust & Savings Bank. The college made a loan secured by a deed of trust to the bank for the property in 1916. The resolution of dedication was not recorded, and there was nothing in the record title to impart notice to them except a deed from the Laguna Beach Company to Mabel W. Frankenfield for lot 3, in block 27, containing the following language:

"The party of the first part guarantees that no land between this lot and the ocean will be sold or used for private uses of any kind."

A committee of the college visited the premises in April, 1916, and looked over the property with a view to making the loan. It included all the unsold lots in the entire tract. They did not notice anything to indicate the dedication to public use. At that time of the year there would be little, if any, evidence of the public use, and there is nothing in the testimony of the witnesses to the transaction to show that any member of the public was exercising his or her rights of occupancy at the time, nor was anything on the ground to indicate such use, except

the two small pavilions and the steps. As to them there was nothing to show that they were for public use or that they were anything other than private erections on the part of the premises on which they stood. The bank did not see the premises, but relied wholly on the record title. The clause in the deed to Frankenfield, even if we concede that subsequent purchasers of any other lot except 3 of block 27 must take notice of it, indicates nothing except a personal contract in favor of Frankenfield which she only could enforce, and she is not a party to the action. It does not appear that the bank had any knowledge of the Frankenfield deed. There is no evidence that the public were occupying the public use at the time of the visit of the committee, nor that it ever had occupied any part of the premises so as to impart notice to the committee, or to Pomona College, or to the bank. Consequently the judgment must be reversed as to those defendants.

As to the defendant the Laguna Beach Company, the judgment is affirmed, except as to lot 37, block 2, of said subdivision, known or "Laguna Cliffs," and, as to said excepted part, the judgment is reversed.

As to the defendants Orange County Trust & Saving Bank and Pomona College, said judgment is reversed.

We concur: SHURTLEFF, J.; WASTE, J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.; LENNON, J. (SHAW, C. J., and LENNON, WASTE, WILBUR, LAWLOR, and SLOANE, JJ., concur in opinion as modified.)

---

190 Cal. 198

## HURT v. HAERING. (L. A. No. 7293.)

(Supreme Court of California. Dec. 14, 1922. Rehearing Denied Jan. 11, 1923.)

**1. Divorce ⟸79—Affidavit for publication of summons referring to verified complaint sufficient, though complaint not filed for more than two months.**

Under Code Civ. Proc. § 412, an affidavit for publication of summons in a divorce action, referring to a verified complaint, which stated a cause of action and also plaintiff's residence in the state and county for the requisite period immediately preceding commencement of the action, *held* sufficient, though more than two months elapsed after verification of the complaint before the complaint was filed, as the complaint speaks from the date of its filing.

**2. Divorce ⟸79 — Allegation of jurisdiction not esential part of "cause of action."**

The allegation of jurisdiction, while essential to the maintenance of an action for divorce in the particular county in which it is instituted, is not an essential part of the cause of action, within Code Civ. Proc. § 412, requiring that it appear, either in the affidavit for publication of summons or the verified complaint on file, that a cause of action exists against the defendant to be served; a "cause of action" arising out of an antecedent primary right and corresponding duty and the delict or breach of such right or duty by the person on whom the duty rests.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cause of Action.]

**3. Parties ⟸67—Husband may be sued by name by which known, though different from that stated in marriage license.**

One may be sued for divorce by the name by which he was always known to his wife and others, though that is not the name stated in the marriage license.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Leora Forman Hurt against Walter A. Haering. Judgment for defendant, and plaintiff appeals. Reversed.

Chas. H. Adkins and E. C. Bowen, both of Los Angeles, for appellant.

Lucien Gray, of Los Angeles, for respondent.

WILBUR, J. [1] This is an action for breach of promise of marriage. Defendant claims that the plaintiff is a married woman, and bases that claim upon the invalidity of a divorce decree obtained by the plaintiff from her husband. The court held the divorce decree invalid and instructed the jury to bring in a verdict for the defendant. The claim that the divorce decree was void was based upon the fact that no jurisdiction was acquired over the defendant by the publication of the summons, for the reason that there was no statement of a cause of action in the affidavit for publication of the summons, except by reference to a verified complaint. The complaint states a cause of action, but was verified October 28, 1915, and was not filed until January 13, 1916, 77 days later. An essential allegation in a complaint for divorce is that of residence; that the plaintiff has been a resident of the state for one year and county for three months immediately preceding the commencement of the action. Such an allegation was contained in the complaint in question; but, in view of the fact that more than two months elapsed after the time of verification and before the filing of the complaint, it is claimed that the complaint cannot be considered a verified complaint within the meaning of section 412 of the Code of Civil Procedure, which provided that it must appear either in the affi-

davit for publication, or "* * * by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made. * * *"

[2] The respondent's argument is that the allegation of residence is an essential allegation (Flynn v. Flynn, 171 Cal. 746, 154 Pac. 837), and that the verification of the complaint in the divorce action cannot properly be deemed a verification of the essential fact of residence during the three months immediately preceding the action, and that to that extent the complaint is not verified. As the complaint speaks from the date of its filing, the complaint in the divorce action states a cause of action and the essential jurisdictional facts. Ronnow v Delmue, 23 Nev. 29, 32, 41 Pac. 1074. It is also clear that the complaint in the action is a verified complaint and shows that the plaintiff therein had a cause of action for divorce against the defendant. The allegation of jurisdiction, while essential to the maintenance of the action in the particular county in which it was instituted, is not an essential part of the cause of action within the meaning of section 412, Code of Civil Procedure. "A cause of action, as Prof. Pomeroy points out with his usual lucidity (Remedies and Remedial Rights, § 452 et seq.), arises out of an antecedent primary right and corresponding duty and the delict or breach of such primary right and duty by the person on whom the duty rests. 'Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term and as it is used in the Codes of the several states.'" McKee v. Dodd, 152 Cal. 637, 641, 93 Pac. 854, 855 (14 L. R. A. [N. S.] 780, 125 Am. St. Rep. 82). See, also, Frost v. Witter, 132 Cal. 421, 425, 64 Pac. 705, 84 Am. St. Rep. 53; Lemon v. Hubbard, 10 Cal. App. 471, 102 Pac. 554; Hutchinson v. Ainsworth, 73 Cal. 452, 455, 15 Pac. 82, 2 Am. St. Rep. 823; Code Civ. Proc. § 22.

The point that the court in the divorce action did not obtain jurisdiction over the defendant by publication of summons is not well taken.

The cases cited by respondent to the point that the order of publication must be made with reasonable promptness after the affidavit for publication (People v. Huber, 20 Cal. 81; Forbes v. Hyde, 31 Cal. 342; and Cohn v. Kember, 47 Cal. 144) have no application.

[3] Respondent also claims that the divorce decree was invalid because of the fact that the name of the plaintiff's husband as stated in the marriage license was Tychof B. Hurt, but the plaintiff testified that her husband was always known to her and all others by the name of Theodore. It is consequently proper to sue him by that name. The trial court was also of that view.

Judgment reversed.

We concur: SHAW, C. J.; LENNON, J.; WASTE, J.; SHURTLEFF, J.; LAWLOR, J.; SLOANE, J.

---

59 Cal. App. 112

## MEEKER v. CROSS. (Civ. 3961.)

(District Court of Appeal, Second District, Division 1, California. Oct. 27, 1922. Rehearing Denied Nov. 21, 1922. Hearing Denied by Supreme Court Dec. 26, 1922.)

**1. Fraud ⟸13(2)—False representation must be believed to be untrue.**

Under Civ. Code, § 1572, subd. 1, defining actionable fraud, a false representation, though accompanied by an intent to deceive, is not alone sufficient to constitute fraud, but it is essential that it also appear that the party making the representation did not at the time believe it to be true.

**2. Corporations ⟸121(5)—Evidence held insufficient to support finding corporation's president knew his statement as to value of stock was untrue.**

In an action to rescind a sale of corporate stock for fraud, evidence that the seller was the president of the corporation but that he was not the active manager thereof, and relied on a statement prepared by certified accountant showing the corporation to have a surplus *held* insufficient to support a finding that he knew his statement the stock was worth par was not true.

**3. Corporations ⟸121(5)—Evidence held insufficient to sustain finding representation as to value of stock was unwarranted by information.**

In an action to rescind a purchase of corporate stock, evidence that the seller in making a statement the stock was worth par relied upon a statement prepared by a certified public accountant which showed a surplus, and thereafter himself purchased treasury stock of the company at par, *held* insufficient to sustain a finding that he made the statement as to value as a positive assertion, in a manner not warranted by his information, which would have been actionable fraud under Civ. Code, § 1572, subd. 2.

**4. Corporations ⟸116—Mere representations as to value of stock is not fraudulent.**

Mere statement by the seller that the corporate stock sold was worth $100 per share, made to one with whom no confidential relations existed, must be deemed merely the opinion of the seller, on which the buyer had no right to rely, so that it was not actionable fraud.

On Application for Rehearing.

**5. Appeal and error ⟸878(3)—Exclusion of plaintiff's evidence cannot be reviewed on defendant's appeal.**

Alleged error in striking out testimony on behalf of plaintiff cannot be reviewed on an

appeal by defendant, against whom the judgment was rendered, in the absence of an appeal by plaintiff, who was the party aggrieved thereby.

6. **Appeal and error ⊂⊃837(12)—Plaintiff's evidence, erroneously excluded, cannot be considered in determining sufficiency to sustain judgment for plaintiff.**

Evidence offered by plaintiff and stricken from the record on motion of defendant cannot be considered on defendant's appeal from a judgment against him as evidence in support of finding on which the judgment was rendered.

Appeal from Superior Court, Los Angeles County, Charles Wellborn, Judge.

Action by L. M. Meeker against George E. Cross. Judgment for plaintiff, and defendant appeals. Reversed.

Thos. C. Ridgway, of Los Angeles (Jesse A. Gyger, of Los Angeles, of counsel), for appellant.

Jeff P. Chandler and Howard Wright, both of Los Angeles, for respondent.

SHAW, J. Defendant appeals from a judgment rescinding a sale of 100 shares of the corporate stock of the Puente Mercantile Company, made by him to plaintiff on February 7, 1920.

As alleged in the complaint, the court among other facts, found: (a) That on the 7th day of February 1920, the defendant was, and for some 10 years had been, president of said Puente Mercantile Company, (b) that defendant as such officer had full and complete charge of the business operations of the company, and was entirely familiar with the extent of its indebtedness and the business which it had been conducting and which it was then transacting, and with the extent of the profit which it was then deriving in the carrying on of the business, (c) that, at the time that plaintiff purchased from defendant the 100 shares of the capital stock of the Puente Mercantile Company, defendant falsely and fraudulently represented to plaintiff that said 100 shares of the capital stock of the Puente Mercantile Company were of the value of at least $100 per share; (d) that said statement and representation was false and fraudulent, and (e) was known to said defendant to be so at the time it was made; (f) that said statement and representation was made by the defendant to the plaintiff with the intent to deceive and defraud plaintiff; (g) that plaintiff, believing the representation to be true and relying thereon, purchased the stock; (h) that said statement and representation so made by the defendant to the plaintiff, as above stated, was a positive assertion, made in a manner not warranted by the information of the defendant making it, and that said statement and representation was untrue. As made, these findings bring the case within section 1572 of the Civil Code which defines actual fraud as consisting—

"in any of the following acts, committed by a party to the contract, * * * with intent to deceive another party thereto, or to induce him to enter into the contract:

"1. The suggestion, as to a fact, of that which is not true, by one who does not believe it to be true;

"2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true."

While conceding that defendant was and, as found by the court, had been president of the company for 10 years, and represented to plaintiff that the stock was worth $100 per share, appellant challenges the sufficiency of the evidence to support these findings in all other respects.

It appears from the record that defendant was a stockholder and president of the First National Bank of Puente, a stockholder of the Puente Savings Bank, and stockholder and president of the Puente Mercantile Company, all of which were located and conducted business in Puente, Cal. Plaintiff, being desirous of obtaining a controlling interest in the two banks, entered into negotiations with defendant for the purchase of his stock therein, as a result of which he, on February 7, 1920, purchased from defendant 125 shares of the First National Bank at $200 per share, and 109 shares of the stock of the Puente Savings Bank at $150 per share, and on the same day purchased 100 shares of the capital stock of the Puente Mercantile Company for the price of $100 per share. In payment therefor he gave to defendant his check for $43,350, being full cash payment for the bank stock, and $2,000 on account of the purchase price of the Mercantile Company stock, for the balance of the purchase price of which he gave to defendant his note for $8,000 secured by the 100 shares of the Puente Mercantile Company. The only testimony touching the representations made by defendant to plaintiff as to the value of the mercantile stock is that in which plaintiff testifies that—

"in a conversation which I had with Mr. Cross and which I think took place in the office of the Puente Mercantile Company at Puente, Mr. Cross said that he could use some more money and would like to sell me an interest in the mercantile company and would like to sell me his home in Puente, as he was going out of the banking business. * * * I asked him about the mercantile company stock. He said it was worth $100 a share. Mr. Cross took me up and showed me his home, and I looked it over and I told him I would not be interested in buying the home—went back and talked about the mercantile company stock, and I decided to buy $10,000 worth."

And, further, that he believed the representations to be true and relied thereon. On the date of the purchase defendant executed a document as follows:

"I, George E. Cross, of Puente, California, having this day sold to L. M. Meeker, of El Monte, California, 125 shares of the First National Bank of Puente, 109 shares of the Puente Savings Banks, and 100 shares of the Puente Mercantile Company, and the good will accompanying same, for valuable considerations, do hereby agree to assist L. M. Meeker in procuring additional bank stock and agree to give all the good will and support possible to him and the banks in which he may be interested in Puente. It is further agreed that I will not become interested in, directly or indirectly, any other bank in Puente for five years without the written consent of L. M. Meeker."

It further appears that while defendant was president of the mercantile company and was in its place of business for a few minutes each day, he was not actively engaged in the conduct thereof, which was in charge of W. E. Newton, as manager in the conduct and management of the business. On February 11th W E. Newton was taken ill, and Mr. Guy V Newton, who was vice president, took charge of the business as manager It was the custom of the company from time to time to have Arthur Loomis, a certified public accountant, examine the books, and his report of the condition of the business, made on February 14, 1919, for the preceding year of 1918, showed a surplus above capital existing on December 31, 1918, of upwards of $7,000. On March 10 1920, he completed an audit of the books for the preceding year of 1919, an inventory of which was furnished by W. E. Newton as general manager of the company, and with which defendant is shown to have had no connection and given no information. From this report it appeared the company had outstanding 499 shares of capital stock, the par value of which was $100 per share, with a surplus on December 31, 1919, of upwards of $7,700, and that the company on June 19, 1919, had paid a dividend of $6,250 on its capital stock. That after the making of this report and subsequent to the time when plaintiff purchased his stock, Guy V Newton, then vice president and acting manager of the corporation, to whom the corporation was indebted for money loaned to it in the sum of $5,000, purchased from the corporation 50 shares of its treasury stock at par, and in March, 1920, being subsequent to the time of plaintiff's purchase of stock from defendant, the latter, to whom the corporation was indebted in the sum of $4,000 for money loaned to it, purchased at par 40 shares of treasury stock from said corporation. Both Newton and defendant testified that they thought the stock was worth par. Upon the report made by the accountant who audited the books, the company made an income tax return for the year 1919, showing a taxable income of $7,249, which return was made prior to March 15, 1920, and signed by Guy V. Newton as treasurer of the company, who testified that at the time he believed the corporation had earned a profit for the year 1919; and in the same month, to wit, March, 1920, Newton as treasurer made a report to the state board of equalization showing a gross business done during the year 1919 of about $300,000, with a surplus of assets of $6,396. Later in July or August, 1920, Guy V Newton, as acting manager of the corporation, began an investigation of the affairs thereof, as a result of which he came to the conclusion that the value of the stock at that time was some $50 per share, and so reported to both plaintiff and defendant. Notwithstanding such information, which Mr. Newton gave to plaintiff and which the court found that plaintiff believed, he took no action in the matter, and a little later an accountant other than Loomis, namely, one Robert F. Mackie, was employed to audit the books, and an inventory of the assets was had as of date September 30, 1920, as a result of which it was discovered that errors had been made during preceding years in bookkeeping, and in the inventory upon which the report of Loomis had been based, and that the capital stock of the company on January 1, 1920, was not worth in excess of $50 per share, and, due to losses made during the year 1920, of less value on September 30th. Thereafter, upon the information so disclosed by this last report of the accountant, and on November 3, 1920, plaintiff caused to be served upon defendant a notice of rescission of the sale for fraud, and demanded a cancellation of the note so given as part of the purchase price and the repayment of the $2,000 in cash made thereon, and at the same time offered to surrender the stock so purchased, followed by this action for a rescission.

[1, 2] Under subdivision 1 of section 1572, Civil Code, a false representation, though accompanied by an intent to deceive, is not of itself sufficient to constitute actionable fraud. It is essential that it be made to appear that the party making the false representation did not at the time believe it to be true. Conceding, as heretofore stated, that the representation as to the value of the stock so made by defendant to plaintiff was untrue, the evidence disclosed by the record is, in our opinion, insufficient to warrant the finding that the representation was known by defendant to be false and untrue at the time when made. Conceding, as claimed by respondent, that defendant was one of the largest stockholders of the company and had for 10 years occupied the position of a director and president thereof, that it was his custom to visit its place of business wherein he spent a few minutes each day and was by other directors consulted upon matters of

importance affecting the interests of the company, and that it was a heavy borrower from the bank of which defendant was president, such facts, considered alone (and they are all to which counsel for plaintiff directs our attention in support of the finding) constitute no grounds upon which to impute to defendant knowledge of the financial condition of the business of the company, or cause him to believe that the value of the stock was other than as he represented it. On the contrary, most potent evidence of defendant's good faith in the transaction is furnished by uncontradicted testimony that both he and Guy V. Newton, then manager of the company, shortly after the sale to plaintiff, purchased from the corporation treasury stock, which they considered worth par, and for which they paid $100 per share; that, as appears from a report made by an expert accountant employed by the company, it had made upwards of $7,000 during the year 1918, and had, on June 19, 1919, paid a dividend of $6,250 on its capital stock; that covering such period its treasurer had made return of an income statement to the government showing earnings for the year 1919 to have been $7,249, and made a similar report to the board of equalization of the state.

Defendant's position as president was, as appears from the record, largely that of a figurehead. He took no part in the direct conduct of the business, which was in charge of a manager, with subordinate employees, and as such president he was warranted in basing his belief as to the value of the stock upon information afforded by the statements and reports of such subordinates and expert accountant. The case presented is quite similar to the facts involved in that of Nash, Trustee, v. Rosesteel, 7 Cal. App. 504, 94 Pac. 850, where it was sought to recover damages for a fraudulent representation made by the president of a corporation in a sale of his stock. There the representation was that a dividend of 6 per cent. had been declared and paid by the company to its stockholders covering the period from July 1, 1901, to January 1, 1902. Relying upon this representation, the plaintiff therein purchased the stock. Later it was learned that while the corporation had paid the dividend, it was not paid out of its earnings or surplus, by reason of which fact the action of the board of directors, although based upon an inventory and balance sheet furnished by those intrusted with the preparation of the same, was illegal. In that case this court said:

"Conceding that the books of the company and this inventory exhibited an erroneous condition of the business, it is not, and, indeed, under the evidence, could not, be claimed that either the defendant or other member of the board with whom he acted had any knowledge thereof until nearly six months thereafter."

And further, as bearing upon the question now under consideration, it was said:

"Neither actual knowledge of the alleged erroneous inventory nor an intent to deceive is claimed. but appellant contends that both knowledge and intent must be imputed to him [defendant] because of the fact that he was a director and as president exercised a general supervision over the affairs of the company. We cannot assent to this contention. On the contrary, defendant as president and his co-directors were justified in relying upon subordinates and employees for data upon which to base their corporate action in declaring the dividend, and were justified, in the absence of anything constituting gross negligence, in accepting and acting upon their reports, which fully warranted defendant in making the representation"—in support of which several cases are cited.

This statement of law was quoted with approval in Smeland v. Renwick et al. (Cal. App.) 196 Pac. 283. So, in the instant case, defendant, from information touching the condition of the company, was warranted in believing that the representation which he made to plaintiff was at that time true.

[3] Neither, in our opinion, is the evidence sufficient to justify the finding made by the court that the representation made by defendant was a "positive assertion made in a manner not warranted by the information of the defendant making it," which, if sustained by the evidence, would bring the case within the second subdivision of section 1572, Civil Code, which declares actual fraud to consist of "the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true." What we have heretofore said is likewise applicable to this phase of the case. While the representation was concededly untrue, nevertheless the information which the defendant had with reference to the condition of the company and upon which he based the representation, justified him in believing it to be true and was warranted by the information which he had upon the subject.

[4] Moreover, the representation was a mere statement of value, namely: "That the stock was worth $100 per share." It stands naked and alone, and as such must be deemed merely the opinion of Cross as to the value of the property which he was offering for sale to one with whom no confidential relation existed, but who was dealing with him at arm's length. The general rule is that a bare and naked statement as to the value of property, in the absence of confidential relations between the parties, is deemed the opinion of the party making the representation, and upon which the purchaser thereof has no right to rely, but acts upon his own judgment. Apparent exceptions found are due to statements of extrinsic facts affecting the value and with which the false representation is made or upon

which it is based. Winkler v. Jerrue, 20 Cal. App. 555, 129 Pac. 804; Ellis v. Andrews, 56 N. Y. 83, 15 Am. Rep. 379; Shumaker v. Mather, 133 N. Y. 590, 30 N. E. 755; Union National Bank v. Hunt, 7 Mo. App. 42; Id., 76 Mo. 439. Quoting from the syllabus in Gustafson v. Rustemeyer, 70 Conn. 125, 39 Atl. 104, 39 L. R. A. 644, 66 Am. St. Rep. 92, it is said:

"The mere naked assertion of the value of property by a vendor to a purchaser during negotiations for a sale, though consciously untrue and relied upon by the purchaser to his hurt, does not, in the absence of special circumstances, constitute an actionable deceit."

In the instant case there was no representation of extrinsic facts or special circumstances affecting the value of the stock.

We are forced to the conclusion that the mere naked statement made by defendant to plaintiff that the stock was worth $100 per share, cannot be accepted otherwise than as an opinion in the nature of trade talk, and as such plaintiff was not justified in relying thereon.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

On Application for Rehearing.

PER CURIAM. [5, 6] Rehearing denied. Conceding the ruling of the trial court upon defendant's motion in striking out testimony of plaintiff, which constituted evidence of extrinsic facts and special circumstances affecting the value of the stock, to have been erroneous, as claimed by respondent, such error, in the absence of an appeal by plaintiff, who was the party aggrieved thereby, cannot be reviewed on an appeal by defendant, against whom the judgment was rendered. Neither, since it was stricken from the record, can we consider the testimony as evidence in support of the finding upon which the judgment is based.

---

59 Cal. App. 547

## PEOPLE v. STUDER. (Cr. 903; Cr. 2522.)

(District Court of Appeal, Second District, Division 1, California. Nov. 2, 1922. Hearing Denied by Supreme Court Dec. 28, 1922.)

**1. Homicide ⟸250—Evidence held to sustain conviction of manslaughter in altercation causing death from hemorrhage.**

Evidence that defendant had shaken his aged mother and forcibly ejected her from the house, and expert testimony that a hemorrhage of the brain, from which she died that evening, might have been caused thereby, *held* sufficient to sustain a conviction of manslaughter.

**2. Criminal law ⟸364(6)—Quarrels between defendant and brother held not res gestæ of later attack on mother.**

In a prosecution for homicide by an assault on defendant's mother, which resulted in her death from cerebral hemorrhage, evidence of quarrels by defendant with his brother and with a neighbor at their home several hours before the difficulty with defendant's mother, which were not shown to have been in the presence of the mother or connected with the subsequent attack on her, was not admissible as part of the res gestæ.

**3. Criminal law ⟸1169(12) — Admission of evidence as to previous quarrels with others held prejudicial in close case.**

Where the only evidence to sustain conviction was that of two women, who testified they had seen defendant assaulting his mother, and defendant gave a reasonable explanation for acts which might have appeared as assault, so that the case against him was not of that clearly strong character which reduces the comparative importance of errors in the admissibility of evidence, it was prejudicial error to admit evidence of previous quarrels on the same day between defendant and his brother.

On Hearing in Supreme Court.

**4. Homicide ⟸58—Breach of the peace causing death from hemorrhage of mother of parties may be manslaughter.**

A disturbance of the peace by violent quarrels between two brothers, during which defendant ejected his mother from the house, which precipitated as a natural and probable consequence a hemorrhage in the brain of the mother, causing her death, is sufficient to authorize a conviction for manslaughter, though it would not be sufficient if the death were that of a mere bystander.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Joseph Studer was convicted of manslaughter, and he appeals from the judgment of conviction and from the order denying his motion for a new trial. Reversed.

Wm. T. Aggeler, Public Defender, and Frederic H. Vercoe, Chief Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., for the People.

CONREY, P. J. The defendant was charged with the crime of murder, and convicted of the crime of manslaughter. He appeals from the judgment of imprisonment and from an order denying his motion for a new trial.

Appellant does not claim that the evidence is legally insufficient to sustain the verdict of the jury. But he claims that it is barely sufficient, and that errors occurred which seriously prejudiced him in relation to his right to a fair trial.

[1] On September 25, 1921, appellant was living at 514 South Concord street, in the city of Los Angeles, which his brother John and their mother, Elizabeth Studer. She was 86 years old and for some years had been suffering from chronic nephritis, commonly known as Bright's disease. She was also

suffering from an enlarged left ventricle of the heart, accompanied by arteriosclerosis and high blood pressure. The evidence received by the court described certain conduct of appellant on the day mentioned, culminating at a point where, according to one witness, Mrs. Studer was pushed out of the house by appellant. She then walked toward the house of a neighbor, Mrs. Birch, who lived in the second house north of the Studer residence. Mrs. Studer was assisted into this house by Mrs. Waddell, who lived next north of the Studer house, and by Mrs. Henderson, who lived across the street. There she sat in a chair for about half an hour, and then became unconscious. During that half hour she talked naturally, but complained of suffering some pain. Shortly after 6 o'clock in the evening, which was two hours or a little more after her arrival at the Birch house, Mrs. Studer was taken to a hospital, where she died that night. The evidence shows, and the fact is not contested, that her death was directly caused by a hemorrhage in the fourth ventricle of the brain.

The only testimony of eyewitnesses claiming to have observed any acts of violence of appellant toward Mrs. Studer was given by Mrs. Henderson and by a 13 year old girl named Daisy Sherbondy. The back porch of the Henderson house is located about 150 feet from the front door of the Studer house, and there are no intervening obstacles to the view. According to the testimony of Mrs. Henderson, soon after 3 o'clock on the afternoon of Sunday, September 25, 1921, she heard loud talking by male voices, and looked through the screen of her porch and across toward the Studer house. She saw John Studer on the street opposite the Waddell house, Mrs. Studer on her front porch, and Joseph directly behind her. John walked up the street northward, Joseph backed into the house, Mrs. Studer walked in, and closed and latched the screen door. "She stood right in front of the screen, and he directly in front of her, and he shook her this way and this way (indicating), and then he pitched her to the side—that is, this way (indicating); pitched her over that way." He had hold of her apparently by the arms. He kicked the door shut. About two minutes later Mrs. Henderson started across the street, and at that time saw Mrs. Studer on the lawn near her house. Mrs. Waddell also came out from her own house, and the two helped Mrs. Studer walk up the street to the Birch house, where Mrs. Birch came out and took the place of Mrs. Henderson.

Daisy Sherbondy lived in the third house south of the Studer house. Her testimony is that, at some time after 3 o'clock, on the same afternoon heretofore mentioned, she went to visit a friend at a house located at the rear of her home and facing on Bernal avenue. Her attention was attracted by loud talking, and she walked across lots a distance of about 103 feet to a gate at the back of the Studer lot, and stood at a point where she could see the steps at the rear of the Studer house, where there was a back porch with a screen door, from which there were steps leading down to the yard. She saw Joseph Studer open the door with his foot. His mother was standing beside him. His left arm extended back of her, and his right hand was on her right arm. He then pushed her, and she fell on the steps. "Q. Now, did you hear Joseph Studer say anything as he stood in the doorway there? A. I think he said, 'Beat it.'" The witness then turned and ran home; Mrs. Studer being still on the steps.

Taking the testimony of these two witnesses together, and assuming its truth, it is reasonably probable that the incident described by Miss Sherbondy immediately followed the incident at the front door as described by Mrs. Henderson, and that immediately following these two transactions, Mrs. Studer walked around toward the front of the house, where she was assisted to the Birch house, as before described.

There is evidence legally sufficient to prove that the actions of the defendant were the cause of the death of his mother. For instance, Dr. Louis Weber, who qualified as a specialist on diseases of the brain and nervous diseases, answered in response to a hypothetical question that the acts of the defendant (being substantially those to which we have referred), together with the attendant circumstances of excitement and commotion, also assumed in the question, superinduced the hemorrhage whereby the death was caused. We do not overlook the fact that there were other and different expert opinions about this matter; but that does not concern us at this time, since it is at least made clear that there is a chain of evidence here which is sufficient to sustain the verdict.

Appellant claims that the court committed certain errors in the reception of evidence. Mrs. Waddell testified that during the morning of said day she saw Mrs. Studer on Mrs. Studer's front porch and around her premises; that at about noon she heard loud talking and swearing at the Studer house; that Joseph was "hollering after his brother John," using such phrases as "Jesus Christ," "God damn it to hell," "To hell with your church." The witness testified that at about the same time she heard sounds from the Studer house, such as sounds of dishes being broken. At about a quarter past 12, and after the witness heard the said loud talking, John Studer went up the street. The sounds as of objects being thrown in the house did not occur until after John left. Mr. Louis Waddell testified to some of these same facts about what occurred at noon. He also testified that at about noon, while he was standing on a ladder in his own yard, appellant

came out into the Studer back yard and there called witness a "God damn coward," and dared him to come down and fight. The evidence shows that John Studer had returned home before 3 o'clock. Mrs. Waddell testified that at some time between 2 and 3 o'clock she again heard loud talking over there. The voices were both John's and Joseph's, who talked like they were quarreling. Again John left the house and went up the street. There is no evidence that he came back again during that day.

Appellant contends that all of this testimony, relating to what occurred between John and Joseph, and between Joseph and Mr. Waddell, should have been excluded, and that the court erred in overruling his objections thereto. He claims that there is no evidence that the decedent was present while the loud talking or quarreling and noises described were going on, or that the defendant swore at or quarreled with his mother. Although the witness did not testify to the presence of Mrs. Studer in her house at the precise moment of those occurrences, there is ample evidence that she was there throughout the day.

It must be conceded that there is no testimony that the defendant was swearing at or quarreling with his mother while these things were occurring, or at all. No act or word of his appears to have been directed toward her, other than the acts of shaking her by the shoulders as described by Mrs. Henderson, and the acts described by Miss Sherbondy.

[2, 3] Appellant objected to the testimony concerning the incidents which occurred at noon, and concerning the conduct of appellant toward the witness Louis Waddell. The objection was that, unless the language used by Joseph was addressed to his mother, the evidence was incompetent, irrelevant, and immaterial. This objection should have been sustained. The facts then sought to be proved were not part of the res gestæ of the alleged crime. They merely proved a quarrel between the two brothers, in the house where their mother was, at a time three hours before the alleged acts of violence. In that interval of three hours, so far as the evidence shows, the defendant may have been entirely peaceful and quiet. There is no testimony showing any nervous excitement or disturbance of Mrs. Studer during that time. If the testimony concerning these 12 o'clock incidents had been offered for the avowed purpose of proving that the defendant had a quarrelsome disposition, or that he was a man who used profane language in the presence of women, no doubt the court would have refused to permit such testimony, because the people were not entitled to prove the defendant's temperament or his vocabulary, as evidence of his guilt in the case at bar. However, this result was accomplished, under color of an attempt to treat distinctly separate acts as one continuing act, whereby it was argued that great mental excitement was produced in the deceased by these disturbances in her presence. The case is not at all parallel to those cited by respondent, wherein, as counsel say, a series of "continuous and uninterrupted acts, ending in the complete crime," may be proved. We think that the court erred in admitting said testimony. And we further are of the opinion that the defendant was prejudiced thereby, because the case against him, on the entire record, is not of that clearly strong character which reduces the comparative importance of such errors. People v. Fleming, 166 Cal. 357, 370, 136 Pac. 291.

The defendant denied all of the acts of violence charged against him. He testified that when his mother came in from the front porch she had a "dizzy spell," and walked toward him; that her body was swaying unsteadily, when she caught hold of him; that he carried her to a couch, and ministered to her needs. Dr. E. B. Studer, a son of deceased, and Mrs. Van Vlack, her daughter, testified that Mrs. Studer sometimes had such attacks of dizziness. It thus appears that there was very positively conflicting evidence on the most important question concerning the conduct of the defendant toward his mother. Therefore it well may be that, except that the jurors were prejudiced against him by the irrelevant evidence relating to his conduct earlier in the day, the testimony favorable to the defendant would have had greater weight in their minds.

The court gave to the jury the following instruction:

"Every person is responsible for the natural and probable consequence of his acts. If you are satisfied from the evidence beyond a reasonable doubt that the defendant, Joseph Studer, did create a scene of commotion amounting to a disturbance of the peace, or committed any act of violence upon Elizabeth Studer by laying his hands on her, or that the defendant, Joseph Studer, forced his mother out of doors, and that she suffered a hemorrhage of the brain from which she died, and you are further satisfied beyond a reasonable doubt that this scene of excitement or the violence contributed to her death, or that her death was one of the natural and probable consequences of his acts, even though Elizabeth Studer herself contributed to bringing about that hemorrhage by the exertion of walking up a hill or grade, still you should find the defendant, Joseph Studer, guilty of manslaughter. And this is so even if Joseph Studer did not intend to kill Elizabeth Studer, if you are satisfied beyond a reasonable doubt that the hemorrhage was brought about or precipitated as a natural and probable consequence of such acts on the part of the defendant, Joseph Studer. The only elements of intent which it is necessary for the prosecution to establish is the intent on the part of the defendant, Joseph Studer, to have maliciously disturbed the peace, and to have committed any unlawful acts of violence upon Elizabeth Stu-

der, if you so find from the evidence beyond a reasonable doubt that such disturbance of the peace was created and such acts of violence committed by the defendant, Joseph Studer."

Counsel for appellant earnestly contends that the foregoing instruction is erroneous because it directed the jury that a disturbance of the peace by the defendant might be considered by them, even though such disturbance was not directed against the decedent personally, and even though such decedent was not present at the time of such disturbance of the peace; also because the instruction in effect told the jury that if appellant created any disturbance of the peace *or* committed any act of violence upon the decedent, then if such disturbance alone contributed to Mrs. Studer's death, the jury might find appellant guilty of manslaughter regardless of any act of violence. We are satisfied that under this instruction the defendant could have been found guilty even though he committed no act of violence toward his mother, and notwithstanding the fact that none of the disorderly words used by him were addressed to her. According to the instruction, it is the law that, if a person creates a scene of commotion amounting to a disturbance of the peace, and, through excitement thus induced in the nervous system by a bystander, a hemorrhage is caused in the brain of the bystander, and death results therefrom, and if the jury finds that such death was a natural and probable consequence of such disturbance of the peace in the presence of the deceased, then the author of such disturbance may be convicted of manslaughter. Following the only decision that we have been able to find which seems to have determined this question, we have reached the conclusion that the instruction as given is a correct statement of the law. In re Heigho, 18 Idaho, 566, 110 Pac. 1029, 32 L. R. A. (N. S.) 877, Ann. Cas. 1912A, 138, and note. There is such a thing as involuntary manslaughter resulting from the commission of an unlawful act not amounting to felony; the killing being without malice. Pen. Code, § 192. Such an act may amount to manslaughter, although the defendant did not intend to kill any person. But the fact that the quoted instruction is without fault as a statement of the law only further emphasizes the importance of those errors in reception of evidence, to which we have referred.

There are numerous other assignments of error in the argument for appellant. These relate to claimed errors in rulings on evidence, to asserted misconduct of the district attorney, to instructions given, and to refusal of the court to give instructions requested by the defendant. We deem it unnecessary to determine or discuss these points at this time.

The judgment and order are reversed.

We concur: SHAW, J.; JAMES, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [4] The petition for a rehearing is denied. The opinion contains this passage:

"According to the instruction, it is the law that, if a person creates a scene or commotion amounting to a disturbance of the peace, and, through excitement thus induced in the nervous system of a bystander, a hemorrhage is caused in the brain of the bystander, and death results therefrom, and, if the jury finds that such death was a natural and probable consequence of such disturbance of the peace in the presence of the deceased, then the author of such disturbance may be convicted of manslaughter."

We withhold our approval of this passage so far as it holds that the death of a bystander is all that is necessary to constitute the crime of manslaughter under the circumstances related. It was not a mere bystander who was the victim of the circumstances, and that question is not involved in the case.

SHAW, C. J., and WASTE, LENNON, LAWLOR, SLOANE, and WARD, JJ., concur.

---

59 Cal. App. 507

## BARBERICH et al. v. POOSHICHIAN et al.

(Civ. 4302.)

(District Court of Appeal, First District Division 2, California. Oct. 27, 1922. Hearing Denied by Supreme Court Dec. 26, 1922.)

**1. Vendor and purchaser ⟸214(6)—Mere assignment of rights under executory contract casts no personal liability on assignee.**

Generally the mere assignment of rights under an executory land sale contract does not cast on assignee any of the personal liabilities imposed by the contract on assignor.

**2. Vendor and purchaser ⟸214(6)—Assignee of purchaser liable for breach of assignor's obligations assumed.**

As respects damages caused by waste on property sold under an executory contract to defendants' assignor, where defendants assumed contract of the original purchaser, they were liable for breach of its obligations because of privity of contract.

**3. Vendor and purchaser ⟸214(6)—Assignee of purchaser liable for tearing down fences and outbuildings irrespective of obligation to perform assignor's contract.**

Where land was sold under an executory contract in which it was provided that purchaser should not commit nor suffer to be committed any waste or damages on the premises, assignees of purchaser were liable for damage caused by tearing down fences and outbuildings, irrespective of whether they had obligated themselves to perform the conditions of the contract binding on the assignor.

**4. Vendor and purchaser ⊜214(6)—Assignee of purchaser under executory contract chargeable with destruction of personal property.**

Where land was sold under an executory contract for a named sum payable in installments, which sum also included the purchase price of certain personal property, such as horses, cows, etc., on the property, in vendor's action for forfeiture of the contract and for damages for destruction of the personal property, where practically all the personal property included in the contract came into possession of assignees of purchaser, the destruction was chargeable to assignees, although it was accomplished by others holding under them.

**5. Action ⊜48(1)—Action for forfeiture of land contract and conversion of personal property properly joined.**

An action for forfeiture of an executory land contract may be joined with an action for damages for conversion of personal property where they both arose out of the same transaction; Code Civ. Proc. § 427, providing for uniting causes of action in the same complaint arising out of the same transaction.

Appeal from Superior Court, Fresno County; J. E. Wooley, Judge.

Action by George Barberich and another against Harry Pooshichian and others. From a judgment for plaintiffs, defendants Arsen and Ada Yeretzian appeal. Affirmed.

Arsen Yeretzian, of Fresno, for appellants.
Frank Kauke, of Fresno, for respondents.

LANGDON, P. J. This appeal is taken by the defendants Arsen and Ada Yeretzian from a judgment against them in an action to have a certain contract for the purchase and sale of real property in the county of Fresno, state of California, declared forfeited and to recover damages alleged to have been caused because of waste committed upon said property by the said defendants, while they were occupying the same under a contract to purchase.

In April, 1920, the plaintiffs and the defendant Pooshichian entered into a contract with relation to said land, by which plaintiffs were to sell and said defendant was to buy the same. Said defendant paid $1,500 to plaintiffs as the first payment upon the property. The purchase price was to be $6,600, payable in installments, and this sum also included the purchase price of certain personal property, such as horses, cows, chickens, and farming implements upon the property. The agreement also contained a provision that the taxes upon the land were to be paid by the purchaser, and that the purchaser was to care for the premises "in the best farmlike manner and keep and maintain all of said personal property thereon in good order and condition and care and feed all the live stock thereon in the best farmlike manner." There was also a provision that the purchaser should not commit nor suffer to be committed any waste or damage to the premises, and that, in the event the purchaser should fail to comply with the terms and agreements on his part to be kept and performed, the sellers might, at their option, declare the agreement canceled, annulled, and at an end and re-enter and take possession of the property, and that in that event all sums theretofore paid by purchasers under the contract should be forfeited and held and retained by the sellers as a reasonable rental for the use and occupation of the premises.

The breach relied upon by the plaintiffs as working a forfeiture of this contract was the failure to pay taxes for one year and the failure to keep the premises free from noxious weeds and grasses and to properly cultivate the same and properly care for the grapevines and fruit trees planted thereon. The trial court gave judgment against the defendants jointly, canceling the contract, decreeing that all moneys paid under said contract be retained by plaintiffs as and for rental for the use and occupation of the premises, and that the plaintiffs recover $1,000 damages for waste and damage done to the property during the time they were in possession of same, and $450, the value of certain chickens, hogs, cows, and horses, sold and disposed of by defendants, which were a part of the personal property included in the contract. The judgment also bound the defendants to return the balance of the personal property included in the contract or pay the reasonable value thereof, which was recited in said judgment.

As stated the original vendee, Pooshichian, has not appealed from the judgment against him, but this appeal is taken by defendants Arsen and Ada Yeretzian, to whom Pooshichian assigned his rights under this contract, and who took possession of the land. The other defendants held the land under the Yeretzians by virtue of contracts with them, which do not concern us here.

The plaintiffs' right to the remedy they sought is settled in this state, after very careful consideration, by the case of Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17.

[1] However, the appellants contend that, as assignees of the vendee, they were not obligated to perform the obligations cast upon the original vendee by the contract, and therefore may not be charged with damages for a breach of such obligations. The general rule is that the mere assignment of rights under an executory contract does not cast upon the assignee any of the personal liabilities imposed by the contract upon the assignor. 3 Cal. Jur. 281, § 33; Lisenby v. Newton, 120 Cal. 571, 52 Pac. 813, 65 Am. St.

Rep. 203; Wilson v. Beazley, 186 Cal. 437, 199 Pac. 772. But the rule is, of course, otherwise in a case where the assignee obligates himself to perform the covenants binding upon his assignor.

[2] There was no evidence offered upon this question in the instant case, but it is alleged in the complaint:

That Pooshichian agreed to keep the premises free and clear of all noxious weeds and grasses; "that prior to the commencement of this action certain of the rights and interests which were acquired by the said defendant Harry Pooshichian under said contract were by mesne transfers and conveyances conveyed and assigned to the defendants Emma Pooshichian, Arsen Yeretzian, Ada Yeretzian, K. Bedrosian, Arousiak Bedrosian, and M. Mkhalian, and that each * * * of said defendants has assumed and promised, undertaken, and agreed to keep, observe, and comply with each and all of the terms and conditions in said contract contained on the part of the original vendee therein named. * * *"

These allegations were not denied by said defendants, and the trial court found that they were true. Appellants are liable, therefore, for a breach of these obligations because of the privity of contract existing between the parties. And upon this theory recovery for the damage caused by noxious weeds and grasses could be had against appellants.

[3] As to the tearing down of the fences and outbuildings, appellants would be liable for the damage caused thereby irrespective of whether or not they had obligated themselves to perform the conditions of the contract binding upon their assignor. As stated in the case of Wilson v. Beazley, supra, the assignee may be charged with acts causing damage to property during the time of his occupancy; and, of course, for the conversion of the personal property the plaintiffs are entitled to recover.

[4] The destruction or disposition of the personal property, which was accomplished by the defendants Bedrosian and Mkhalian, is chargeable to the appellants because said defendants were holding under the appellants, and their possession was appellants' possession in so far as these plaintiffs are concerned. According to the testimony and the findings of the court, all of the personal property included in the contract, except some chickens, came into the possession of the appellants.

[5] Appellants argued in the trial court that an action for forfeiture of a contract may not be combined with an action for damages for conversion of personal property. We are of the opinion that the two causes of action may be joined under the circumstances disclosed by the complaint in the present case, because they both arose out of the same transaction. Our Code provides (section 427, Code Civ. Proc.) that a plaintiff may unite several causes of action in the same complaint where they are all claims arising out of the same transaction. This provision includes causes of action legal and equitable, ex contractu and ex delicto, as well as those ex delicto though based on contract. 21 R. C. L. § 34, p. 469.

We find no errors in the record before us which would warrant a reversal of the judgment against the appellants, and the same is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

---

59 Cal. App. 585

## OHANESIAN v. GALENTE et al.
(Civ. 3767.)

(District Court of Appeal, Second District, Division 1, California. Nov. 9, 1922.)

**1. Brokers ⟸65(1)—Where broker fraudulently induced vendor to sell land, note for commission was without consideration.**

Where broker induced vendor to sell his land by fraudulent representation that purchaser's mortgage to vendor would be a first mortgage, the vendor's note to broker for the commission was without consideration.

**2. Brokers ⟸38(4)—Evidence insufficient to authorize recovery against broker for fraud in sale of plaintiff's land.**

Where broker induced vendor to sell land by fraudulent representations that purchaser's mortgage to vendor for the purchase price would be a first mortgage on the land, but the mortgage was in fact a second mortgage, the vendor was not entitled to damages for fraud, in the absence of a showing that the property in foreclosure sale would not produce a sum sufficient to pay the entire indebtedness including both mortgages.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by J. M. Ohanesian against Joe Galente and another, in which the defendants brought a cross-action against plaintiff. Judgment for defendants, and plaintiff appeals. Affirmed in part, and reversed in part.

E. A. Bagby, of Visalia, for appellant.

Bradley & Bradley, of Visalia, for respondents.

CONREY, P. J. Action to recover money due on a promissory note. Cross-action to recover damages suffered through wrongful acts of the plaintiff, connected with the same transaction in which the note was made. The plaintiff appeals from the judgment.

Respondents were the owners of a tract of land, subject to a $2,000 mortgage held by the Producers' Savings Bank. Respondents employed appellant to sell this land for them to one Kalfas, for the sum of $5,500,

of which $2,000 was to be used to pay the existing mortgage debt, and the remainder to be payable in several installments secured by mortgage on the land conveyed by defendants to Kalfas. The deed to Kalfas, and the $3,500 mortgage by Kalfas to respondents, were placed in escrow. At or about the same time Kalfas arranged to borrow $2,000 from the Visalia Savings Bank & Trust Company, to be secured by first mortgage on the same property. This mortgage also was placed in escrow. The several documents were recorded in the following order: First, the deed to Kalfas; next, the $2,000 mortgage to the savings bank; and then the mortgage to respondents. Concurrently with these proceedings, the Producers' Savings Bank note was paid off, and that mortgage released.

By their answer, respondents alleged that there was no consideration for their note to appellant. As a further defense, they alleged that the note was procured from them by appellant by means of fraud and false representations, and as an alleged commission for the sale of certain real property belonging to respondents; that the fraudulent representations made by appellant to respondents were in negotiating a sale of said property to Kalfas and by representing to respondents that they were to receive a first mortgage for the unpaid part of the purchase price, whereas the mortgage executed to respondents was, unknown to them, a second mortgage, respondents being unable to read and not understanding the transaction or said papers; that the representations so made were by appellant known to be false and fraudulent and were made by him with intent to deceive and defraud respondents.

For a "further answer and cross-complaint," respondents set out the fact that the sale to Kalfas was negotiated for them by appellant, and repeated, in substance, the averments of the answer noted above; alleging that, unknown to respondents, the Visalia Savings Bank mortgage was prior to that of respondents, notwithstanding that appellant, their agent represented to them that their mortgage would be a first mortgage. The damages claimed by respondents, as set out in the cross-complaint on which they went to trial, consisted of their loss of $1,500, the value of the growing crop of fruit on the land at the time of the transfer, and the sum of $87 interest paid by respondents on the mortgage to the Visalia Savings Bank.

Respondents alleged that after the execution of said mortgages and deed appellant took possession of the premises and the crop of fruit, and took the profits thereof for his own use, and that in all of said transactions Kalfas was only acting as the agent of the appellant.

After the cause was submitted for decision, the court allowed respondents to file an amended answer and an amended cross-complaint. In these amended pleadings they alleged, and in conformity therewith the court found, that the fruit crop was of the value of about $1,000, and that Kalfas took possession and harvested and sold the crop, and then departed for parts unknown, without paying anything on the mortgage indebtedness; that it then became necessary for respondents to pay off the $2,000 first mortgage, including $87 interest, in order to protect their second mortgage. The amended answer covered certain defects of the original answer, by more directly alleging that appellant, in making the false representations to respondents, knew that they were false, and by further alleging that respondents believed and relied upon appellant's said statements and representations, and without such belief would not have entered into the transaction, and would not have executed their note to appellant. This note, in the principal sum of $300, was for the amount of appellant's commission for his supposed services to respondents in connection with the sale to Kalfas of their said land.

The court found that these several allegations of the amended answer and cross-complaint were true, and that on account of the false and fraudulent representations made by plaintiff and cross-defendant to said defendants and cross-complainants to induce them to enter into said transaction, said defendants and cross-complainants have been damaged in the sum of $1,087; also, that the defendants were not indebted to the plaintiff in any sum whatever; and that plaintiff is not the lawful holder of the said $300 note. The court by its judgment ordered that the plaintiff take nothing, and that the last-mentioned note be canceled; and entered judgment in favor of respondents in the sum of $1,087 and costs.

[1] Directing our attention first to the action on the note given by respondents to appellant, we are of the opinion that the evidence is sufficient to sustain the court's finding that the note was given without any consideration. According to the testimony introduced by respondents, appellant obtained their consent to the transaction by representing to them that they were to receive a first mortgage securing the unpaid balance of the purchase price; he supervised the steps by which the transaction was carried out, and obtained for them only a second mortgage. The whole history of the transaction, as well as the direct testimony of the defendants, shows that except for their belief in the representation that they were receiving a first mortgage, they would not have made any conveyance of their property. Since it does not appear that the bank which received the first mortgage, or Kalfas, the grantee, were parties to this deception, re-

spondents were not in a position to rescind the transaction. They were left in that unfortunate situation by reason of the fact that they were deceived by appellant, who was their agent and upon whom they relied. From these facts it is a fair conclusion that the plaintiff did not render the service for which he was to be paid, and that the note which represents the amount of his supposed commission was given without consideration.

[2] The award of damages to respondents rests upon the finding that Kalfas took possession of the property and of the unharvested fruit crop and sold it, and that thereafter he "departed for parts unknown and has never been heard of since"; and upon the further finding that respondents, in order to protect their mortgage, had to pay off the first mortgage of $2,000, together with accrued interest in the sum of $87. The court apparently set off this $2,000 against the $2,000 which had been used to pay off the former mortgage of $2,000, and then allowed the remaining $87 as damages. But there is neither evidence nor finding establishing the value of the real property. It is found that the fruit crop was of the value of about $1,000. Kalfas had the right to sell the fruit crop and to appropriate the proceeds thereof to his own use. If he should pay off these mortgages, respondents would have received no damage. If he does not pay, and if the property is sold on foreclosure at the suit of respondents, the property at foreclosure sale may produce a sum sufficient to pay the entire indebtedness included in both mortgages. So far as appears from the evidence, it may be that the entire mortgage indebtedness will thus be paid. It follows that there is no evidence to sustain the finding that respondents have been damaged in the sum of $1,087, or at all.

The conclusion last above stated does not conflict with our first conclusion to the effect that the $300 note was given without consideration. For the fraud and deceit of the agent in procuring for respondents a second mortgage under the circumstances herein stated, thereby subjecting them to the necessity of paying the first mortgage, or even an installment of interest thereon, constituted a failure of appellant to perform the service which was to have been the consideration for the note.

That part of the judgment which provides that the plaintiff take nothing in this action and that the defendants recover their costs is affirmed. That part of the judgment which provides that the defendants (cross-complainants) have judgment against the plaintiff (cross-defendant) for the sum of $1,087 is reversed. Appellant shall have his costs of this appeal.

We concur: SHAW, J.; JAMES, J.

(59 Cal. App. 564)

## MARKUS v. LESTER. (Civ. 3518.)

(District Court of Appeal, Second District, Division 2, California. Nov. 3, 1922.)

**1. Contracts ⟸92—"Entirely without understanding" defined.**

In Civ. Code, § 38, providing that a "person entirely without understanding" has no power to contract, the quoted phrase means a want of capacity to understand transactions of the kind involved.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Entirely Without Understanding.]

**2. Appeal and error ⟸1010(1)—Rule as to reversing for insufficiency of evidence stated.**

Reviewing courts may not reverse a case for insufficiency of the evidence to support findings of fact, save where the evidence is so free from any substantial conflict that the appellate court can declare, as a matter of law, that it is too weak to support the findings.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Joseph J. Markus against J. C. Lester. From judgment for defendant, plaintiff appeals. Affirmed.

Cooper, Collings & Shreve, of Los Angeles, for appellant.

C. P. Johnson, of Los Angeles, for respondent.

FINLAYSON, P. J. This action is for money had and received. The complaint alleges that on June 14, 1920, defendant received from plaintiff the sum of $800 to and for plaintiff's use. Defendant joined issue on this averment by denying that the money was so received. The court found the issue in favor of defendant, and entered judgment accordingly. Plaintiff appeals from the judgment.

At the trial plaintiff introduced evidence showing that he and defendant had entered into a conditional sale agreement, in writing, under the terms of which an automobile was delivered by defendant, as the seller, to plaintiff, as the buyer. Eight hundred dollars of the purchase price was made payable upon the execution of the instrument, and the balance was to be paid in certain designated monthly installments. The contract provided that in the event that plaintiff failed to meet any installment when due, defendant, at his option, might retake possession and keep all payments previously made. Having paid defendant the $800 at the time of the execution of the contract, plaintiff now seeks its recovery. The theory upon which it is sought to recover in this form of action is: First, that the contract was a nullity because plaintiff was without sufficient mental capacity to make any valid agreement whatever; and, secondly, that he had the right to and did rescind the contract because of certain

alleged false and fraudulent representations claimed to have been made to him by defendant at the time of the sale. Wherefore he contends that, ex æquo et bono, the $800 ought now to be deemed to belong to him, The trial court, in expressly finding that defendant did not receive the $800 to or for plaintiff's use, impliedly found that plaintiff did have sufficient understanding to make a valid contract, and that the sale was not induced by any false or fraudulent representations on defendant's part. Appellant's sole contention is that the evidence is insufficient to support these implied findings.

It would be impracticable for us to analyze and discuss the testimony of each witness. A brief statement of some of the more important facts will suffice to show that there was a substantial conflict in the evidence, which imposed upon the trial court the duty of determining the disputed facts. And no rule is better settled than that on appeal the findings of the trial court on conflicting testimony cannot be reviewed.

Upon the question of his mental competency the testimony of one of his own witnesses, a medical expert, was enough to show that appellant possessed contractual capacity. It appears that appellant, an ex-service man, was gassed in the late war. One of his witnesses, a physician, testified that gassing usually results in a general weakness, a shortness of breath and a pain in the chest on exertion, and possibly a cough, a lack of endurance and a loss of weight, but that it would not affect the mentality, save indirectly by weakening the person's physical condition and his power of resistance. The witness further testified that his examination of plaintiff revealed only a weakened physical condition.

[1] Though appellant's physical weakness may perhaps have made him more readily susceptible to the influence of persuasive arguments than would be the case with the average person, the evidence leaves no room to doubt his mental capacity to enter into this contract. The evidence is abundantly sufficient to show that he was in possession of his faculties, and that he understood the nature of his transaction with defendant. The Civil Code (section 38) provides that "a person entirely without understanding has no power to make a contract of any kind." The phrase "entirely without understanding" means a want of capacity to understand transactions of the kind involved. Jacks v. Estee, 139 Cal. 507, 73 Pac. 247; Ripperdan v. Weldy, 149 Cal. 667, 674, 87 Pac. 276; Jacks v. Deering, 150 Cal. 272, 88 Pac. 909.

Equally without merit is the claim that the evidence shows without substantial conflict that defendant overreached plaintiff through false and fraudulent representations. The automobile in question was a secondhand 1914 Packard. It is claimed that defendant represented it to be a 1915 model; also that he falsely represented it to be in good mechanical condition, and that it would never wear out. Defendant testified that he did not tell plaintiff that the car was a 1915 model. He also testified that the car was in first-class mechanical condition. He denied that he ever told plaintiff that the machine would never wear out. There is nothing inherently improbable in defendant's testimony, and the trial court was warranted in accepting it as true.

Appellant claims that it was falsely represented to him that the car had been owned by a very wealthy man, a Mr. Pillsbury, immediately before coming into defendant's possession. Defendant testified, and it is conceded, that the car originally was owned by Pillsbury. Defendant denied, however that he told plaintiff that the car had belonged to Pillsbury immediately before he obtained its possession.

It next is urged that defendant falsely represented the title to the automobile to be in himself. There is no basis for this claim. Nowhere in appellant's testimony does he say that defendant told him that he (the defendant) owned the car. What appellant did say when on the witness stand was that defendant told him that Pillsbury owned the car just before it came into defendant's garage. But this, as we have seen, the defendant denied. The owner of the car, a man of the name of McKay, had left it with defendant, with instructions to sell it. The sale was made by defendant within the scope of his instructions, and there can be no question as to his authority to pass the title to appellant.

Appellant claims that he returned the car shortly after the sale, and that defendant received and kept it, wherefore it is argued that the consideration for the sale has failed. The sole basis for this claim is that very shortly after the car was delivered to plaintiff it was taken to and left at a repair shop under circumstances which, according to the version given by defendant and his witnesses, were as follows: Plaintiff returned to defendant's place of business with the car, and complained that he had experienced difficulty in starting it. Thereupon defendant, upon being informed by one of his salesmen that plaintiff had "killed his engine" and that he had "jimmied the starter," told the salesmen to accompany plaintiff to an electric repair shop and there have the starter fixed. Accordingly, plaintiff and the salesman, so defendant testified, took the car to the designated shop, where it was left with instructions to fix the starter. There it remained for some time. Finally defendant wrote plaintiff a letter, reminding him that his car was at the repair shop, and telling him that it was ready to be taken away. Plaintiff never called for his car, and when the next monthly installment fell due defaulted in his payment. Under these circumstances, which in view of the trial court's decision in favor

of defendant must be accepted as true, appellant cannot be heard to say that the consideration has failed, or that the contract was rescinded by mutual agreement.

[2] Finally, it is urged that the implied finding that the value of the car was $2,000 is not supported by the evidence. We fail to perceive how there could be any finding, express or implied, as to the value of the car. But assuming that the court did impliedly find the value of the car to be $2,000, the testimony of defendant and his witnesses would have warranted such finding. Defendant, who had had years of experience in the business of buying and selling second-hand or used automobiles, and so was well qualified to give evidence as an expert upon such matters, testified unequivocally that in his opinion the reasonable market value of the car was not less that $2,000. In this he was corroborated by other witnesses equally well qualified to speak authoritatively upon such matters. There was no inherent improbability in defendant's testimony, and we are powerless to overthrow the trial court's findings without undermining the fundamental principle that reviewing courts are limited to a consideration of questions of law, and may not reverse a case upon the ground of the insufficiency of the evidence to support findings of fact save where the evidence is so free from any substantial conflict that the appellate court can declare, as a matter of law, that it is too weak to support the findings. Without undertaking any further analysis of appellant's arguments, we repeat that we are satisfied, after a careful examination of the record, that the evidence amply justifies the findings.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

---

59 Cal. App. 679

**HOBSON et al. v. HUNT et al. (Civ. 2528.)**

(District Court of Appeal, Third District, California. Nov. 17, 1922.)

**Brokers ⇐53—Broker not entitled to list a person as prospective purchaser where such person's attention not called to the property by broker.**

In an agreement to pay broker $5 an acre commission if the broker during the life of the agreement effected a sale or found a purchaser ready, willing, and able to buy at the price fixed, a clause providing that after the termination of the right to sell the owner sold or exchanged the property to or with any party introduced "or whose name in writing has been given the owner, as a prospective purchaser," by the broker, the broker should get the same rate of commission on whatever price was accepted for the property, *held* not to render the owner liable for such commission on owner's sale after termination of the broker's right to sell, to a person who, with several others, was listed as a prospective purchaser by the broker in a letter to the owner, prior to terminating broker's right to sell, where there was no evidence that such person's attention had ever been called to the property prior to the listing of his name as prospective purchaser.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action for commission on sale of real estate by Gail Hobson and another, as executrix and executor of the last will of D. W. Hobson, deceased, against A. D. Hunt and another. From judgment for defendants, plaintiffs appeal. Affirmed.

Butler & Van Dyke, of Sacramento, for appellants.

W. P. Rich and W. H. Carlin, both of Marysville, for respondents.

FINCH, P. J. August 6, 1919, the defendants gave D. W. Hobson Company the exclusive right, for 2 months, and thereafter until 10 days' notice in writing of the cancellation thereof, to sell their stock ranch at Browns Valley, together with certain personal property, at the price of $40 an acre, $10,000 of the purchase price to be paid on delivery of deed. The agreement contained the following:

"If the above-described property be sold or exchanged during the life of this agreement, or if the agent during the life of this agreement shall find a purchaser ready, willing, and able to buy the said property at the above price, the owner agrees to pay the agent as a commission $5 per acre of said price, and in event of the said property being sold or exchanged by the owner, after the termination of this right to sell, to or by any party introduced or whose name in writing has been given the owner, as a prospective purchaser, by the agent, the owner agrees to pay the agent, as a commission, the above-mentioned rate of commission on whatever price is accepted for the said property."

J. H. Ware called at the office of the company, the date of the call not appearing from the evidence, and he was shown a ranch near Folsom, but was not interested in it. Ware testified that nothing was said to him about the Hunt ranch on that occasion. Thereafter, on Saturday, the 27th day of September, as indicated by the letter of October 1st, hereinafter referred to, one of the company's salesmen called on Ware and informed him that the company had a ranch of 710 acres at Browns Valley for sale, on which a cash payment of $15,000 would be required. October 1st, the salesman wrote Ware, stating that it was possible that the owner of the Browns Valley ranch, mentioned in the conversation with Ware on Saturday, would accept $10,000 or $11,000 as a first payment, but Ware made no reply to the letter. Sep-

tember 23d the company wrote the defendants, stating the efforts being made to effect a sale, and giving the names of 11 prospective purchasers, including that of Ware. The evidence does not show that Ware's attention had been called to the defendants' ranch prior to September 27th, when the salesman called on him. About October 20th the defendants gave written notice of cancellation of the authorization to sell. November 26th Ware came to an agreement directly with defendants to purchase the ranch for $24,000, of which sum $2,000 was to be paid in cash, and the land was conveyed to him January 2, 1920. The evidence does not show when or by what means Ware was brought in touch with the defendants. Ware testified that at the interview of September 27th the salesman said he would like to take Ware—

"to see a ranch in Browns Valley. He didn't tell me it was the Hunt ranch, but mentioned a ranch up there that he said was $40,000 or $45,000, $15,000 cash to handle it. I told him: 'It doesn't interest me; no use taking up my time or your time to go look. I haven't the $15,000. I wouldn't be interested.' * * * That is as far as his efforts were concerned. It was dropped. * * * It didn't interest me at the figure or at the cash that was required to handle it. * * * I don't remember the letter at all, but, had I received it, it wouldn't have interested me, because I didn't have that amount of money."

Ware further testified that the name Hunt Bros. or the Hunts was never mentioned in connection with the place. D. W. Hobson died prior to the time of the trial. It may be that the plaintiffs experienced difficulty in proving their case by reason of Hobson's death, and the trial court doubtless gave that fact due consideration in weighing the evidence. There being a substantial conflict, the findings of the court are conclusive.

The court found that Ware was not a prospective purchaser of defendants' property at any time prior to the termination of the contract, and that "D. W. Hobson Company did no act nor performed any services which in any way brought about, induced, influenced, or caused said purchase or sale of said property." These findings are fully supported by the evidence. Ware emphatically declined to consider the purchase when the company endeavored to interest him in the land, and when he finally agreed to purchase it he seems not to have been aware that it was the same ranch mentioned by the company's salesman. There is no evidence of bad faith on the part of Ware or the defendants. October 10th the defendants wrote the company, stating that the contract had expired, complaining of the delay in effecting a sale, and requesting an immediate reply. Receiving no reply, the defendants canceled the contract about October 20th.

Neither party has presented any authority directly in point. Respondents rely on the case of Wright & Kimbrough v. Dewees (Cal. App.) 197 Pac. 957. Whether or not that case is controlling here, it cannot be said that Ware was a prospective purchaser of defendants' land at any time during the life of the contract. There is no evidence that his attention had ever been called to the defendants' land prior to the listing of his name as a prospective purchaser by the letter of September 23d. One cannot be made a prospective purchaser by merely calling him such. In the language of counsel for respondents:

"It would scarcely be argued that an agent, obtaining a contract such as that shown in the record in this case, could write to the owner, giving him a list taken from the great register of a county or from a compilation of prominent persons in a community, and then if perchance, months after the contract had expired, the owner should sell to one of those persons, he could be required to pay commissions to such an agent."

The contract must be given a reasonable interpretation. The clause in question was doubtless intended to protect the agent in the event of a sale made after the termination of the contract, to a person whom the agent had interested in the land during the life of the contract to the extent that such person had become a prospective purchaser; that is, one to whom there was at least some probability of making a sale within a reasonable time. To construe the contract otherwise would be to hold that the agent in such a case might give the owner any number of names of persons as prospective purchasers, regardless of whether or not they were such in fact, and then, in the event of a sale to any one of them, claim the commission. It would be highly unreasonable to hold that such was the intention of the parties to the contract. It would tend to make a real estate dealer a procurer of names, rather than a procurer of purchasers.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

59 Cal. App. 520

## SHURTLEFF v. MARCUS LAND & INVESTMENT CO. (Civ. 3868.)

(District Court of Appeal, Second District, Division 2, California. Oct. 27, 1922. Rehearing Denied Nov. 24, 1922. Hearing Denied by Supreme Court Dec. 26, 1922.)

**1. Vendor and purchaser ⟸330—"Reasonable market value" is amount owner could obtain at fair sale.**

The "reasonable market value" of land as bearing on measure of damages for vendee's breach under Civ. Code, § 3307, is the amount which the owner can obtain for it at a fair sale.

**2. Vendor and purchaser ⟸329—Price owner received at subsequent sale after defendant's breach is not conclusive as to fair sale price.**

Under Civ. Code, § 3307, as to damages for vendee's breach, the price received by the owner for her land after defendant's breach of its contract to purchase the land is not conclusive evidence of the fair sale price of the land, but the court can consider other evidence as to such price and base its findings thereon.

**3. Vendor and purchaser ⟸329, 330—Value of real property to owner is not always reasonable market value; market value is relevant evidence.**

The value of the property to the owner which, under Civ. Code, § 3307, measures the damage caused to him by breach of an agreement to purchase the property, is not always identical with market value, though market value generally is proof of such value to the seller, and is always competent and relevant where that matter is in question.

**4. Appeal and error ⟸1011(1)—Trial court's conclusion as to ultimate fact, based on conflicting evidence, not disturbed.**

In an action for damages for breach of a contract to purchase real property, the trial court's conclusion as to the ultimate fact of the value of the property to the seller, based on much conflicting testimony, will not be disturbed on appeal.

**5. Vendor and purchaser ⟸329—Opinions of experts as to land values held not based on particular use.**

Under Civ. Code, § 3307, as to damages for vendee's breach, in action for such breach testimony by expert witnesses for the defendant that the property was best fitted for subdivision purposes, but stating their opinions as to its market value for any purpose, is not objectionable as being based upon the use of the property for subdivision purposes only.

**6. Pleading ⟸34(7)—Denial of damages held sufficient when objected to on appeal.**

A denial, in an action for breach of contract to purchase real property, that, at the time defendant refused to carry out its contract or at any time thereafter, the value of the property was the sum alleged in the complaint or any other sum less than the contract price for the property, and denying plaintiff was damaged by the breach of the contract, when first objected to on appeal, is sufficient denial of damages to sustain a judgment for nominal damages only.

**7. Appeal and error ⟸194(2)—Answer imperfectly raising issue is sufficient after trial as if issue had been joined.**

When issue is imperfectly joined, but the case is tried as if it were joined, and both parties treated as joined, the defect in denial in the answer cannot be urged for the first time on appeal.

**8. Appeal and error ⟸194(2)—Defective denial held cured by plaintiff's conduct at trial.**

If defendant's denial of damage to plaintiff by its breach of contract to purchase plaintiff's land was defective, plaintiff cannot raise that question for the first time on appeal, where her case in chief consisted principally of evidence which tended to show she had been damaged, and the amount thereof, and at no time during the trial did she object to defendant's testimony on that issue on the ground that the denial was insufficient.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Eleanor M. Shurtleff against the Marcus Land & Investment Company to recover damages for breach of contract to purchase land. Judgment awarding plaintiff one dollar damages only, and plaintiff appeals. Affirmed.

J. Wiseman Macdonald and W. W. Wallace, both of Los Angeles, for appellant.

Francis J. Heney, of Los Angeles, for respondent.

CRAIG, J. The following facts are undisputed: On January 10, 1920, respondent entered into a written contract to purchase a certain tract of land from appellant at an agreed price of $58,245; at this time a mortgage upon the property had been foreclosed and about seven months of the period for redemption had expired; on January 23, 1920, the respondent refused to accept title to the land; on February 13th appellant sold the land subject to the mortgage to one Toplitzky for $52,778.10; March 16th following Toplitzky sold to respondent for an advance of $1,500 over the price paid by him.

The action is for damages for breach of contract, the amount claimed being the difference between the price called for in the contract of sale to respondent and the amount realized by appellant through her subsequent sale to Toplitzsky, and amounting to $5,466.90. Both sides agree that section 3307 of the Civil Code provides the measure of damages. That section reads:

"The detriment caused by the breach of an agreement to purchase an estate in real property, is deemed to be the excess, if any, of the amount which would have been due the seller,

under the contract, over the value of the property to him."

[1, 2] The court found that the value of the property to the plaintiff on January 23, 1920, was $60,000; that the plaintiff had been damaged in the sum of $1, and rendered judgment accordingly. Appellant's principal contention is that the evidence is insufficient to support this finding as to damage. She asserts that her detriment is the excess of the amount due her under the contract over the value of the property to her, and that although in most cases the reasonable market value establishes the element of value to the vendor, under the peculiar facts of this case the value to the vendor is "exactly what she could obtain for it at a fair sale." This appears to be a distinction without a difference. The reasonable market value is the amount which the owner can obtain for it at a fair sale. Winnepiseogee Lake Cotton & Woolen Manufacturing Co. v. Town of Gilford, 67 N. H. 514, 35 Atl. 945. But appellant assumes that what she obtained by the sale in February should have been accepted by the court as the test and full proof of "what she could obtain for it at a fair sale." We think this assumption is erroneous. In arriving at the value of the property to the seller the court properly received evidence not only of the amount realized by the seller through the sale which she made, but also of the rental value of the property, the condition of the title, and the reasonable market value as testified to by experts, which included those elements which they regard as relevant to the issue, such as: The activity of the market, the use for which the property is adapted, its relation to transportation facilities, and other matters which we need not here delineate. The appellant's expert witnesses, in response to questions asked by her counsel, gave opinions as to the market value of the property at the date of the breach of contract. Without doubt this evidence was offered as proof of the price which appellant contended she could have obtained for the property at a fair sale. Yet appellant now takes the position, which is apparently inconsistent, that the trial court should not have considered evidence of the market value in computing the value of the property to the seller, but should have disregarded all such testimony and accepted the sale price as conclusive of that element. Appellant calles attention to the testimony of witnesses on both sides who gave it as their opinion that the fact that a mortgage has been foreclosed would tend to reduce the value of the property to the seller. They did testify to that effect, and also that it would reduce the market value. But the court having received this evidence presumably gave it consideration together with all of the other facts submitted.

[3, 4] We do not hold that the term "value of the property to him" used in section 3307 of the Civil Code is always identical with market value. Cases cited by appellant, and others, as Los Angeles City v. Pomeroy, 124 Cal. 597, 57 Pac. 585, in which it is held that actual or intrinsic value may be quite different from market value, unquestionably established the proposition that "value of the property to him" is a thing apart from market value. However, as the appellant concedes, market value generally is proof of the value of the property to the seller. It is always competent and relevant where that matter is in question. Where, as in the instant case, the trial court received much conflicting testimony, its conclusions as to the ultimate fact will not be disturbed on appeal. It found that the allegation in the appellant's complaint that the value of the property in question to the plaintiff on the date respondent breached the contract was $52,721.07 and no more, was untrue. The court found that plaintiff had been damaged in the sum of $1, and no more. The court found it to untrue that the value upon the date in question to the plaintiff was any less sum than $60,000. While the finding might have been stated in more direct language, we think this is sufficient as a statement that the value to the seller on the 23d day of January, 1920, was $60,000.

The foregoing views as to the legal principles involved in this phase of the case are sustained by California decisions. That "market value," while not "actual value," is the criterion of actual value, is held in Los Angeles City v. Pomeroy, 124 Cal. 597, 57 Pac. 585. By analogy it is logical to say that market value is not value to the seller, but it is indicative of value to the seller and as such may properly be received in evidence upon that issue. Dean v. Hawes, 21 Cal. App. 350, 131 Pac. 885, referring to section 3307 of the Civil Code, holds that—

"In actions for damages for the breach of a contract such as is pleaded here the sum recoverable as compensation for the breach is the difference between the contract price and the market value of the land at the time of the breach."

Reference is then made to Drew v. Pedlar, 87 Cal. 443, 25 Pac. 749, 22 Am. St. Rep. 257, in which it is said that the actual loss sustained by the vendor would ordinarily be the difference between the actual contract price and the actual value of the land at the time of the breach of the contract to purchase.

[5] There is no merit to the contention that the testimony of respondent's witnesses as to the value was irrelevant in that it was based upon the use of the property for subdivision purposes only. Although the expert, Paul Crippen, said it was best fitted for subdivision purposes, he also said his opinion as to its market value had reference to any purpose. John A. Cain also testified as to

the value of the property for agricultural, circus, and subdivision purposes. He gave his opinion that the market value at the time in question was between $800 and $850 per acre. Other witnesses gave similar testimony. It cannot be fairly said that these witnesses confined their evidence to the value of the property for a single purpose.

[6] Appellant raises the point for the first time on appeal that the defendant's answer is defective in that it is claimed that the allegation to the effect that the property was of a value to the plaintiff of $52,721.07 is not controverted. The denial of the answer on that point is in the following language:

"Said defendant * * * denies that on the 23d day of January, 1920, or at the time defendant refused to carry out its part of said agreement, or at any time after the 10th day of January, 1920, the value of the said real property was the sum of $52,721.07, or any other sum less than the sum of $58,245."

In the same paragraph the answer goes on to say:

"Further answering said paragraph V, said defendant denies that plaintiff has been damaged by the alleged refusal of defendant to carry out its terms, or any term of said agreement, or to purchase said real property or to pay the purchase price, or any part thereof, according to the, or any of the, terms of said agreement in the sum of $5,523.93, or any other sum."

Appellant's point is that the denial in the part of the answer first above quoted is not a denial of the value of the property to the seller. The denial of appellant's allegations as to damages is complete and, if sustained by the evidence, would permit of a judgment for only nominal damages, which is the judgment rendered.

[7, 8] But it is a familiar rule that when issue is imperfectly joined, but the case is tried and both parties treat the issue as joined, the defect in denial in the answer cannot be successfully urged for the first time on appeal. Klopper v. Levy, 98 Cal. 525, 33 Pac. 444; Stockton Combined Harvester & Agricultural Works v. Glens Falls Insurance Co., 121 Cal. 167, 53 Pac. 565. Appellant correctly states the rule that it is only where the record shows the party against whom the estoppel is invoked consciously at least acquiesced in the trial of the issue, as if it had been made, or diverted attention from the fact that it was not made, and from supplying the defect by amendment that the rule preventing objection being raised to a lack of sufficient denial can be successfully urged. The instant case is typical as one complying with these conditions. Appellant's case in chief consisted principally of evidence intended to show she had been damaged and the amount of detriment suffered. Respondent replied with the testimony of expert witnesses to meet the issues thus presented. At no time during the trial did the appellant object to such testimony on the ground that the denial of the answer was insufficient or otherwise raise the point.

We have considered the errors assigned as to the rulings of the court upon objections to testimony and find no reversible error.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

---

59 Cal. App. 569

## WHITE et al. v. KIRCHMANN et al.

## LA BARRE et al. v. COFFER.

(Civ. 4268.)

(District Court of Appeal, First District, Division 2, California. Nov. 8, 1922. Hearing Denied by Supreme Court Jan. 4, 1923.)

**Trusts ⇐44(1)—Evidence held not to prove that deceased owner of bonds had directed defendant to deliver them to plaintiff.**

In an action to enforce alleged trusts in bonds, in which it was alleged that a decedent had left bonds in a safe deposit box with plaintiffs' names attached, and that before her death she had called defendant to her bedside and had instructed defendant to deliver bonds to persons whose names were attached thereto, and that defendant had agreed to do so, evidence *held* not to sustain allegations.

Appeal from Superior Court, City and County of San Francisco; Henry C. Gesford, Judge.

Action by Jessie A. White, Lauren B. La Barre, and Richard Kenneth La Barre against Henry Kirchmann, Sr., and Anna Coffer, formerly Anna Overvold. From a judgment for the last-named defendant, the two last-named plaintiffs appeal. Affirmed.

Marion Weston Cottle and Goldman & Altman, all of San Francisco, for appellants.

Hugo D. Newhouse and Russell P. Tyler, both of San Francisco, for respondent.

STURTEVANT, J. This is an action brought to enforce certain alleged trusts in certain personal property. The defendants had judgment in the trial court, and two of the alleged beneficiaries have appealed under section 953a of the Code of Civil Procedure.

Prior to her death Jane Sanders had become the owner of bonds of the federal government and of certain corporations, and had said bonds on deposit in her safe-deposit box. It was the theory of the alleged beneficiaries that she had attached to some of the securities written directions, indicating to whom such securities should be delivered in the event of her death, and that on the evening before her death she called to her side the

defendant Anna Coffer, and requested the said Anna Coffer to send certain of the securities to the individuals whose names were marked on, or according to the written directions attached to each of said securities, and that Anna Coffer accepted the trust and agreed to comply with the directions of the trustor. The allegations of the plaintiffs' complaint setting forth the foregoing theory were denied by the defendants in their answers. On the trial of the case the plaintiffs relied on the testimony of Anna Coffer to prove their case. After the case had been fully tried and submitted the trial court decided the case against the plaintiffs, and made findings both general and specific in which it found the facts in favor of the defendants and against the plaintiffs. In their brief the appellants contend that the evidence shows without conflict that the allegations of the amended complaint are true, and that the findings to the contrary are unsupported by evidence. These contentions are not supported by the record.

As far back as 1910 or 1911 Mrs. Sanders had become the owner of several of the bonds which were in her box at the time of her death. Each bond was in the sum of $1,000, and there were nine bonds of the Great Western Power Company, three of the Pacific Gas and Electric, two of the City Electric, and one California Unifier. The bonds at that time were in the safe-deposit box, to which Mrs. Sanders had a key and Anna Coffer also had a key. Anna Coffer testified that Mrs. Sanders gave her the bonds in the year 1910 or 1911, and that the donee demurred to accepting the gift.

"When I got those bonds I made a fuss; I did not want to take them from her, and she cried, and she said she wanted me to have them because of what I had done for her husband during his illness. So I said, 'I will never take them, unless if you need them you take them back.' Before her death in 1918 Mrs. Sanders had acquired other bonds of the federal government, and all of the bonds were in the safe deposit box."

The night before her death in the hospital Mrs. Sanders said to Mrs. Coffer,

"I took those bonds and marked them. Will you send them the way I marked them?"

To that request Mrs. Coffer testified that she did not give an answer, but that her reply to Mrs. Sanders was in the nature of requesting her to preserve her strength. She further testified that Mrs. Sanders did not indicate the specific articles that were marked, nor how they were marked; in short, her testimony was to the effect that she neither accepted nor refused to accept the alleged trust. She further testified that after the death of Mrs. Sanders she and the executor, Mr. Kirchmann, went to the safe-deposit box and examined the contents. They found two Liberty bonds, each for $1,000, and to which was attached a paper bearing these words: "Lauren La Barre, 2704 Bedford Avenue, Brooklyn, N. Y." On May 27, 1918, those two bonds were transmitted by registered mail to Mr. La Barre at the above address. The testimony did not develop the fact that any other bond or bonds were marked, but there was in the box a card, admittedly in Mrs. Sanders' handwriting, but not signed, on which appeared these words: "Give $5,000 (five thousand) of this to Lauren La Barre, also $5,000 (five thousand) to Kenneth La Barre." There was a package in the box marked for delivery to Ed Donaldson; there was an envelope on which was written, "Walter Scott's property." That envelope and its contents was forwarded to Mr. Scott. As we understand the record, the Donaldson package was sent to Donaldson, but there is some question as to whether it was sent in the original envelope or otherwise. All of the bonds that were in the safe-deposit box were sent to the individuals accordingly as the bonds were marked.

Mr. Kirchman was called as a witness, and testified that he went to the safe-deposit box the day after Mrs. Sanders died; that Anna Coffer, Edward Sanders, and Mrs. Edward Sanders went with him, and on that occasion they removed the will and a letter addressed to the witness. On the same afternoon, or the next day, the witness and Anna Coffer went to the box, and at that time the witness removed the bonds from the box. He testified that he took the bonds to his office in the Merchants' Exchange Building. At that time the Donaldson bonds were in the envelope, others had small slips of paper attached to them with their names, not the addresses, and were not in envelopes. The bonds were sent according to the way they were addressed, or the way the slips of paper were attached. After the bonds had been sent there were no bonds left. The witness testified that the card found in the box, and hereinabove fully set forth, was with a lot of miscellaneous papers such as tax bills, citizenship papers, etc., but was not attached to any bond or bonds, and there were no bonds in the envelope in which the card was found.

The evidence fully supports the findings, and the findings support the judgment. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

59 Cal. App. 526

## STRUPELLE v. STRUPELLE. (Civ. 3870.)

(District Court of Appeal, Second District, Division 2, California. Oct. 27, 1922.)

**1. Divorce ⊂⊃172—Oral announcement evidence was insufficient is not conclusive judgment.**

An oral announcement in a prior divorce action that the evidence then adduced was insufficient to justify an interlocutory decree for plaintiff, but that plaintiff might offer additional evidence, was not tantamount to a judgment denying the right to divorce, and is not conclusive against a subsequent action after the dismissal of that action by plaintiff.

**2. Divorce ⊂⊃139—Submission is set aside by leave to amend and offer additional proof giving plaintiff right to dismiss.**

The submission of an action for divorce to the court was set aside when leave was granted to amend the complaint and to adduce additional evidence, so that thereafter the plaintiff could dismiss the action under the authority of Code Civ. Proc. § 581, subd. 1.

**3. Dismissal and nonsuit ⊂⊃5—Plaintiff can dismiss at any time before final submission; "trial."**

Within Code Civ. Proc. § 581, subd. 1, authorizing the plaintiff to dismiss at any time before trial, the word "trial" means the determination or finding in the case, so that the plaintiff may dismiss even after the introduction of evidence if he does so before the retirement of the jury, or before the final submission of the case for decision by the court.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trial.]

**4. Divorce ⊂⊃69—Unreasonable delay in bringing action depends on circumstances indicating connivance, collusion, or condonation.**

Since no definite time is fixed as being the lapse of an unreasonable time before commencement of a divorce action which bars the action under Civ. Code, § 124, subd. 3, the question whether the delay is reasonable or authorized must be decided in the light of the circumstances peculiar to each particular case, in view of the definition of an unreasonable lapse of time by section 125, as such delay as establishes the presumption that there has been connivance and collusion, which by sections 112 and 114 imply consent to the act of which complaint is made, or condonation, which under sections 115 and 121 implies forgiveness.

**5. Divorce ⊂⊃69—Facts held not to show laches.**

A finding that a husband without just cause or excuse and with intent to desert his wife voluntarily separated himself from her, and has willfully and voluntarily lived separate and apart from her for nearly nine years, is inconsistent with the existence of connivance, condonation, or collusion by the wife which would establish that her delay in bringing the action was unreasonable.

**6. Divorce ⊂⊃69—Delay in bringing action held not to show acquiescence in desertion with intent to continue relationship.**

A delay of nine years in bringing an action for divorce on the ground of desertion by the husband did not establish a presumption of acquiescence in the desertion with intent to continue the marriage relation, within Civ. Code, § 125, where, in the meantime, the wife had heard nothing from her husband, and had brought a prior action for divorce in which the trial judge had stated her proof was insufficient, but had not thereafter permitted her to adduce additional proof.

**7. Divorce ⊂⊃37(3)—Intent to desert may be inferred from absence without provision for support.**

The intent to desert which, with the voluntary separation of one of the married parties from the other, constitutes desertion may be inferred from the fact that the husband abandoned his wife without apparent cause and left the state, making no provision for her support, and giving her no inkling of his whereabouts for nine years.

**8. Divorce ⊂⊃184(10)—Findings based on conflicting testimony may not be disturbed.**

The findings of the trial court in an action for divorce upon issues on which there was a sharp conflict in the evidence may not be disturbed on appeal.

**9. Divorce ⊂⊃249(1)—Interlocutory decree cannot make disposition of property.**

Under Civ. Code, §§ 146, 147, authorizing the court to assign to the innocent party community property or the homestead in case of a dissolution of the marriage and in granting a decree of divorce, the interlocutory decree of divorce cannot make final disposition of the property, since it does not dissolve the marriage, and is not a decree of divorce, but it may indicate the disposition of the property that will be made by the final decree.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action for divorce by Enrica Strupelle against Michele Strupelle. From an interlocutory decree for plaintiff, defendant appeals. Decree modified and affirmed.

B. F. Thomas, of Santa Barbara, for appellant.

W. P. Butcher, of Santa Barbara, for respondent.

FINLAYSON, P. J. This is an appeal by the defendant from an interlocutory decree of divorce in an action wherein the wife seeks a divorce from the husband on the ground of desertion.

Defendant, according to the court's findings, on August 4, 1911, with intent to desert and abandon plaintiff, voluntarily and willfully separated from her, and ever since has voluntarily and willfully lived separate and apart, with intent to desert his wife. The action was commenced April 9, 1920.

One of the defenses interposed was that there was an unreasonable lapse of time before the commencement of the action. The court found against defendant on this defense. For the purpose of overcoming any presumption of unreasonable delay, plaintiff put in evidence the record of a prior action for divorce which she had commenced against defendant on May 12, 1914, in the same court. In that action defendant, who was constructively served with summons by publication, made no appearance. His default having been regularly entered, the action came on for hearing on January 11, 1915, before a judge of the superior court for another county, sitting for the judge of the superior court for Santa Barbara county. After plaintiff had offered such evidence in that action as she then was prepared to adduce, a minute order was entered setting forth, in substance, that the court orally announced from the bench that "upon the evidence offered an interlocutory decree of divorce cannot be granted," and that "leave is granted plaintiff to offer additional evidence and to amend her complaint if desired." Thereafter plaintiff, through her counsel, tried in vain to persuade the judge before whom the cause had been heard to return to Santa Barbara and hear such additional evidence as plaintiff was prepared to adduce. Failing in this effort, plaintiff's counsel, on April 5, 1920, or four days before the commencement of the present action, filed with the clerk of the court a written request for the dismissal of the former action.

[1] Appellant, with all seeming seriousness, now contends that the pronouncement from the bench in the former action announcing in substance and effect that the evidence then adduced was insufficient to justify an interlocutory decree of divorce, but that plaintiff if so advised might offer additional evidence, was tantamount to a solemn judgment of the court formally denying to plaintiff the right to a divorce. It further is urged that the dismissal of the former action was unauthorized and void. Wherefore it is argued that the "former judgment" is now res adjudicata. To state this contention is to answer it. The court's oral announcement from the bench was not a judgment. In effect, it was no more than a statement that in the opinion of the court the evidence, in so far as offered, was not sufficient to authorize a divorce, but that the case would be continued indefinitely to enable plaintiff to adduce further testimony should she be so advised.

[2] Moreover, the former action was properly dismissed. The plaintiff, "at any time before trial," upon payment of the costs, may dismiss the action by written request to the clerk, filed with the papers in the case. Code Civ. Proc. § 581, subd. 1. If the former action was submitted for decision, the submission was set aside when leave was granted to amend the complaint and to adduce additional evidence. Westbay v. Gray, 116 Cal. 660, 667, 48 Pac. 800.

[3] In Hancock Ditch Co. v. Bradford, 13 Cal. 637 (cited with approval in Westbay v. Gray, supra), it was held that the word "trial," as used in that provision of the former practice act which corresponds with subdivision 1 of section 581 of the Code of Civil Procedure, means the determination or finding in the case. A plaintiff, therefore, even after the introduction of evidence by both sides, may dismiss the action in the manner permitted by subdivision 1 of section 581 of the Code of Civil Procedure, if he do so before the retirement of the jury or before the final submission of the case for decision by the court. Westbay v. Gray, supra; MacDermot v. Grant, 181 Cal. 332, 184 Pac. 396.

[4] Appellant urges here, as he did in the court below, that there was "an unreasonable lapse of time," within the meaning of subdivision 3 of section 124 of the Civil Code, before the commencement of the present action. We should hesitate to say that a lapse of time of any definite length must necessarily and of itself be deemed unreasonable as a matter of law,

> "It would," says the court in Locke v. Locke, 153 Cal. 58, 94 Pac. 244, "be attributing to the Legislature a very unjust and unreasonable purpose to hold the meaning of the Code to be that when a husband is guilty of willful neglect to provide for his wife she must immediately, *or within any particular time*, commence an action for divorce." (Italics ours.)

We think that whether delay in bringing an action for divorce on the ground of desertion is reasonable or otherwise is a question which must be decided in the light of the circumstances peculiar to each particular case. Section 125 of the Civil Code defines an unreasonable lapse of time to be such delay "as establishes the presumption that there has been connivance, collusion, or condonation of the offense, or full acquiescence in the same, with intent to continue the marriage relation notwithstanding the commission of such offense." Connivance and collusion imply consent to the act of which complaint is made (Civ. Code, §§ 112, 114); condonation implies forgiveness, and is revoked when the condonee commits the offense anew (Civ. Code, §§ 115, 121).

[5] None of these matters of defense could coexist with the facts found by the trial court, namely, that defendant, without any just cause or excuse and with intent to desert and abandon plaintiff, voluntarily separated himself from her, and ever since, with intent to desert, has willfully and voluntarily lived separate and apart from her. Nor is connivance, collusion, or condonation consistent with the testimony given by plaintiff and her witnesses. Plaintiff testified that

after defendant, without cause and without giving her any reason or explanation for his conduct, left her and went away, she received no word from him until shortly prior to the commencement of the present action, when he wrote her a letter from a town in Arizona in which he says:

"After a long time silence I now notify you that I am still alive, and I would be glad to hear from you."

Her testimony also shows that from the time when he left, August 4, 1911, until a few days before the commencement of the present action, she did not know his whereabouts, and that during all of this time she received no support from him whatever. With such a state of facts connivance, collusion and condonation are utterly incompatible.

[6] Nor did the delay in commencing the present action establish a presumption of "full acquiescence" in defendant's desertion, "with intent to continue the marriage relation." The facts testified to by plaintiff and her witnesses are entirely inconsistent with any intent on plaintiff's part "to continue the marriage relation," with all its rights and privileges. An exposition of the law upon this subject may be found in Thomson v. Thomson, 121 Cal. 11, 53 Pac. 403; Locke v. Locke, supra; Neeley v. Neeley, 179 Cal. 232, 176 Pac. 163; and Walker v. Walker, 14 Cal. App. 487, 492-493, 112 Pac. 479.

[7] Equally without merit is the contention that the evidence is insufficient to support the finding of desertion. The claim is that there was no corroborative evidence of defendant's intent to desert. Desertion consists of the voluntary separation of one of the married parties from the other and the intent to desert. Both ingredients are to be found in this case. The former is proved by the direct testimony of plaintiff and her witnesses; the latter may be inferred from the fact that defendant abandoned his wife without apparent cause and left the state of California, making no provision for his wife's support and giving her no inkling of his whereabouts during the years of his voluntary exile. Morrison v. Morrison, 20 Cal. 431.

[8] By way of defense, and also as a cause of cross-action, defendant averred in his answer and likewise in a cross-complaint that he was driven from the family dwelling place by reason of certain alleged acts of cruelty on plaintiff's part. Upon the issues thus raised there was a sharp conflict in the evidence. The trial court, giving credence to plaintiff and her witnesses, as was its right, found in the wife's favor upon all the issues thus tendered by defendant's pleadings. It was the province of that court to determine the credibility of the witnesses for the respective parties, and we may not disturb the findings without usurping the functions of a trial judge.

There are no other points worthy of mention, except that which is directed against the power of the trial court to make a final adjudication of the property rights in its interlocutory decree.

[9] The property consists of two lots—lots 19 and 20 of block 286, as designated upon the official map of the city of Santa Barbara. These two lots appear to be adjoining pieces of land, forming one parcel. Lot 20, purchased after the marriage, is community property; lot 19, purchased by the husband before the marriage, is his separate property. On December 27, 1910, which was during the marriage relation, defendant filed a declaration of homestead covering both lots. In its findings, and likewise in its interlocutory decree, the trial court properly determined the status of the property and properly determined how it ought to be assigned. But the actual assignment of the property should have been left for the final decree of divorce. A court may assign to the innocent party the community property or the homestead "in case of a dissolution of the marriage" (Civ. Code, § 146) and "in granting a decree of divorce" (Civ. Code, § 147). The interlocutory judgment is not a decree of divorce, nor does it dissolve the marriage. The court therefore should not assign or dispose of the community property or homestead until such time as the marriage is absolutely dissolved by the final decree of divorce. Remley v. Remley (Cal. App.) 193 Pac. 604. For this reason the interlocutory decree must be modified. But, as the purpose of the appeal obviously was to obtain a positive reversal, and the modification cannot substantially change the important features of the final judgment to be made upon the expiration of the year from the entry of the interlocutory decree, the appellant should not recover any costs on this appeal.

The interlocutory decree is modified by striking therefrom everything after the paragraph which adjudges that plaintiff shall have and recover a monthly allowance of $75, and by inserting in lieu of the parts so stricken out the following:

"And it is further ordered, adjudged, and decreed that plaintiff is entitled to have assigned to her, in and by any final decree of divorce which may be entered herein, all of lot 19 in block 286 of the city of Santa Barbara, state of California, for and during the term of her natural life; and she also is entitled to have assigned to her, in and by any such final decree, an undivided one-half of lot 20 in said block 286, as a tenant in common of said lot 20."

As so modified the interlocutory decree will stand affirmed as of the date of its entry, January 3, 1921. Upon entering its final decree of divorce the trial court will assign the property according to the determination expressed in the interlocutory decree; and, when it makes its final decree, it may then,

pursuant to the authority conferred by section 140 of the Civil Code, make provision in that decree for such reasonable security for the payment of the sum allowed for the wife's support and maintenance as it may deem proper.

We concur: WORKS, J.; CRAIG, J.

---

59 Cal. App. 613

**MILES v. BYBEE et al. (Civ. 3972.)**

(District Court of Appeal, Second District, Division 1, California. Nov. 14, 1922.)

**1. Pleading ⊂⊃279(4)—Relief held erroneous as based on supplemental complaint based on contract subsequent to commencement of action.**

In an action to rescind a contract to buy a restaurant for alleged false representations by vendor, where the evidence showed that the latter was in possession under a lease by which lessor agreed to convey the property to him on completion of certain payments, and plaintiff, after giving notice of rescission at least 10 days after commencing the action, delivered the key of the premises to lessor under an arrangement whereby the latter was to sell the property, which he did, and repay plaintiff the money paid by him from the proceeds, a judgment against lessor for part of the amount received by him on such sale *held* erroneous, as based on matters of complaint supplemental to, if related at all to, the original cause of action, which failed.

**2. Pleading ⊂⊃279(4)—No relief on supplemental complaint where plaintiff had no cause of action when original complaint was filed.**

Relief cannot be granted on a supplemental complaint, which is proper only in aid of the case made by the original complaint, where the proof shows that plaintiff had no cause of action when his original complaint was filed.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Joseph J. Miles against A. F. Bybee and C. M. Zadow and another, doing business as the Title Guarantee Sales Company. From a judgment against defendant Zadow, he appeals. Reversed.

N. B. Nelson, of Los Angeles, for appellant.

Humphrey Marshall, of Los Angeles, for respondent.

CONREY, P. J. This action was commenced by complaint filed December 21, 1920, to enforce rescission of a contract entered into on the 13th day of December, 1920, between the plaintiff and the defendant Bybee, whereby plaintiff agreed to purchase from Bybee a certain restaurant property in the city of Los Angeles. It was alleged that defendants Zadow and Roddle were doing business under the name of Title Guarantee Sales Company, and that, upon entering into said contract, the plaintiff paid over to Zadow and Roddle, as escrow holders, the sum of $700 to be delivered by them to Bybee "after all bills are paid and title shows clear." It was alleged that in making said purchase the plaintiff relied upon certain false representations made by the vendor, and that, upon discovery that these representations were false, the plaintiff gave notice of rescission and demanded the return of said sum of money paid by him as part of the purchase price, and that defendants had failed and refused to make such repayment.

In a second cause of action these same facts were alleged, together with a further allegation that on the date of the contract "the defendants received from the plaintiffs the sum of $700 for the use of the plaintiff."

The case came on for trial in May, 1921. The court made findings that the representations made by defendant Bybee were true, and that the plaintiff was entitled to take nothing from the defendants Bybee or Roddle, but rendered a judgment against Zadow in the sum of $600. From this judgment Zadow appeals.

The result at which the court thus arrived is explained as follows: At the trial it was shown in evidence that the restaurant property was held in possession by defendant Bybee under a lease contract from defendant Zadow, under which, upon the completion of certain payments, Zadow agreed to convey the property to Bybee; that after the plaintiff had given his notice of rescission, to wit, about the 1st of January, which was at least 10 days after the commencement of this action, the plaintiff delivered the key of the restaurant premises to Zadow under an arrangement whereby Zadow was to sell the property, and out of the proceeds repay to the plaintiff the money which he had paid for the restaurant; that on or about April 20, 1921, Zadow made a sale, and received from the purchaser the sum of $600, together with a note for $700. In view of these facts, the court, at the time of its decision permitted the plaintiff to file an "amended and supplemental complaint," "to conform to the proof," in which these subsequent transactions were set forth. Thereupon the court made its findings, in which, after making certain allowances to Zadow, arising out of circumstances which we find it unnecessary to discuss, it determined that the plaintiff was entitled to judgment against Zadow for said sum of $600.

[1] From the foregoing it is manifest that, although the plaintiff was not entitled to recover anything upon his original cause of action, he obtained judgment against Zadow by substituting him as the principal defendant on a new cause of action arising out of a contract made between him and the plain-

tiff after the commencement of this action. This is a totally different cause of action from that upon which the case went to trial. Appellant had objected to the evidence of these subsequent transactions, and certainly did not consent to the substitution of a new or supplemental cause of action.

[2] Without discussing other questions, it is clear that the judgment must be reversed because it is based upon matters of complaint which, if related at all to the original action, are supplemental to a cause of action which has failed.

"Furthermore, since a supplemental pleading is proper only in aid of the case made by the original complaint, relief cannot be granted upon a supplemental complaint, where the proof shows that the plaintiff had no cause of action when his original complaint was filed." Imperial Land Co. v. Imperial Irr. Dist., 173 Cal. 668, 673, 161 Pac. 116, 119.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

---

59 Cal. App. 636

## MATOZA v. SOUTHERN PAC. CO.
(Civ. 4242.)

(District Court of Appeal, First District, Division 1, California. Nov. 15, 1922. Hearing Denied by Supreme Court Jan. 11, 1923.)

**1. Railroads ⟸102(8)—Right to use tracks over private crossing paramount.**

The right of a railroad company to the use of its tracks in the proper conduct of its business is paramount to one's right to the use of his private farm crossing, and, if by reason of proper operation he suffers damage from being temporarily unable to use his crossing, this is merely damnum absque injuria of which he cannot complain.

**2. Railroads ⟸102(8)—Unnecessary obstruction of private crossing actionable.**

The unnecessary and arbitrary obstruction of a private farm crossing by a railroad company renders it liable for damages proximately resulting therefrom.

**3. Railroads ⟸102(8)—Company liable for abuse of discretion in operation over private crossing.**

A railroad company has a very wide discretion upon the question of proper operation of its business and the management of trains at a private farm crossing, and the court will not lightly regard the judgment and opinion of experienced employees as to what constitutes proper operation; but, where the court finds from the evidence that such discretion has been abused, the company may properly be called on to respond in damages to one suffering from its arbitrary action.

**4. Railroads ⟸102(10)—Finding of negligence in obstructing private crossing sustained.**

Evidence *held* to sustain a judgment against a railroad company for negligence in obstructing a private farm crossing preventing removal of cows from an alfalfa field, in consequence of which some of them died from overfeeding.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Manuel Matoza against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. K. Ford and Elliott Johnson, both of San Francisco, for appellant.

A. A. Rogers, of San Leandro (Henry G. Tardy, of Oakland, of counsel), for respondent.

KERRIGAN, J. The action is brought by plaintiff for the recovery of damages for the death of four cows, and certain expenses incident to their treatment in an effort to save them, alleged to have been caused by the negligence of the defendant in obstructing a private farm crossing traversing its railroad tracks so that the plaintiff was prevented from removing his herd of dairy cows from a field of green alfalfa, in consequence of which some of the herd consumed too much of the succulent pasture, four of them dying from the effects thereof.

Judgment went for plaintiff in the sum of $680, and the plaintiff appeals.

The main finding of the court, and upon which this judgment is based, is that the defendant negligently obstructed said private farm crossing, and maintained said obstruction after being apprised of the danger to plaintiff's cows arising therefrom.

The appellant urges two points in support of this appeal, namely, that its right to the use of its railroad track was paramount to the right of the plaintiff to the use of his private farm crossing thereover, and that, as the obstruction complained of was one necessarily incidental to the proper operation of its railroad, it could not be charged with negligence in the matter, whatever the effect of such necessary obstruction might be upon the property of the plaintiff; and second, that the plaintiff was guilty of contributory negligence which would prevent him from recovering damages.

The facts of the case may be summarized as follows: The defendant operates a line of railroad between Oakland and San Jose. At Alvarado on said line it maintains a depot adjacent to which is a siding. At this point is a farm lying on both sides of said railroad, of which the plaintiff is the lessee; the plaintiff's buildings and corrals being on one side of the track and on the other a field in which at the time of the occurrence of the events giving rise to the action there was growing a crop of alfalfa. One afternoon at about 4 o'clock the plaintiff drove his herd of 84 cows from his corrals into the al-

falfa field, using said farm crossing, his intention being to allow them to feed there not longer than 20 minutes, a longer period not being permissible, owing to the danger of the cows overfeeding and suffering from the effects thereof. Almost immediately after driving the herd into said field he noticed that a long freight train of the defendant was moved upon said siding so as to block his crossing. This freight train was known as No. 802. He thereupon requested the conductor of said train to part it at the point of the crossing, as it would in a few minutes be necessary for him to recross the track with his herd, and, according to the finding of the trial court, informed the conductor of the danger to his cows if their egress from the alfalfa field should be prevented. The conductor asked where the crossing was, the plaintiff gave him the information, and the conductor proceeded to the point apparently for the purpose of complying with the plaintiff's request. In the meantime another freight train (No. 801) pulled up on the main line and stopped opposite said first train, it also blocking the crossing. Train 802 was on its way to San Jose and was waiting at this point for a passenger train bound for Oakland to pass it before it could proceed on its way. Train No. 801 was proceeding to Oakland, and was to be overtaken and passed at this point by said passenger train. The passenger train was due at 4:44. It was late, and did not arrive until 4:56, but the fact that it would not arrive on time was not known to the conductor of No. 802. The plaintiff made no request to the conductor or No. 801 to move the train or part it at the crossing, apparently thinking that it was sufficient that he had requested the employee in charge of No. 802 to open the crossing. Having made such request, the plaintiff proceeded to assemble his herd of cows at the crossing gate; but the conductor of No. 802, being of the opinion that to part his train or otherwise open the crossing would result in delaying the passenger train (his testimony as to the time at which the plaintiff's demand that the crossing be opened was made placing it much later than the testimony given by the plaintiff), took no steps to effect the opening, so that the plaintiff was compelled to wait at the crossing gate until about 5 o'clock, when the delayed passenger train having arrived, No. 802 proceeded on its way, as did also the passenger and No. 801, leaving the farm crossing unobstructed. Some of the plaintiff's herd had in the meantime consumed too much green alfalfa, from the effects of which four of the cows sickened and died in spite of the efforts of the plaintiff and a veterinary to save them.

The appellant urges in support of its appeal that it had the paramount right to the use of its track in the operation of its railroad, and that the plaintiff's right to the use of his farm crossing was subordinate to this right, and, if by reason of the occupancy by the railroad company of its main line and siding in the prosecution of its business the plaintiff was temporarily unable to use his crossing, such disability arose from the nature of the situation; that the railroad company owed no duty to the plaintiff of which there could be a breach giving rise to a remedy against it.

[1-3] There can be no doubt that the defendant's right to the use of its railroad tracks in the proper conduct of its business was paramount to the plaintiff's right of crossing (Kans. Central Ry. Co. v. Allen, 22 Kan. 285, 31 Am. Rep. 190; Clayton v. Chic. I. & P. Ry. Co., 67 Iowa, 238, 25 N. W. 150; Gratz v. Lake Erie & W. R. Co., 76 Ohio St. 230, 81 N. E. 239; A. & N. R. Co. v. Gough, 29 Kan. 94; A., T. & S. F. v. Conlon, 9 Kan. App. 338, 61 Pac. 321); and that, if by reason of such proper operation the plaintiff suffered damage from being temporarily unable to use his crossing, this would constitute merely damnum absque injuria, of which he could not complain. But since it is admitted that the right to cross the defendant's tracks at the point involved in this action did in fact exist, it must follow that the defendant could not unnecessarily and arbitrarily obstruct the crossing without incurring liability for damage proximately resulting from such obstruction. To hold otherwise would amount to a denial of the plaintiff's right. We think a very wide discretion should be recognized in the railroad company upon the question of the proper operation of its business, and the movement and management of its trains, and that a court should not lightly regard the judgment and opinion of experienced and responsible employees of the company as to what constitutes proper operation under a given set of circumstances. Where, however, it finds from the evidence that such discretion has been abused, the railroad company may properly be called upon to respond in damages to a person suffering from its arbitrary action.

[4] The evidence in this case mainly turns upon the amount of time which the conductor of No. 802 had in which to open the plaintiff's crossing by parting the cars of his train, and reattaching them and getting the train ready by the refilling of its air tanks so that it could take the main line when by the passing of the passenger train it should be free to do so. There was evidence that these operations could have been completed in 15 minutes. The evidence as to the time elapsing between the notification to the conductor of No. 802 by the plaintiff that he must have the train parted to allow his cattle to use the crossing, and the time when the passenger train was due, was in direct conflict, as was also that as to the conversation, if any, had between them; and we may say at once that if the trial court had ac-

cepted the testimony of the railroad employees upon these points it could not have arrived at the conclusion that the damage of which the plaintiff complains arose from any fault of the defendant; but it evidently accepted the testimony of the plaintiff, which gave to the defendant's employees at least 30 minutes to effect an operation admittedly requiring not more than fifteen. The court having accepted this testimony, we are unable to say that its conclusion that the injury to the plaintiff's herd resulted from the defendant's negligence is not sustained by the evidence.

The appellant also refers to the fact, as a ground for holding the trial court's conclusion to be erroneous, that the crossing at the time in question was blocked not only by train 802 but by 801 also, so that, if said conductor had complied with the plaintiff's request and parted his train, the crossing nevertheless would have remained obstructed, since admittedly the plaintiff took no action with regard to No. 801. We think the answer to this is that so long as No. 802 blocked the crossing it would have availed plaintiff nothing to have removed the impediment of No. 801; and that if the plaintiff's request to the conductor of 802 had been complied with, and the plaintiff had failed to notify the conductor of 801 of his desire to cross the track, or some responsible agent the scope of whose duties would bind the company by such notification, such failure could be availed of in this case, but not so long as the plaintiff's request to the conductor of No. 802 remained uncomplied with.

Complaint is also made by the appellant that the judgment is erroneous since the plaintiff's own negligence contributed to his damage, this contention being based upon certain evidence that the plaintiff failed to take proper steps to remove his cattle from the alfalfa field by other means when he discovered that the obstruction to his crossing was not to be removed. As to this point also the evidence is in conflict, and the trial court chose to accept that version of it which would absolve the plaintiff from the contributory negligence suggested.

It follows from the foregoing that the judgment should be affirmed and it is so ordered.

We concur: TYLER, P. J.; ST. SURE, Justice pro tem.

---

59 Cal. App. 408

## PEOPLE v. ANDERSON et ux. (Cr. 615.)

(District Court of Appeal, Third District, California. Oct. 23, 1922.)

**1. Robbery ⇐24(1)—Evidence held to sustain conviction.**

In a prosecution for robbery, evidence *held* to support a verdict that defendants had conspired with third persons to commit the crime of robbery as defined by Penal Code, § 211.

**2. Robbery ⇐8 — Threats ⇐1(1) — "Robbery" and "extortion" distinguished.**

The distinction between "robbery," as defined by Penal Code, § 211, as the felonious taking of personal property in the possession of another from his person or immediate possession and against his will, accompanied by force or fear, and "extortion," which, according to section 518, is the obtaining of property from another with his consent, induced by a wrongful use of force or fear, or under color of official authority, is that in the one offense the property is taken against the will of the owner or possessor, while in the other the property is taken with the consent of the owner or possessor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Extort—Extortion; Robbery.]

**3. Criminal law ⇐1167(1) — Reversal for variance between pleading and proof necessary only where crime other than that for which conviction was had, shown.**

It is only where the evidence compels the conclusion that a crime other than that of which the defendant was convicted was committed that the reviewing court will be forced to order a reversal of the cause on the ground of variance between the accusatory pleading and the proof.

**4. Robbery ⇐15—Conspirator may be guilty of conspiracy to rob although not actually present and participating.**

In prosecution for robbery, committed by defendant and his wife with the aid of a third person, pursuant to a conspiracy to rob, if the wife was a party to the conspiracy, it was immaterial whether she was not present when the property was taken by her husband and the third person, and although she took no direct part in the act of taking it.

**5. Robbery ⇐14—Return of property held not to relieve act of criminality.**

In prosecution for robbery, that defendants returned a part of the property to the person robbed, *held* not to relieve the act of criminality, but might be considered by the jury with other circumstances as to guilt or innocence.

**6. Criminal law ⇐365(1)—Evidence as to signing documents by person robbed held admissible as res gestæ.**

In a prosecution for robbery, where it appeared that defendant and his wife, together with a third person, conspired to commit the act, entering the room of the person robbed, and compelling him to sign a check and assignment of a bill of sale and a registration certificate of an automobile, it was not error to permit the prosecuting witness to testify as to the circumstances under which he signed such documents, the evidence being admissible as res gestæ, in view of Code Civ. Proc. § 1850, and not objectionable because showing another crime.

**7. Criminal law ⊂⊃1168(4)—Refusal to rule upon motion to exclude evidence held harmless error.**

In prosecution for robbery, erroneous failure to rule upon a motion to exclude evidence *held* not prejudicial, where it did not appear exactly to what part of the testimony the motion was addressed, and where the evidence was admissible as to one of the two defendants.

**8. Criminal law ⊂⊃622(1) — Severance held within discretion of court.**

Under St. 1921, p. 90, providing that where two or more persons are jointly charged with a public offense they must be tried jointly, unless the court orders separate trials, the court may, in its discretion, order separate trials of two or more defendants jointly charged with a felony, but is not bound to do so upon mere request, the matter being within the discretion of the court.

**9. Criminal law ⊂⊃822(6)—Instruction as to conspiracy to rob held harmless error.**

In prosecution for robbery, pursuant to a conspiracy between defendant, his wife, and third persons, an instruction that where a person stands by, aids, assists, or encourages in the perpetration of a crime, he is to be punished as a principal, although erroneous as being in the disjunctive, *held* harmless error in view of other portions of the instruction.

**10. Robbery ⊂⊃26 — Instruction authorizing conviction of defendant's wife as a conspirator held not erroneous as not based on evidence.**

In a prosecution of defendant and his wife for conspiring to rob complaining witness, being based upon evidence, the question as to whether the wife participated in the acts charged was for the jury.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Ralph J. Anderson and Ethel Anderson were convicted of robbery, and, from the judgment of conviction and refusal of new trial, they appeal. Affirmed.

J. S. Daly and Mark L. Burns, both of Sacramento, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendants, who are husband and wife, were convicted of the crime of robbery, upon an information, filed in the superior court of Sacramento county, jointly charging them with said crime. A motion for a new trial made in behalf of each of the defendants was denied, and the appeal here is by the defendants from the judgment of conviction and the order refusing to grant them a new trial.

The points upon which the defendants claim that they are entitled to a reversal of the judgment and the order appealed from, generally stating them, are: (1) That there is a fatal variance between the charge set out in the information and the evidence, in this, that the crime charged is that of robbery, whereas, the proof, if it shows that any crime at all was committed by the defendants, discloses that it was the crime of extortion and not that of robbery; (2) that error was committed in the admission of certain testimony; (3) that erroneous instructions upon the law were read to the jury by the court to the prejudice of the rights of the accused.

The theory upon which the information was undoubtedly framed and upon which, it appears clear from the record, the case was tried, was that the defendants and another party, whose name and identity the officers of the law seemed not to have been able to discover, formed and entered into a conspiracy, the object of which was to commit the crime charged in the information.

The party upon whom the crime charged is alleged to have been committed is one E. Litts, a painter by trade, and a resident of the city of Sacramento for about five years prior to the time at which the crime is alleged to have been perpetrated. His story of the several circumstances leading to the perpetration of the alleged offense as given at the trial is substantially as follows:

That he first met the defendant, Ethel Anderson, early in the month of November, 1921—either the 3d or 4th of that month—between the hours of 5 and 6 o'clock p. m. at a garage at Seventh and M streets, in the city of Sacramento, having been introduced to her by one William Jones, the night man in charge of said garage. It appears that Mrs. Anderson had been employed at 621 M street in said city, but had been given notice on the day upon which she first met Litts that her services at said place were no longer desired and was requested to remove therefrom. Just prior to the time at which she met Litts, as stated, she had been engaged in conversation with said Jones and had stated to him that she desired to have a trunk and some other personal articles which were at the premises at 621 M street removed therefrom to the home of her husband's brother at Thirtieth and G streets, in the city of Sacramento, and Jones, after introducing her to Litts, asked the latter if he would convey the said trunk and articles in his automobile to said place at Thirtieth and G streets. Litts replied that he would do so; but Mrs. Anderson said that before taking the trunk, etc., to her brother-in-law's home she would like to go about the city and see if she could find an apartment or living rooms. Litts stated that he would be pleased to take her around the city in his automobile for that purpose. Litts and the said defendant then started out and drove to several places on as many different streets stopping

at each long enough to enable Mrs. Anderson to ascertain whether she could secure accommodations and, having failed to find suitable rooms for her purposes, Litts drove her back to 621 M street, where he met the woman's husband, having been introduced to him by the former. The trunk and some other articles were removed from the house and into the machine and Litts and Mrs. Anderson took the same to the home of her brother-in-law and left them there. While at this place, Mrs. Anderson telephoned to her husband, saying that she would meet him at Fifth and K streets and Litts drove her to said corner where she met her husband. The couple finally decided to apply to the Central Hotel between Fifth and Sixth streets on K street for lodgings, and Ralph Anderson walked to the hotel and Litts and Mrs. Anderson went there in the automobile. In the forenoon of the following day, Litts again met Mrs. Anderson at the garage above referred to, and again took her in his machine about the city of Sacramento to look for an apartment or a place in which to take up her residence. Finally they found and located themselves in rooms at 1316 Seventh street, Litts having taken the couple there in his automobile. Litts, at the request of the parties, went to Thirtieth and G streets, got the trunk and other baggage belonging to the defendants and took them to their Seventh street apartment. Litts then returned to the garage at Seventh and M streets where he left his car.

He met Mrs. Anderson on the following morning, which was either Friday or Saturday, and she remarked to him that if she were in San Francisco she thought she could secure a position in an apartment house in said city. Litts said to her that he was going down on Sunday morning and if she desired to accompany him she could do so. She readily agreed to this, and on Sunday they together drove to San Francisco in Litts' automobile. After Mrs. Anderson had telephoned to certain parties in San Francisco, she reported to Litts that she was not able to secure employment, and later in the day they started on their return to Sacramento, arriving there and at her home at 1316 Seventh street at about 10 minutes after 10 o'clock that night. Litts thereupon drove his machine to the garage, and then went to his room at 815 F street and retired for the night. Litts testified that Mrs. Anderson told him that her husband knew that she was going to San Francisco, that, in fact, he had advised her to accompany Litts to the city for the purpose for which she desired to go there, as above indicated.

On the following evening, shortly after 5 o'clock, Litts met Mrs. Anderson at the garage. She stated that she expected that he would be at the garage at that hour, for she was aware of his custom of taking his automobile out every evening near that time. She at that time told him that her husband had deserted her; that he was very angry because she returned home so early from San Francisco the preceding evening, saying that she should not have left the city until she could have seen the lights of the metropolis from the ferryboat, and that they quarreled and "fought all night, and he took what money they had and left her with but 19 cents." Litts thereupon asked her what she proposed to do, and she replied, "It is up to you," to which he retorted, "I can't do anything; he will be back," and asked her if he had taken his clothes, to which she answered that he had not taken all of them, and Litts repeated: "He will be back; just go on back home again and he will be back over there." She said that he would not return, for he had been waiting for a chance to get away for a long time. She said that she expected to go to work at the Central Hotel for her room, and Litts then told her that "if she could find a room, I would give her enough to eat on until she got a job and that is all I could do." She replied that she could not go to work, as she had no clothes, and then proposed that if Litts would secure a place she would keep house for him. Litts replied that he did not know whether he could or could not do that, and after she had stated that she would have to do something and that she was not able to work, Litts added, "You can look around and see; that's all you can do and perhaps you can find a job." He then left her at the garage and went to his home.

It appears that Mrs. Anderson was dissatisfied with her rooms at 1316 Seventh street and, after the conversation last referred to with Litts, she started out to look for another place and finally came to 1229 E street. She subsequently met Litts and reported to him that she had found rooms which would be suitable if he desired to rent them, and on the day following that of the conversation last mentioned he, accompanied by Mrs. Anderson, drove to 1229 E street and Litts rented the same, paying with his own personal check, $55 as the first month's rental. After securing said place, Litts, at the request of Mrs. Anderson, drove to Sixth and M streets, where she got out, and he left his machine in front of the "Old Pavilion," at Sixth and M streets. This was about 3 o'clock in the afternoon. He walked over to K street, remained for about 10 or 15 minutes, and then returned to where he had left his automobile, and found Mrs. Anderson sitting in the machine. She had in her hand "the little tin plate that holds the license tag, or registration certificate of the automobile" and he asked her where she got it, and she said "it was in the book." He replied that it was strange that it was in there, as he always kept it "in the top of the car," and he thereupon "put it back in the book and slipped it down between the two front seats," there

being two separate and distinct seats in the front part of the car. They then went to 1316 Seventh street, secured the trunk and baggage belonging to Mrs. Anderson, and took the same to the rooms at 1229 E street. They lived together at the latter place for some 6 or 7 days, occupying the same room and the same bed. On one occasion, while they were thus living together, Mrs. Anderson asked Litts why he did not leave his car in front of the house instead of taking it to a garage, and insisted upon him doing so. He said that he would not do that, as he had a place to keep the car, and he intended to leave it there at nights.

On the morning of the 15th of November, 1921, about 2 o'clock, Litts was awakened by some one moving about in the room. A light was turned on and he observed that it was Mrs. Anderson, who had arisen from the bed. She remarked that she was unable to sleep. He asked her what time it was and she said 10 minutes after 2. She returned to the bed. Litts immediately went to sleep but in a short time thereafter he was awakened by the glare of a spot light which was flashed in his face. He soon recognized, by the aid of the light reflected from the spot light, the defendant, Ralph Anderson, husband of the woman who was sharing the bed with him at that time. A light was then turned on, and Anderson asked: "Who is that woman in that bed?" to which Litts replied, "A wife." Anderson then in a loud voice exclaimed, "That's my wife." Litts said, "I don't know whether it is or not." Anderson replied, "I have got a secret man out here in the car. I am going to take you down and take you to police headquarters." Litts answered, "All right; I will go with you," but when he started to get up, Anderson, with his gun, pushed him back in bed. Accompanying Anderson to the room of Litts were two other men, one of whom, because of the active part he took in the occurrences in Litts' room, is referred to throughout the record of this case as "the unknown man." Both Anderson and the "unknown," as we will hereafter refer to the man who was especially active in the carrying out of the transactions occurring in Litts' room, had revolvers in their hands and the unknown also had a spot light. Anderson demanded of Litts a writing to be subscribed by the latter, admitting that he had been cohabiting with the former's wife. At first Litts refused to sign any such document, saying he didn't know whether the woman was really Anderson's wife or not.

While this conversation was proceeding between Anderson and Litts, the unknown was ransacking Litts' suitcase and also his coat, vest, and trousers, and in the suitcase he found the certificate of registration of Litts' car, a bill of sale to Litts from the party from whom he had purchased the car, a lady's gold watch with a diamond setting, some old coins which Litts had preserved, a Liberty bond for $50, and an electric flatiron, all of which he took possession of. He also found in the vest or coat pocket of Litts the latter's check book, which he threw on the bed, and a bill book containing $15 in currency. He handed the bill of sale and the certificate of registration to Anderson, and the latter made a demand on Litts to assign to him the bill of sale and the said certificate. Anderson also at this time demanded from Litts a check on his bank for the sum of $95. He first asked Litts how much money he had in the bank, and the latter replied that he did not have very much money on deposit. "Well," continued Anderson, "there is $1,100 in there." Litts asked, "How do you know?" The defendant answered, "I know; I got the dope on all that; the last check you drew was $55." It may here be stated that Litts testified the last check he drew on his bank account was for the sum of $55, with which he paid the rent for the apartment he and Mrs. Anderson were occupying and that the drawing of that sum from the bank reduced his bank account to the sum of $1,100. Litts refused to sign the document and to make out the check demanded, but the demands, according to the testimony of Litts, were made in such a violent and threatening manner that he finally agreed to sign the statement involving an admission that he had cohabited with Mrs. Anderson for several days. He also agreed to make the assignment of the bill of sale and certificate of registration. Anderson called for some ink so as to prepare the several documents mentioned, but Litts said that he had no ink in the house, whereupon Anderson, according to Litts' testimony, ordered the unknown and the "third man" (as we will hereinafter refer to the man who was with Anderson and the unknown) to go to the garage at Seventh and M streets, procure some ink and a pen and return as soon as possible. The unknown and the third man thereupon left the room, but within a few minutes the unknown returned to the room and remained with Anderson. In the course of 20 or 30 minutes the third man returned with some ink in a salt cellar and a pen point. Litts, upon again being demanded by Anderson to do so, signed the several documents, the unknown signing the name of Harrison Stewart as a witness to the execution of the assignment of the bill of sale. Litts also signed a check for the sum of $95, omitting, however, to insert therein the name of the payee. Anderson objected to the signature to the check, saying that it did not correspond in style or form with Litts' signature as written in the certificate of registration of his car, and also objected to the omission to insert his (Anderson's) name in the check as the payee thereof. Anderson thereupon filled out a new check for the sum of $95, payable to him, and demanded of Litts that he sign the

same, which was done. While all this was going on, the unknown was arranging the several articles of personal property above mentioned in such manner as to make it convenient for him to carry them away and also stepped up to Litts and took from his fingers two diamond rings, this latter act being done while the defendant, Ralph Anderson, was still standing near the bed and in conversation with Litts.

After all this occurred, Ralph J. Anderson and the unknown left the house, but within a few minutes returned and procured the trunk and other articles belonging to Mrs. Anderson and removed them from the house. They took with them the bill of sale with the assignment thereof to R. J. Anderson indorsed upon it by Litts, the certificate of registration of Litts' car, also indorsed with an assignment thereof to said Anderson, the check for $95, the Liberty bond for $50, the bill book containing $15 in currency, a statement subscribed by Litts confessing that he had been cohabiting with Mrs. Ethel Anderson for several days, the lady's gold watch, the diamond rings, some old coins, an electric flatiron, and some clothing belonging to Litts. After Anderson and the unknown had left the premises, Litts arose, went to the telephone, called the police station and informed the officer in charge of what had taken place in his room and telling him who the parties were that had committed the acts which have been described. About 6 o'clock in the morning Litts went to the garage on Twelfth street between E and F where he left his car the night before and which, it will be noted, is a block only from his apartment at 1229 E street, and, while standing in front of the door of the garage, the defendant, Ralph Anderson, walking, put in an appearance, passed within a few feet of Litts without saluting or, apparently, noticing the latter and soon disappeared from Litts' sight. Late in the evening of that day (the 15th), after a complaint had been sworn to by Litts against the Andersons and the unknown, as John Doe, charging them with robbery, and a warrant thereupon issued and the publication of the fact of the filing of the charge by the evening newspapers of Sacramento, the defendants R. J. and Ethel Anderson, accompanied by J. E. Taylor, the proprietor of the garage at Seventh and M streets, appeared at the rooms of Litts at 1229 E street and returned to him the two diamond rings, the certificate of registration of the car, the bill of sale, the check for the $95, the electric flatiron, the watch, a fountain pen, a few of the old coins and the bill book, minus the currency therein contained at the time these articles were taken from Litts by said parties. The Liberty bond, the clothing taken, and the currency in the bill book were not returned. The foregoing statement is, as has already been indicated, taken from the testimony of Litts. It should, however, be added that Mrs. Anderson was not a witness to the occurrences in Litts' room above narrated, having immediately left the room upon the appearance therein of her husband and the unknown.

J. E. Taylor, above mentioned, testified that he was not only a part owner of the garage at Seventh and M streets, but was also engaged in motor delivery business; that the defendant Ralph Anderson, who at one time worked at said garage for him (Taylor), came to the garage on the evening of the 14th of November, 1921, about the hour of 7:30 and asked him if he (Taylor) would haul Mrs. Anderson's trunk to the garage and store it there for a few days. Taylor said that he would do as so requested, but testified that at that time Anderson did not inform him where the trunk was. At this time Anderson was engaged as a taxi driver for one of the taxi companies of Sacramento, and about midnight of the said 14th day of November he again appeared at the garage in a taxi which he was driving and again requested Taylor to haul Mrs. Anderson's trunk to the garage. Taylor asked Anderson where the trunk was, and Anderson suggested that when he was ready to go for the trunk that he (Taylor) follow him (Anderson) to the place where the trunk was to be found. Later on, about 2 o'clock a. m. of the 15th, Anderson returned to the garage and stated that he was prepared to go to the place where the trunk was. Taylor, accompanied by one of his employees, by the name of Murphy, followed Anderson to 1229 E street. Anderson was accompanied in his taxi by the party heretofore referred to as the unknown. Here it should be stated that, as to the unknown, Taylor testified that he did not know the man and that he had never seen him until early on the day previous—the 14th day of November, when he (the unknown) was in the company of the defendant Ralph Anderson. Anderson and the unknown, however, on arriving at 1229 E street, left the taxi and went to the door of and entered the house. It appears that Taylor was employed to deliver to the post office the mail deposited in the post office boxes in the outlying districts of the city, and, as it was approaching the time when he should make a collection of the mail, he left the house, after waiting in vain a number of minutes for Anderson's return from the house with the trunk, intending, as he stated, to return to said house after he had collected the mail from the boxes and delivered the same at the post office. About half an hour later, or near 2:30 o'clock a. m. Taylor, being required to go to Twelfth and C streets to secure mail from the box stationed at that corner, on returning, stopped at 1229 E street and sounded his horn several times. He saw the defendant Mrs. Anderson, sitting in her husband's taxi. Within a few minutes after he had sounded his horn, the defendant Ralph Anderson and the

unknown came out of the house and stepped to the sidewalk, not bringing the trunk with them. Taylor asked Ralph Anderson about the trunk, and thereupon Anderson and the unknown returned to the house and soon reappeared with the trunk and placed it in Taylor's motor truck. Taylor then started for the garage, and Ralph Anderson, his wife and the unknown followed in the taxi. The Andersons and the unknown arrived at the garage a few minutes after Taylor and his employee Murphy had reached there. The defendants went into the garage, accompanied by the unknown, and a general conversation ensued between Taylor and the Andersons. Suddenly, so Taylor testified, the unknown "sprang up" and exclaimed, "See what I got from that guy," at the same time exhibiting the rings, watch, and other articles heretofore mentioned. Anderson declared that he did not want the jewelry and articles in the possession of the unknown, and then stepped over and held a conversation with his wife, the nature of which was not made to appear at the trial. Taylor said to the unknown: "You have no business taking that stuff out there." The latter replied: "Well, I got it and I will keep the rings," at the same time, turning and facing Anderson, said that the latter could have the rest of the articles. Finally, the rings, watch, and certain other articles were wrapped up and Taylor said to the defendants that they should return them to Litts. Certain of the articles mentioned were returned to Litts by the Andersons as indicated above.

While the Andersons and Taylor were at Litts' apartment for the purpose of returning to him the rings, watch, etc., Taylor telephoned to the police station and informed the officers in charge that the Andersons were then at 1229 E street. Officers Becker and McKinney, armed with the warrant of arrest which had been earlier that day issued by the police court upon the complaint of Litts, immediately went to Litt's apartment and there placed the Andersons under arrest. These officers testified that they had a conversation with Ralph Anderson while he was incarcerated in the city prison, and that he stated to them that he had met his wife, Ethel Anderson, on the afternoon of the 14th day of November, 1921, and that there was then an understanding had between them that Mrs. Anderson would that night unlock the door leading to Litts' rooms from the street so that he could readily enter said rooms when he went there during said night, as he contemplated doing; and, in this connection, it should be stated that Litts testified that he always kept the door leading to his apartment from the street locked.

The above comprises substantially all the testimony presented by the people in support of the charge set forth in the information, and, while it is in our opinion sufficient to sustain the charge as we shall later undertake to show, still it will be interesting to note that the testimony of the defendants in their own behalf is rather confirmatory than otherwise of the theory of the prosecution that the taking of the property of Litts under the circumstances as above described was the culmination of a conspiracy previously formed and entered into by the Andersons and the unknown, and we will therefore reproduce herein in a general way the testimony of the defendants.

There is little material variance between the testimony of Ethel Anderson and that of the complaining witness, Litts, as to the circumstances under which the two first became acquainted with each other; nor is there any substantial difference between them with regard to the circumstances leading to the renting of the apartment at 1229 E street by Litts, and the fact that the said defendant entered into the relationship with Litts, as detailed above.

Ethel Anderson admitted that her husband became angry with her on the night of her return with Litts from San Francisco, but declared that the ground of her husband's indignation was in the fact that she had returned home later in the night than he thought that she should, and that he did not quarrel with her because she had returned home "too early." She stated that her husband, early on the day following that of her return from San Francisco, left her with only 19 cents in her possession. She admitted meeting Litts that day and that she then explained to him her condition financially, and also told him that her husband had gone in search of work, but that she did not know whether he was looking for employment in the city or had gone to the country for that purpose, and said that it was necessary for her to secure employment. She testified that, after considerable discussion between herself and Litts, the latter suggested that he would rent rooms and employ her to keep house for him. She agreed to this proposition, and Litts advanced her the sum of $20. She testified that she went to 1229 E street with Litts and there took up her abode; that the first night that they were there together and when it was time to retire, she proposed to sleep on a davenport bed, and suggested that Litts take the bedroom, but Litts, so she testified, said that there was no reason why two rooms should be "mussed up," since both of them could occupy the bed. She strenuously objected to this proposition, so she declared, and thereupon Litts suggested that she take the bed and he would take the davenport; that after she had retired, Litts came to the room and, against her vigorous protest, got in bed with her; that Litts violently and by means of force outraged her person. She admitted, however, that, notwithstanding this offensive conduct on the part of Litts, she, nevertheless, remained in bed with him that night and occupied the same bed with him

every night until the morning of the 15th of November, 1921, when her husband and the unknown appeared upon the scene and carried out the several transactions above described. She testified that on the day following the night of that sordid experience with Litts she went to Taylor, proprietor of the garage at Seventh and M streets, and related to him the fact of Litts' mistreatment of her the night before. She admitted that she arose from bed near the hour of 2 o'clock on the morning of the 15th and corroborated the testimony of Litts to the effect that he asked her the reason she had arisen from the bed and that she replied to him that she could not sleep, and also in reply to Litts told him that it was then about 10 minutes after 2 o'clock. She further testified to the circumstance of the entrance into the house of her husband and the unknown; that her husband had a spot light which he thrust into the face of Litts and upon a light being turned on discovered her in bed with Litts; that he said to her in a loud and vehement manner, "Get the hell out of here as quick as God Almighty will let you;" that she hastily arose, dressed and, placing a few articles belonging to her in her trunk which was in the room, fled from the house; but seeing a car in front of the house and believing it to be that of her husband, she took a seat in it and remained there until her husband returned and with the unknown drove her to the garage at Seventh and M streets, as already explained. She testified that on the afternoon of the 14th of November she met her husband near Seventh and J streets; that she then for the first time learned that he was employed by a taxi company as a driver; that she told her husband that she was working at 1229 E street, but that her husband did not ask what she was doing, for whom she was working, or what compensation she was receiving. She stated that, at the request of her husband, she went to a rooming house and secured a room for her husband, he giving her the sum of $4 to pay for the same; that the rent of the room for a week was the sum of $6, and that she returned to Seventh and J streets, informed her husband that she had secured the room, paid down the $4 he had given her, and that there was still $2 to be paid; that thereafter she took the street car and returned to 1229 E street.

The defendant Ralph Anderson testified that he became acquainted with Litts on the 4th of November, 1921, and corroborated in a general way the testimony of his wife as to the latter's efforts to find living rooms or an apartment, assisted by Litts. He stated that on the 14th of November he was, and for some days prior thereto had been, employed by the Adams Taxi Company in Sacramento as a taxi driver. He testified that on that day, near the hour of half past 5 p. m., he had occasion to visit the garage at Seventh and M streets and there met J. E. Taylor, by whom at one time he had been employed, and that on that occasion Taylor told him that his wife had been at the garage to see him (Taylor) and had reported that Litts was not treating her right, and that Taylor advised him to "go down there and get her"; that upon receiving this information he made no reply, but walked away and went to his room and, as his employment with the Adams Taxi Company required him to enter upon the discharge of his duties near the hour of 1 a. m., he retired. He arose at 12:30 a. m. and shortly thereafter took up his work and made two trips and then went to Taylor's garage for the purpose, so he testified, of requesting Taylor to go to 1229 E street, get his wife's trunk, and remove it to the garage; that while engaged in conversation with Taylor concerning this matter, a stranger—a man whom he had never seen before and whose name he never learned—and who is referred to herein as the unknown, was standing near and stepped up to him and asked him "what was wrong, and I told him, and he volunteered to go out with me and help me bring the trunk back." Said defendant accepted the proffered service, and the unknown accompanied him to the rooms occupied by his wife and Litts. This was about 2 o'clock a. m. Arriving at 1229 E street, continued said defendant, he and the unknown stepped from the sidewalk to the door leading into the apartment of Litts, and he rang the door bell, to which no answer was made, and he thereupon "tried the door and it opened and I walked in," the unknown following. Said defendant stated that it was his intention to break the door down and enter the house if Litts or some other inmate thereof did not respond to the bell and open it; that his mind was fully made up, before arriving at the place, to kill Litts if he found any evidence of immoral relations between the latter and the defendant Ethel Anderson. After getting into the house he "searched around" for the bedroom and found Litts and his wife in bed together. "I believe," continued said defendant, "the first thing I did was to tell my wife to get up out of the bed and get out of the house." He admitted demanding of Litts a signed statement to the effect that he and Ethel Anderson had been living in said house as "man and wife," but that Litts at first refused to sign any such statement; that he asked Litts if he had any ink in the house and the latter replied in the negative and said "if I wanted ink so badly I will have to get it myself, and this fellow (referring to the unknown) and I left the house and went down to Taylor's, got the ink, came back again, and then Litts signed the statement and all these others papers at the time." In this connection, it should be stated that said Anderson denied that there was a third party with them, and as is to be implied from the statement that he and the unknown went

after the ink, denied that any "third man" went after that article.

Asked how Litts came to sign the assignment of the bill of sale and certificate of registration of his car, said defendant testified that "this other fellow [referring to the unknown] brought this certificate and this bill of sale over to me and demanded me to have Litts sign them." "Q. And did you demand of Litts that he sign them? A. Yes." He admitted that he saw the unknown take from Litts' fingers the two diamond rings, but that he did not know that he (the unknown) had taken the other jewelry and other articles of personal property, nor was there any understanding between him and the unknown that any property should be taken by them from Litts. On cross-examination he declared that he was very angry during all the time he was in Litts' room, but that the idea of killing Litts "had got out of my mind at that time." He admitted commanding Litts to issue to him his personal check for $95, but denied that a check omitting therein his name had previously been signed by Litts and destroyed upon his suggestion that he preferred a check containing his name as the payee. He admitted that Litts drew the check and signed his name thereto, but he said that the unknown took the check, the bill of sale, the certificate of registration, and all the articles of personal property heretofore enumerated; that all he took with him was the statement as to Litts' relations with his wife. He stated that they remained in Litts' room from 2 to 3:30 a. m.; that Taylor took his wife's trunk in his automobile to the garage and that he, his wife, and the unknown followed in the taxi he was then driving. His testimony as to what occurred after they had arrived at the garage harmonizes in a general way with that of Taylor and the defendant Ethel Anderson. Asked if he did not, early in the morning of the 15th and after he had left Litts' room, pass the garage on Twelfth, E, and F streets in which Litts had left his car and see Litts standing outside and in front of said garage, he replied that he did go back to Twelfth and E at the hour named, intending to tell Litts where his jewelry and other articles of personal property taken by the unknown could be found; that in going to Litts' rooms at that time he might have passed the garage, but that if he did he did not know it, and that he did not see Litts while he was then on the way to the latter's place of residence. He corroborated the testimony of his wife and Taylor to the effect that he, accompanied by the two former, went to Litts' rooms about 7 o'clock the evening of the 15th and returned to Litts certain of the articles, including the rings and the watch, but admitted that at that time he knew that a warrant of arrest had been issued against him upon a complaint charging him with the crime of robbing Litts, having read of the same in the evening newspapers of Sacramento.

We now have presented a fair statement, in substance, of the testimony of the two defendants, and, as before declared considering the general trend thereof, it seems to sustain, rather than refute—at least we can say that upon its face the jury could well have so concluded—the theory upon which the case was presented by the people, to wit, that the several transactions carried out by the defendants in Litts' room were parts of a conspiracy formed and entered into by the defendants and the unknown (and perhaps the "third man" referred to by Litts as having been in the room with Ralph Anderson and the unknown) to despoil Litts of his personal property and money. At any rate the testimony of the defendants is, upon its face, in many respects, so utterly unbelievable that the jury, as most probably they did, could have justly repudiated it in toto. We will not attempt to point out the palpable inconsistencies thereof or dilate upon the obvious inconsistency which inhers in the story itself told by each. Their stories, in almost all particulars, are so far at variance with a reasonable or sensible explanation of the occurrences leading to and characterizing the taking of Litts' property, that they plainly speak for themselves and so betray their intrinsic improbability.

[1] It will not be questioned that a conspiracy to commit a crime may be proved by circumstantial as well as direct evidence and we cannot say upon the evidence, as a matter of law, that the jury were not authorized to find, as the verdict implies that they did find, that the circumstances disclosed by the evidence were such as to show that the defendants, the unknown, and perhaps the "third man," had conspired together to commit a crime against the person or property of Litts. Nor, upon a reading of the testimony can there arise any rational doubt that the defendants were properly found guilty of the crime of robbery and that the conspiracy entered into between the defendants and the unknown was to accomplish that object. That crime, as defined by section 211 of the Penal Code is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." "Extortion," which the defendants claim the evidence shows was the crime committed, if any crime at all was committed, "is the obtaining of property from another with his consent, induced by a wrongful use of force, or fear, or under color of official authority." Section 518, Pen. Code.

[2] Thus, it will be noted the salient distinction between the two crimes is that in the one the property taken is against the will of the owner or possessor, while in the

other the property is taken with the consent of the owner or the possessor of the property. There is not a single line in the evidence from which the inference is justified that the property taken from Litts was with his consent. There is no claim here, nor could there be upon the evidence as it is disclosed by this record, that the property was obtained "under color of official right." The evidence clearly shows that the defendant R. J. Anderson and the individual known herein as the unknown with revolvers in their hands, entered Litts' apartment in the dead of night, while he was asleep, and threateningly demanded of him the assignment of the bill of sale of his car, the transfer of the certificate of registration of said car, and a $95 check drawn upon the funds of Litts in the bank, and compelled him to execute these written instruments, and at the same time took from him certain of his personal property. There was nothing in the whole transaction which could have inspired in Litts such a fear as would induce him willingly or with his consent to deliver over to the said parties his money and personal property. Indeed, there was but one statement in all that occurred in the room which of itself could possibly be regarded as a sufficient foundation for a motive in Litts to willingly part with his check and the articles which were taken from him, and that was the statement of R. J. Anderson that there was awaiting outside a secret service officer into whose custody he intended to commit Litts; but the latter, it will be observed upon having been told by Anderson that such an officer was near at hand for the purpose of taking him into custody for his immoral relations with Ethel Anderson, unhesitatingly stated that he was prepared to accompany the officer, and attempted to arise from his bed for that purpose, when said Anderson by a shove threw him back on the bed. This circumstance clearly shows, or at least the jury could have so construed it, that Litts was not possessed of such fear as to the matter of being proceeded against for maintaining illicit relations with Ethel Anderson as to have induced him willingly to issue to R. J. Anderson a check for $95 and turn over to him the other property which was taken.

[3] But there stands the uncontradicted testimony that, while Anderson was engaged in conversation with Litts relative to the latter's relations with Ethel Anderson, the unknown was busily engaged in ransacking the suitcase and rifling the trousers, vest, and coat pockets of Litts, from which he took and kept certain jewelry and other articles of personal property, and also, before Ralph Anderson's eyes, as the latter admitted at the trial violently took from Litts' fingers the two diamond rings. There is nothing in the evidence from which the theory that Litts willingly parted with these articles could possibly be deduced. In short, no one can read the evidence in this case without coming to the conclusion that Litts not only did not willingly turn over his money and property to the defendant R. J. Anderson and the unknown, but suffered them without protest to take said money and property because he was at the time influenced by the fear that any attempt on his part to resist them or to prevent them from taking said property would be followed by the infliction upon him by them of bodily injury. But, even if it were necessary to concede that the evidence disclosed some semblance of the crime of extortion, it cannot be doubted that the evidence is such that the finding of the jury that the crime committed was robbery is conclusive upon this court. It is only where the evidence compels the conclusion that a crime other than that of which the defendant has been convicted was committed that a reviewing court will be forced to order a reversal of the cause on the ground of variance between the allegations of the accusatory pleading and the proof. People v. Lewis, 141 Cal. 543, 75 Pac. 189; People v. Crane, 34 Cal. App. 599, 606, 168 Pac. 377 et seq.

[4] It is, however, vigorously contended that there is absolutely no evidence showing or even tending to show that Ethel Anderson was guilty of complicity in the commission of the crime. This contention is founded upon the fact that she was not in the apartment when the transactions occurring therein between her husband and the unknown and Litts took place. But this was a matter for the jury to pass upon. We need not specifically point to the circumstances developed in the case from which the jury could justly conclude, and no doubt did conclude, that Ethel Anderson was a party to the conspiracy to rob Litts or in some manner wrongfully deprive him of his personal property. If she was a party to such a conspiracy, then it matters not that she was not present when the property was taken by her husband and the unknown and took no direct part in the act of taking it. The asseverations of R. J. Anderson at the trial that the unknown alone took the jewelry and other property and that he had no part in such taking were also matters for the jury to determine. And we may well add, as we have in effect before stated, that the jury could not go beyond a reasonable interpretation of the occurrences at the Litts apartment in deciding, as impliedly they did, that said defendants' protestations of innocence, in so far as the taking of the property was concerned, were wholly out of line with the truth of the matter.

[5] Nor does the fact that the defendants returned the property to Litts of itself relieve their act in taking it of the stigma of criminality. It was for the jury to consider that circumstance with the other circumstances in the case in determining the question of guilt or innocence. It is evident from their verdict that they regarded, as justly from the

evidence they were so warranted, the act of returning the property, not as evidence that the defendants did not intend to deprive Litts thereof, but as one the doing of which occurred to the minds of the defendants only after they had received information that a warrant had been issued for their arrest, that if apprehended they would be prosecuted upon the charge of robbery and that the return of the property might operate as a ground upon which they could successfully predicate the claim of innocence of criminal intent.

[6] The contention that error was committed in permitting the witness, Litts, to testify to the circumstances under which he signed the check, the assignment of the bill of sale, and the registration certificate of his automobile, and to state that he was compelled by the defendant Ralph J. Anderson to execute the instruments mentioned, is entirely without merit. The ground of the objection was and is that the testimony related to a crime different from that with which the defendants are charged. But this testimony was admissible under the rule of res gestæ. Section 1850, Code Civ. Proc. It related to acts which were evidently a part of the general scheme, which constituted the object of the conspiracy, and which were committed before said object was fully accomplished.

[7] It is claimed that it was error for the court to refuse to grant the motion of the defendants to strike out certain of the testimony of Police Officer McKinney. That officer, it will be recalled, testified that, in a conversation with the defendant Ralph J. Anderson, after his arrest, the latter, explaining how he got into Litts' apartment, stated that he (Anderson) had in the afternoon of the 14th of November, 1921, met his wife on the street and that then they had an understanding whereby she was to unlock the door to the said apartment so that her husband could enter it that night or early the following morning. This statement by said Anderson to the officer was not made in the presence of his wife. After the officer had given this testimony, the following occurred:

"Question by the District Attorney: Is that all the conversation? A. And we tried to find out from him who this other party was that was with him that night."

"Mr. Daly, Counsel for Defendants: We move to strike this out."

No ground for the motion was stated, and no ruling was made upon the motion, the district attorney proceeding, as if not interrupted, to ask the officer questions regarding the identity of the "other party" who was with the defendant in Litts' apartment. No objection had, previous to the motion to strike out, been made to the testimony of the officer as to the conversation between him and R. J. Anderson. No question was asked as to whether the conversation was or was not had in the presence of Ethel Anderson, the wife of R. J. Anderson. The court should, of course, have ruled upon the motion, notwithstanding the ground therefor was not stated; but if it had ruled and denied the motion and the ruling was erroneous, the error so committed could not be of any avail to the defendants on this appeal for at least two reasons: First, it is not clear to what part of the officer's testimony the motion was addressed, the counsel not having specifically pointed out at the time of his motion the particular part of the testimony which he desired stricken from the record; second, the testimony, it will be conceded, was competent, relevant and material as to the defendant R. J. Anderson, and if counsel desired to confine the consideration thereof to said defendant, he should have asked for an instruction so limiting the consideration of the testimony by the jury. He failed to do this and such failure involved a failure to preserve the rights of the defendant Ethel Anderson in that particular.

The point next urged in the briefs, although in regular order it should have been the first to be advanced and considered, is that the trial court abused its discretion in its order denying the motion of the defendants for separate trials. Formerly, the law was that where two or more persons were jointly charged with a felony, any defendant so charged requiring it should be tried separately. See section 1098 of Deering's 1915 edition of the Penal Code. In the year 1921, however, the Legislature amended said section so that it now reads in part as follows:

"When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials. * * *" Stats. 1921, p. 90.

[8] Thus it will be noted that the court may, in its discretion, order separate trials of two or more defendants jointly charged with a felony, but is not bound or required to do so upon the mere request of any defendant. We presume that if there were circumstances in a particular case which would render it peculiarly proper or only just that there should be accorded to several defendants so charged separate trials, and such circumstances were in an appropriate legal way brought to the attention of the trial court, the question whether such court, in denying separate trials, had abused its discretion might be a proper subject of review. In the instant case, though, there is no showing which presents a reviewable question. The mere request of the defendants for separate trials and the order refusing the application constitute all there is of the record upon that question, and, obviously, upon such a showing this court cannot say whether there was or

was not an abuse of discretion in the making of the order complained of. The same question has been considered by the courts of other state jurisdictions and by the federal courts, and by those courts held that whether two or more persons charged jointly with a felony shall be tried together or separately, is discretionary with the trial court. See Commonwealth v. Borasky et al., 214 Mass. 313, 316, 101 N. E. 377, and other cases therein cited; U. S. v. Ball et al., 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. Ed. 300, 303; Lee Dock et al. v. U. S., 224 Fed. 431, 140 C. C. A 125; U. S. v. Marchant, 25 U. S. (12 Wheat.) 480, 6 L. Ed. 700. Whether there was a statute upon the subject in any of those cases does not appear, but we judge that in Massachusetts there was no such statute, from the fact that in Commonwealth v. James, 99 Mass. 438, the Supreme Court of that state uses this language: "The general rule is that persons jointly indicted should be tried together."

The objections to the action of the court in the giving and refusing to give certain instructions are numerous, but a few only of the assignments under this head will be given special notice herein. A portion of the language of the instruction based upon section 31 of the Penal Code, and because of the giving of which the defendants complain, is subject to just criticism, but, considered in its entirety, we cannot say that the jury could have been misled by it into a misapprehension of the rule declared by said section. The instruction stated, in the language of said section, that—

"all persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, * * * are principals in any crime so committed."

Thus far the instruction is unobjectionable. But the instruction proceeds:

"In other words, *where a person stands by, aids, assists, or encourages in the perpetration of a crime, he is just as guilty as the person who actually does it, and is to be punished as the principal.* So that, if you believe beyond a reasonable doubt, from all the facts and circumstances and evidence in this case, that the defendants, or either of them, aided, abetted, and encouraged the robbery, * * * if you find such robbery was committed, then it is your duty to find said defendant, or the one so aiding and abetting, guilty as charged in the information."

[9] It will be noted that the verbs expressing action in the italicized part of the instruction are stated in the disjunctive form. Under the decisions that part of the instruction is for that reason erroneous, and taken alone, or where the error is not cured by other instructions given on the same subject, a very serious question is always presented. People v. Dole, 122 Cal. 486, 492, 55 Pac. 581, 68 Am. St. Rep. 50. But the first and latter parts of the instruction accurately state the rule and, as the objectionable part is used in immediate connection with the parts that are correct, we do not think the jury could have been confused as to the true rule. The defective part was cured by the parts of the instruction correctly stating the rule. People v. Fredoni, 12 Cal. App. 686, 108 Pac. 663. It would be most unreasonable to assume or believe that any intelligent person, reading or hearing the instruction read, would form the conclusion therefrom that a person innocently encouraging or aiding or assisting in the commission of a crime could be held liable for the perpetration thereof.

[10] It is insisted that the instruction given by the court to the effect that if the jury found "beyond a reasonable doubt from all the facts and circumstances and evidence in this case, that at the time charged in the information herein, the defendants or either of them, were alone or acting in concert with another or others, took and carried away the property mentioned in the information, or any part of it, the property of the complaining witness, * * * from his person or immediate presence, and against his will, by putting him in fear as defined in these instructions, or by force and violence to his person, * * * with the intent to deprive the said Litts of his ownership therein and convert the same to their or either of their own use, then you will find the defendants or either of them that you find so acted, guilty of the crime of robbery as charged in said information," is not applicable to any evidence in the case. The foundation of this claim is based upon the assumption that there is no evidence in the record showing or tending to show that Ethel Anderson had any hand in the commission of the offense. We have, in effect, already answered this proposition in the declaration above that it was for the jury to determine from all the evidence whether the conduct of Ethel Anderson in connection with the transaction, as shown by the evidence, was such as to warrant the conclusion that she was a party to the conspiracy to rob Litts or take from him in a wrongful manner his personal property.

The defendants further complain of the action of the court in refusing to give a number of instructions requested by them. We have examined said instructions, and also the entire charge of the court, and so have found that every principle stated in the rejected instructions was covered by other instructions embraced within the charge as given by the court.

We have given this record, particularly the evidence herein, extended consideration, because of the earnest insistence of counsel for the appellants that the evidence wholly fails to support the verdict, this point being spe-

cially emphasized as to the defendant Ethel Anderson. Indeed, our sole purpose in stating herein the testimony of the defendants was to show, as we think we have shown, that their statements under oath, as before suggested, bolstered, rather than disturbed, the case as made by the people. The verdict, in our judgment, is amply supported as to both defendants.

We have found no prejudicial error in the record, and, accordingly the judgment and the order appealed from are affirmed.

We concur: BURNETT, J.; FINCH, P. J.

---

59 Cal. App. 642

## HAMAKER v. PACIFIC GAS & ELECTRIC CO. (Civ. 2480.)

(District Court of Appeal, Third District, California. Nov. 15, 1922.)

**1. Quieting title ⊂⊃52—Decree held to grant only easement in land.**

A decree adjudging plaintiff to be the owner in fee of land subject to rights, privileges, and easements owned by defendant, and which adjudges defendant to be the owner of a certain water ditch, power and telephone lines, together with rights of way therealong, *held* to grant only an easement to defendant, since the ownership of a right of way for a ditch or power line or telephone line is but the ownership of an easement.

**2. Quieting title ⊂⊃52—Easement of rights of way held sufficiently described in decree allowing same.**

A decree definitely locating the points of entrance upon land of three rights of way, and giving the courses and distances to points of exit, and referring to a delineated map, *held* to sufficiently describe the boundaries of such easements, particularly in view of the fact that improvements on the easements were already constructed.

**3. Eminent domain ⊂⊃318—Use of easement by condemnation does not limit its extent.**

Where an easement consisting of a right of way for an aqueduct has been acquired by condemnation, the construction and use of an aqueduct thereon does not establish the extent of the easement so as to preclude thereafter replacing the aqueduct with a larger one.

**4. Quieting title ⊂⊃52—Judgment concerning easement held not to enlarge rights acquired by original condemnation.**

A judgment defining the rights of the owner of an easement which referred to judgment in condemnation proceedings by which the easement was acquired, and providing that it should "remain in full force," *held* not to enlarge the rights granted by the original judgment.

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by Sadie F. Hamaker against the Pacific Gas & Electric Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Lowell, Lowell & Lowell, of Auburn, for appellant.

Thos. J. Straub and Wm. B. Bosley, both of San Francisco, and Raglan Tuttle, of Auburn, for respondent.

FINCH, P. J. By this action plaintiff sought to quiet her title to 80 acres of land. The answer alleges that the defendant owns easements in the land to maintain and operate a certain water ditch and its branches, an electric transmission line, a telephone line, and an aqueduct, together with a definitely described right of way through which said aqueduct is maintained. The court found that at the commencement of the action the defendant owned, maintained, and operated the water ditch, electric line, and telephone line, "together with a right of way therealong, for the purpose of maintaining, patrolling, repairing and operating" the same. The court also found that the defendant acquired by a judgment of condemnation, rendered January 22, 1917, the alleged right of way for an aqueduct, in which judgment, as well as in the judgment herein, such right of way was particularly described. In the first judgment the character of the aqueduct proposed to be constructed was described, in general language, as consisting of a tunnel and an open ditch, without giving the capacity of the aqueduct or the dimensions of the tunnel or ditch. The judgment contained certain conditions to be performed by defendant, such as the construction and maintenance of bridges, fences, etc. The judgment and final order of condemnation are set out in full in the findings herein. In the year 1917, after the rendition of the judgment of condemnation, the company constructed on the right of way an aqueduct having the capacity of 4,000 miner's inches of water, and used the same until the end of the irrigation season of 1919. In the following January the company commenced the enlargement of the aqueduct, within the limits of the right of way so condemned, to a capacity of 12,000 miner's inches. Plaintiff thereupon instituted this action for the evident purpose of preventing such enlargement. From the judgment rendered in favor of the defendant the plaintiff prosecutes this appeal on the judgment roll alone.

[1] Appellant contends that the court erred in adjudging the defendant to be the owner of the rights of way involved, and that the "decree should not go further than to give the gas company easements to maintain and operate the existing improvements." The decree adjudges the plaintiff to be the owner in fee of the land "subject to the re-

spective rights, privileges, and easements which said defendant owns therein, as hereinafter stated." The decree then adjudges the defendant to be the owner of the water ditch and the power and telephone lines, together with rights of way "therealong for the purpose of maintaining, patrolling, repairing, and operating the same." The ownership of a right of way for a ditch or a power line or telephone line is the ownership of an easement. It is apparent that the judgment declares the defendant to be the owner of easements merely.

[2] It is urged that the descriptions of these three rights of way are insufficient to enable one to locate them. The judgment locates definitely the points of entrance upon plaintiff's land, gives the courses and distances to the points of exit, though some of the courses are given generally as "northerly" or "a general westerly and northerly direction," and recites that the same are delineated on a map annexed to defendant's answer. The ditch and the power and telephone lines had been constructed, as the court finds, prior to the commencement of the action, and were therefore definitely located on the land itself. Had the rights of way been located with reference to permanent monuments upon the land, the description would certainly have been sufficient. No reason appears why these permanent improvements may not be treated as monuments.

[3] The principal ground urged for a reversal is that, since the defendant had constructed an aqueduct along the right of way acquired by condemnation, and had used the same for several years, the limit of the land occupied by such aqueduct is the limit of defendant's rights in the plaintiff's land, citing Winslow v. City of Vallejo, 148 Cal. 723, 84 Pac. 191, 5 L. R. A. (N. S.) 851, 113 Am. St. Rep. 349, and similar cases. In the Winslow Case it is said:

"The rule is well settled that where a grant of an easement is general as to the extent of the burden to be imposed on the servient tenement, an exercise of the right, with the acquiescence and consent of both parties, in a particular course or manner, fixes the right, and limits it to the particular course or manner in which it has been enjoyed."

The right of way given the defendant by the judgment of condemnation, however, was a definitely described parcel of land, with no limit upon the character of improvement to be constructed, except that it was to be an aqueduct for the conveyance of water.

"The condemnor may bind itself to a specified plan of construction or specified use of the property, and have damages assessed upon that basis. In that case an action can be maintained for any damage caused by a subsequent change in the works or use. So if the damages were in fact assessed on the basis of a certain mode of construction, by the procurement or acquiescence of the parties, it has been held that this fact may be shown and relief obtained in case of a change of construction. But, if there has been no such limitation in the condemnation, the condemnor acquires the right to change its works, or increase or change the use of the property as it may deem best, so long as it exercises due care and skill in so doing, and keeps within the purpose of the original appropriation, and no action will lie for damages caused by such changes." Lewis on Eminent Domain (3d Ed.) § 830.

In Western Union Telegraph Co. v. Polhemus, 178 Fed. 904, 102 C. C. A. 105, 29 L. R. A. (N. S.) 465, where the trial court had held that the company was without the right to erect additional poles between those originally erected, it is said:

"We are clearly of opinion that the use of such additional poles as from time to time may be required to support the line is an incident to the old easement, and not a new one. It would be intolerable and at variance with salutary principles of law * * * If an easement could be taken piecemeal, so to speak, and for a lesser purpose than for the entire use, for the full enjoyment of which the right of condemnation is alone conferred."

"A condemning corporation may condemn lands sufficient to provide for not only its present but also its prospective necessities." 20 C. J. 637; Spring Valley W. W. v. Drinkhouse, 92 Cal. 528, 28 Pac. 681; City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585; Central Pacific Ry. Co. v. Feldman, 152 Cal. 303, 92 Pac. 849.

It would be idle to condemn lands sufficient for prospective necessities if, when the necessity arose, the land could not be used without an additional condemnation.

[4] It is finally contended that the judgment herein enlarges the company's rights as given by the judgment of condemnation and relieves it from the obligations therein imposed upon defendant. The answer pleads the judgment rendered in the condemnation proceeding, sets it out in full, and bases defendant's claim to the right of way for the aqueduct on such judgment, and alleges that it is in full force. The findings in this case set the judgment out in full, and recite that such judgment and the final order of condemnation "remain in full force." It is perfectly clear that the rights of the parties under that judgment are in no wise changed by the judgment herein.

The judgment appealed from is affirmed.

We concur: HART, J.; BURNETT, J.

59 Cal. App. 486

## CARTER v. ROWLEY. (Civ. 3627.)

(District Court of Appeal, Second District, Division 2, California. Oct. 25, 1922.)

**1. Estoppel ⊜75—Agent held to have apparent authority to sell car.**

Where the owner of a car employed as agent to procure a purchaser for the car one who was engaged in the business of selling used cars both on his own account and for others, and delivered his car into the possession of the agent at his premises, where there were signs advertising that it was the agent's business to sell used cars, he clothed the agent with indicia of authority to sell the car, according to the custom of trade and the general understanding of business men, so that a sale by the agent in excess of his actual authority gave good title to the buyer, who had no knowledge of the limitations on the authority.

**2. Estoppel ⊜72—Authority to secure purchaser and report does not give authority to sell.**

Authority given by an owner of a car to an agent to secure a purchaser for the car and report to the owner gives the agent no actual authority to sell the car, but if he is given apparent authority to sell it, an innocent buyer secures good title under the rule that, where the loss falls upon one of two innocent persons, it should fall on the principal who has armed the agent with apparent authority.

**3. Principal and agent ⊜103(7)—Possession of agent under circumstances usually accompanying authority to sell gives apparent authority.**

Where a principal intrusts his property to an agent under circumstances such as usually accompany authority to sell the property according to the custom of the trade and general understanding of business men, the agent's possession is evidence that he has received from the owner authority to sell.

**4. Principal and agent ⊜148(2)—Statement to purchaser principal must sign transfer does not give notice agent had no authority to sell.**

A statement by the agent to the purchaser of a used automobile that the owner of the car would have to sign the transfer on a certificate of registration, though it was notice that the car belonged to the principal and not to the agent, was not notice that the agent had no authority to sell the car but only to secure a purchaser and report to the principal.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Replevin by George S. Carter against A. M. Rowley. Judgment for defendant, and plaintiff appeals. Affirmed.

Chester H. Van Winkle, of San Diego, and Wilton W. Webster and George S. Carter, both of Pasadena, for appellant.

Wright & McKee, of San Diego, for respondent.

FINLAYSON, P. J. This is an action to recover an automobile, or its value—alleged to be $600—together with damages for its detention. From a judgment in favor of defendant, plaintiff appeals, contending that the uncontradicted evidence shows him to be entitled to the automobile, and that the findings to the effect that he is neither the owner nor entitled to possession are not supported by the evidence.

Robert J. McNabb was engaged in the business of selling secondhand cars at Lamada Park, in Los Angeles county. Some time between the 16th and 20th of June, 1920, plaintiff left his car with McNabb for the purpose of finding a purchaser. McNabb sold and delivered it to defendant. Plaintiff, claiming that McNabb exceeded his instructions, and that therefore the title to the car did not pass to defendant, claims the right to redelivery.

The further facts, so far as they are pertinent to the inquiry, are substantially as follows: McNabb testified that he is "a garage man and a used car agent"; that at the times in question he was in the used car business, selling used cars, both his own and those belonging to other persons which were left on consignment with him; that the cars were usually displayed on his sales lot and sometimes inside his garage; that the garage was used for the making of repairs and for the storage and display of cars; that it was used for the storage of his own cars and of such cars as were left with him by others to be sold; and that he was not in the storage business. His testimony that he was not in the storage business is corroborated by that of his bookkeeper, who testified that so far as he knew McNabb never did a storage business. It thus will be seen that, though McNabb testified that he was a "garage man," the only business in which he was engaged was that of selling secondhand cars, and that he did not have a garage for carrying on the business of storing other persons' cars, but that he used his garage solely for his own convenience in storing his own cars and such cars as were left with him for sale.

Some time between the 16th and 20th of June, 1920, plaintiff drove his car to McNabb's place of business, exhibited it to McNabb, and instructed the latter to try to find a purchaser at a price which would net plaintiff $575. Plaintiff told McNabb that if he found a purchaser who would pay $575 net "bring him to me and I will sign the necessary license transfer and anything else that is necessary for the completion of the sale." On the following day plaintiff left his car with an employee of McNabb on or

near the latter's premises. Plaintiff testified that he took the car there in order that McNabb might find a purchaser for it. On June 26, 1920, plaintiff's car, along with a number of other secondhand machines on exhibition for sale, was on display in McNabb's vacant lot. While thus on display it was sold and delivered by McNabb to defendant for $615. It seems that McNabb embezzled all of the purchase price which defendant paid for the car, or at any rate converted the money to his own use. Hence this action by plaintiff to regain possession of the car or to recover its value.

McNabb, when he sold the car to defendant, did not claim to be the owner. Defendant unquestionably knew that the car was owned by plaintiff; but we think the evidence shows that defendant was led to believe, and that he did believe, that McNabb was authorized by plaintiff to sell the car, and that for that purpose McNabb was possessed of all the authority of a factor; that is, defendant, it would seem, was led to and did believe that McNabb was an agent who, in the pursuit of his independent calling as a dealer in secondhand cars, was employed by plaintiff to sell the car for him, and that for that purpose McNabb was vested by plaintiff with the possession and control of the car and was authorized to receive payment of the purchase price.

McNabb gave defendant a bill of sale for the car, and made out in his own name as the seller. This he undoubtedly would have had the right to do had the car been delivered to him with authority to sell it for plaintiff; for in that event he would have been a factor; and it unquestionably is the rule that, in the absence of usage or instructions to the contrary, a factor may sell in his own name the property which is intrusted to him for sale. 25 C. J., p. 250.

Plaintiff never signed any statement of transfer indorsed on the certificate of registration which had been issued to him by the state motor vehicle department. It seems that at the time when McNabb sold the car to defendant, the latter, in compliance with the state Motor Vehicle Act, signed a statement of transfer as the transferee, and was told by McNabb that he (McNabb) would take the registration certificate to plaintiff and have the latter sign the statement of transfer as the transferor. Defendant, accordingly, after having signed the statement of transfer as the transferee, left the certificate of registration with McNabb for the purpose of having him take it to plaintiff to secure the latter's signature to the transfer statement. It is probable that McNabb forged plaintiff's name to the statement of transfer; for defendant in due time received from the state motor vehicle department through the United States mail a certificate of transfer. This could have been regularly issued only when signed by plaintiff, as the transferor, as well as by defendant, as the transferee.

[1, 2] Upon these facts we think that defendant has acquired an unimpeachable title to the car, notwithstanding that plaintiff's instructions to McNabb were "to find a purchaser," and notwithstanding that plaintiff, when he agreed to leave the car with McNabb, said to the latter, "when you find a purchaser for this car who will pay me $575 net, you bring him to me and I will sign the license transfer and anything else that is necessary for the completion of the sale of the car." For the purpose of this decision we shall assume that this language was tantamount to an instruction to McNabb to do no more than merely to seek a purchaser, and if one were found to report the offer to plaintiff. If this be the proper construction to be placed upon plaintiff's instructions to McNabb, then it unquestionably may be conceded that McNabb had no actual authority to sell plaintiff's car. An agent does not possess an actual authority to sell if he is merely given the property to seek a purchaser and report the offer to his principal. Levi v. Booth, 58 Md. 305, 42 Am. Rep. 332. But though McNabb may have been given no actual authority to sell, we think that plaintiff by his acts clothed him with an apparent or ostensible authority.

As between two innocent persons, one of whom must suffer, the loss should fall on the principal who has armed the agent with apparent authority and thus has enabled him to obtain the advantage of the person with whom he trades, rather than on the purchaser, where the agent acts within the apparent scope of his authority and there is nothing in the transaction to put the purchaser on notice that the agent is exceeding his authority. Wilcox-Rose Construction Co. v. Evans, 9 Cal. App. 121, 98 Pac. 83. The nature and extent of this exception to the general rule that a purchaser gets no title if his vendor has none, or if the vendor has no authority from the owner, are very clearly stated in the opinion of Senator Verplanck in Saltus v. Everett, 20 Wend. (N. Y.) 278, 32 Am. Dec. 547. After some remarks on the transfer of notes, bills, etc., the learned author of that opinion says:

"After a careful examination of all the English cases and those of this state, that have been cited or referred to, I come to this general conclusion, that the title of property in things movable can pass from the owner only by his own consent and voluntary act, or by operation of law; but that the honest purchaser who buys for a valuable consideration in the course of trade, without notice of any adverse claim, or any circumstances which might lead a prudent man to suspect such adverse claim, will be protected in his title against the original owner in those cases, and in those only, where such owner has by his own direct voluntary act conferred upon the

person from whom the bona fide vendee derives title, the apparent right of property, as owner, or of disposal as an agent. I find two distinct classes of cases under this head, and no more."

After stating the first of these classes, the opinion proceeds:

"The other class of cases in which the owner loses the right of following and reclaiming his property is where he has, by his own voluntary act or consent, given to another such evidence of the right of selling his goods as, according to the custom of trade, or the common understanding of the world, usually accompanies the authority of disposal; or, to use the language of Lord Ellenborough, when the owner 'has given the external indicia of the right of disposing of his property.' Here it is well settled that, however the possessor of such external indicia may abuse the confidence of his principal, a sale to a fair purchaser divests the first title, and the authority to sell so conferred, whether real or apparent, is good against him who gave it."

The question in cases belonging to both classes is: Has the real owner intentionally conferred on the vendor the apparent ownership or the apparent right of selling? If he has, the purchaser is protected; otherwise not.

[3] Mere possession, it is true, even by one who happens to be a dealer in the same class of goods, is not sufficient evidence of ownership or of authority to sell to protect one who purchases from the possessor. Covill v. Hill, 4 Denio (N. Y.) 323; Linnen v. Cruger, 40 Barb. (N. Y.) 633; Wilson v. Nason, 17 N. Y. Super. Ct. 155; Case v .Jennings, 17 Tex. 661. See, also, Pacific Acceptance Corp. v. Bank of Italy (Cal. App.) 209 Pac. 1024, and Levi v. Booth, supra. But where, in addition to possession by the vendor, the owner has given such evidence of authority to sell as usually accompanies such authority according to the custom of trade or the general understanding of business men, then, as was stated by Mr. Justice Field in an early California case, Wright v. Solomon, 19 Cal. 76, 79 Am. Dec. 196, the vendor's possession under such circumstances is evidence, not that he is the owner, but that he has received authority from the owner to sell. Heath v. Stoddard, 91 Me. 499, 40 Atl. 547; Pickering v. Busk, 15 East. 38. See, also, Galbraith v. Weber, 58 Wash. 132, 107 Pac. 1050, 28 L. R. A. [N. S.] 341, and note to Velsian v. Lewis, 3 Am. St. Rep. 201.

"If the principal," says Lord Ellenborough in Pickering v. Busk, supra, "send his commodity to a place where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse sent it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe." And in the same case Judge Bayley, in a concurring opinion, states the rule as follows:

"It may be admitted that the plaintiff did not give Swallow any express authority to sell; but an implied authority may be given; and if a person put goods into the custody of another whose common business it is to sell, without limiting his authority, he thereby confers an implied authority upon him to sell them."

The principles governing this case are well stated by the Supreme Judicial Court of Maine in Heath v. Stoddard, supra:

"A principal is not only bound by the acts of his agent, whether general or special, within the authority which he has actually given him, but he is also bound by his agent's acts within the apparent authority which the principal himself knowingly permits his agent to assume, or which he holds the agent out to the public as possessing. 1 Am. & Eng. Ency. of Law (2d Ed.) vol. 1, page 969, and cases cited. Whether or not a principal is bound by the acts of his agent, when dealing with a third person who does not know the extent of his authority, depends, not so much upon the actual authority given or intended to be given by the principal, as upon the question, what did such third person, dealing with the agent, believe, and have a right to believe as to the agent's authority, from the acts of the principal? Griggs v. Selden, 58 Vt. 561, 5 Atl. 504; Towle v. Leavitt, 23 N. H. 360; (55 Am. Dec. 195); Walsh v. Hartford Ins. Co., 73 N. Y. 5. For instance, if a person should send a commodity to a store or warehouse where it is the ordinary business to sell articles of the same nature, would not a jury be justified in coming to the conclusion that, at least, the owner had by his own act invested the person with whom the article was intrusted, with an apparent authority which would protect an innocent purchaser?"

Let us now apply these principles to the present case. Plaintiff, who employed McNabb as his agent to find a purchaser, voluntarily left his car with McNabb, a dealer in secondhand cars; the so-called "garage" being but a building in which McNabb stored the seondhand cars which were held by him for sale. His premises were surrounded by conspicuous signs advertising to the world that his business was that of selling used cars. Plaintiff testified that he knew McNabb's line of business. With this knowledge he left his car with McNabb in order that the latter might find a purchaser for it. McNabb was more than a mere bailee; he was plaintiff's agent to find a purchaser. Whatever may have been the private arrangement between plaintiff and

McNabb, whatever the latter's actual authority may have been, plaintiff, by his own voluntary act, clothed McNabb with such indicia of authority to sell the car as usually accompanies such authority according to the custom of trade and the general understanding of business men.

We find nothing in any of the authorities cited by appellant which conflicts with these views. A case which at first blush might seem to give some color to appellant's position is Levi v. Booth, supra. But in that case the purchaser had notice of his vendor's want of authority to sell. It is recited in the opinion that "proof was given that before such alleged sale, Henry Levi [the purchaser] had been informed that the ring belonged to the plaintiff [the owner], and that De Wolf [in whose possession the ring had been placed by the owner] had no power or authority to sell it." Nor is there anything in Pacific Acceptance Corporation v. Bank of Italy, supra, which conflicts with our conclusions. In that case the true owner of the truck, the defendant in the action, did nothing which could have misled the plaintiff, the innocent purchaser from Peniston. All that the owner did was to permit the truck to be used in certain work, together with other trucks which were being used by the purchasers thereof on the same job. Unlike the plaintiff here, the true owner in that case had not brought its property to such a place and in such a way as to exhibit an apparent purpose of sale.

[4] Appellant claims that respondent was placed upon notice when he learned from McNabb that the statement of transfer on the back of the certificate of registration was not signed by appellant as the transferor. Section 8 of the Motor Vehicle Act (St. 1915, p. 402, as amended by St. 1917, p. 388, § 7), provides:

"Upon the transfer of ownership of any motor vehicle, the person in whose name such vehicle is registered and the person to whom ownership of such vehicle is to be transferred shall forthwith join in a statement of said transfer endorsed upon the reverse side of the certificate of registration of said motor vehicle in the space provided for said purpose, which statement shall be signed by the transferer and the legal owner in the manner and form of his signature contained on the face of said certificate, and which statement shall likewise be signed by the transferee, who shall also set forth below his signature his post-office address."

We fail to see how the fact that defendant was told by McNabb that it was necessary to have the transfer signed by plaintiff, in whose name, as the legal owner, the car was registered, is a circumstance which might lead defendant, as a prudent man, to suspect that McNabb had not been authorized to consummate a sale of the car. Such information would, of course, apprise defendant of plaintiff's ownership, but it would not alone suffice to charge him with notice that plaintiff had not authorized McNabb to make a sale. The language of the Motor Vehicle Act is that the person in whose name the vehicle is registered shall join in a statement of transfer "*upon* the transfer of ownership of any vehicle," not *before* the transfer of ownership. And though the act declares that delivery of the vehicle "shall be deemed not to have been made" and the title "shall be deemed not to have passed" until the transferee shall have received from the motor vehicle department a new registration certificate, it is quite obvious that if McNabb had in fact been actually authorized by plaintiff to sell the car, plaintiff could not have defeated the transfer of title by contumaciously refusing to join in a statement of transfer. The information communicated to defendant by McNabb was not sufficient to lead the former to suspect that McNabb did not possess authority to do everything necessary to effect a transfer of title up to that point, where nothing remained but the securing of plaintiff's signature to the statement of transfer.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

190 Cal. 204

## FAWKES v. REYNOLDS. (L. A. 6732.)

(Supreme Court of California. Dec. 19, 1922. Rehearing Denied Jan. 18, 1923.)

**1. Appeal and error ⟹719(7)—Formal assignment of errors at law held not necessary.**

On appeal under Code Civ. Proc. §§ 648, 650, a formal assignment of errors of law occurring at the trial is not necessary, so that the sufficiency of an instruction was reviewable where the bill of exceptions with reference thereto recited that after argument to the jury the court instructed it, and to each and all of the instructions so given plaintiff enters his exception.

**2. Appeal and error ⟹699(4)—Record held not so ambiguous as to require presumption that certain instruction was given at appellant's request.**

Where the bill of exceptions showed that the instructions were all given by the court, so that each party had an exception thereto by virtue of Code Civ. Proc. § 647, the record was not so ambiguous as to require finding that an instruction complained of by appellant was given at his request, since such request should have been made manifest by incorporation of appellant's instructions in the bill of exceptions, or by a statement that the instruction was given at his request.

**3. Appeal and error ⟹1078(4)—Alleged error in instruction held not waived by failure to present it in appellant's brief.**

Alleged error in instruction will not be deemed to have been waived by appellant's failure to present the point in his brief, where the cause was first heard in the District Court of Appeal before transfer to the court in bank, and the District Court of Appeal passed on the instruction, and in respondent's petition for transfer to the court in bank and in the oral argument of the parties subsequently printed the question as to the instruction was presented.

**4. Property ⟹4—Water used in irrigation is not personal property.**

Water in use for irrigation purposes is not personal property.

**5. Assault and battery ⟹15—Defendant held entitled to protect pipe line and water therein on plaintiff's premises by use of reasonably necessary force.**

Where defendant had a right to flow of water through pipe lines across plaintiff's land, he had a right to protect his rights in the water and the flow thereof by entering on the land and protecting the property by the use of all force reasonably necessary.

**6. Assault and battery ⟹42—Amount of force justified in repelling an assault on one defending his property held for the jury.**

The question of the amount of force justified in repelling an assault against defendant protecting possession of property is peculiarly within the province of the jury.

**7. Assault and battery ⟹15—Defendant held not to have used more force than necessary in protecting property.**

Where defendant, having the right to protect pipe line with flow of water across plaintiff's land, entered thereon, and while standing on the pipe line when attacked by plaintiff struck plaintiff three times, each blow knocking him down as he came to renew the assault, but defendant did not follow him or continue the assault, but remained upon the pipe line, verdict for defendant should not be disturbed on the ground that he used more force than was reasonably necessary.

**8. Trial ⟹194(4)—Instruction held not to invade province of jury.**

In action for assault, in which the evidence showed that defendant had entered a plea of guilty to a charge of assault, an instruction that such a plea was not to be taken by the jury as conclusive that defendant was guilty of the crime of assault and battery, but only regarded as an admission on his part, and that the jury should consider all that was said by him at the time, was not an invasion of the province of the jury, as the instruction was proper as to the law, and left the question of fact for the jury.

**9. Evidence ⟹265(11) — Plea of guilty on charge of criminal assault held not conclusive as admission in civil action therefor.**

In a civil action for assault, evidence of a plea of guilty by defendant on a charge of criminal assault for the same transaction was not conclusive as an admission of an unjustifiable assault, but was to be weighed in connection with defendant's explanation thereof and all the other evidence.

Sloane, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by J. W. Fawkes, Jr., against Henry Reynolds. From a judgment of the superior court in favor of defendant, plaintiff appeals, and on reversal of the judgment by the District Court of Appeal the case was transferred to the court in bank. Judgment of superior court affirmed.

Wheaton A. Gray and Walter W. Little, both of Los Angeles, for appellant.

Jennings & Belcher, of Los Angeles, for respondent.

WILBUR, J. This is an action to recover damages for an alleged battery committed by the defendant upon the person of the plaintiff. The defendant admitted the battery, but justified it on the ground of self-defense and defense of property. The jury returned a verdict in favor of the defendant, and plaintiff appeals. Upon the appeal plaintiff presented two points in his briefs: First, that the uncontradicted evidence establishes that the defendant used excessive and unjustifiable force; and, second, that the court

erred in instructing the jury with reference to the effect of a plea of guilty entered by the defendant to a complaint for battery based upon the same occurrence which is the subject of this action. The District Court of Appeal (Second District, Division 2), in passing upon this case, held that the defendant was not justified in committing a breach of the peace, and consequently reversed the judgment. A transfer to this court was asked on the ground that that question was not involved in the appeal and was not presented in the briefs. We will first consider that question.

The battery occurred in a controversy concerning the use of water on the morning of August 11, 1919. The defendant alleged that the acts of violence committed upon the plaintiff were for the purpose of protecting his property, "to wit, the water flowing through said pipe line; that it was necessary that said defendant act in the manner above set forth in order to prevent the wrongful and unlawful diversion and appropriation of said water by the above-named plaintiff. * * *" With his pumping plant, on his land, defendant was pumping water, which flowed through pipes crossing plaintiff's land to the land of one Morro, by whom it was used for irrigation. The plaintiff opened the valves in these pipes on his own land, and was using the water for irrigation of his land, apparently believing that an arrangement had been made with defendant for such use. The defendant had not yet completed the irrigation of Morro's land, and intended to pump about three hours longer for Morro, and then to allow the water to be used by the plaintiff as he had done theretofore. This he could not do with the valves open on plaintiff's land. To retain the water in the pipe line, it was necessary that the valves should be in place. Plaintiff had removed a valve, and defendant entered upon plaintiff's land to replace it. Being unable to find it, he stuffed a standpipe with burlap and rags, and stood on them, to overcome the water pressure and thus retain the water in the pipe line. The trial court in effect instructed the jury that the defendant had a right to use all reasonably necessary force to prevent the plaintiff from interfering with defendant's effort in the above manner to retain the water in the pipe line if the water was being used without the defendant's consent. Under such circumstances the jury were instructed that the defendant was entitled to use whatever force may reasonably have been indicated to be necessary to protect his person from injury and to prevent the further diversion of the water by plaintiff, and that, if the defendant thus had a lawful right to use force at the time of the encounter, and used only necessary force in the protection of his person or property, that he was not liable for damages.

[1] The verdict of the jury implies a finding that the defendant did not consent to plaintiff's use of the water, and this implied finding is supported by the defendant's evidence. It follows that under this instruction the verdict of the jury was proper. This instruction as to the right of the defendant to use necessary force if the water was being used without his consent was not attacked in the plaintiff's brief, nor was there any assignment of error in the bill of exceptions in which it was claimed that this instruction was erroneous, nor does the record disclose whether or not this instruction was given by the court at the request of either the plaintiff or the defendant. The bill of exceptions with reference to the instruction is as follows:

"The cause was argued to the jury by counsel, and the court thereupon instructed the jury, and to each and all of the instructions so given by the court the plaintiff now enters his exception to the same and to each of the same."

The defendant now claims that we cannot now consider the sufficiency of this instruction.

Before the amendment of section 659, Code of Civil Procedure, it was essential that an assignment of error be made in the statement of the case on a motion for a new trial. Section 659, subd. 3, Code of Civil Procedure, as enacted in 1873–74 (Stats. 1873–74, p. 315), upon that subject is as follows:

"* * * When the notice designates, as the ground of the motion, errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specification be made, the statement shall be disregarded on the hearing of the motion. * * *"

Under this section the authorities cited by the respondent, Bohnert v. Bohnert, 95 Cal. 444, 30 Pac. 590; Estate of Black, 132 Cal. 392, 64 Pac. 695; and many other cases (People v. C. P. R. R. Co., 43 Cal. 398; Bagnall v. Roach, 76 Cal. 106, 18 Pac. 137; Smith v. Smith, 119 Cal. 183, 186, 48 Pac. 730, 51 Pac. 183; Laver v. Hotaling, 115 Cal. 613, 47 Pac. 593; Thompson v. Patterson, 54 Cal. 542; Budd v. Drais, 50 Cal. 120; Heinlen v. Heilbron, 71 Cal. 557, 563, 12 Pac. 673; Hershey v. Kness, 75 Cal. 115, 16 Pac. 548; Leonard v. Shaw, 114 Cal. 69, 45 Pac. 1012; Lambert v. Marcuse, 137 Cal. 44, 69 Pac. 620), hold that, in the absence of such assignment of error, the court will not consider such errors upon appeal, as the trial court was precluded from considering them in the granting or denying of the motion for a new trial, but this provision has been repealed, and the authorities cited no longer apply (Code Civ. Proc. § 659; Stats. 1915, p. 201). The appeal in this case is based upon a bill of exceptions, prepared under section 650 of the Code of Civil Procedure, which provides that

the bill of exceptions "must contain all the exceptions and proceedings taken upon which the party relies. * * *" If the exception to the verdict or decision is upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient. Code Civ. Proc. § 648. A formal assignment of errors at law occurring at the trial is not necessary under the provisions of section 648, 650, Code of Civil Procedure, and errors of law appearing in such bill can be reviewed without any formal assignment of error. Such was required in a statement of the case under section 659, subd. 3, Statutes 1873–74, p. 315. Reay v. Butler, 69 Cal. 572, 11 Pac. 463; Shadburne v. Daly, 76 Cal. 355, 18 Pac. 403; Hagman v. Williams, 88 Cal. 146, 25 Pac. 1111; Barfield v. South Side Irrigation Co., 111 Cal. 118, 43 Pac. 406; Snell v. Payne, 115 Cal. 218, 46 Pac. 1069; Smith v. Smith, 119 Cal. 183, 51 Pac. 183; Harper v. Gordon, 128 Cal. 489, 61 Pac. 84. It follows that the contention that the error, if any, in the giving of this instruction cannot be considered because of the failure to assign the giving thereof as error in the bill of exceptions is not well taken.

[2] Plaintiff's claim that this court must indulge in the presumption that the instruction under discussion was given at the request of the defendant cannot be maintained. It is true that where the record is ambiguous upon this subject the presumption in favor of the judgment would require us to assume that the instruction was given at the request of the appellant. Gray v. Eschen, 125 Cal. 1, 5, 57 Pac. 664; Sutter Butte C. Co. v. American R. & A. Co., 182 Cal. 549, 555, 189 Pac. 277. The latter case was one in which the record was prepared under section 953a, Code of Civil Procedure. In Gray v. Eschen, supra, the record was ambiguous for the reason that it appeared from the bill of exceptions that the instructions were based upon those given by counsel, and in some instances modified by the court, and the exceptions thereto were thus stated:

"It is understood that every portion of the charge is deemed excepted to by each counsel, and every omission or modification is also deemed excepted to by each counsel."

In this condition of the record the court was unable to say whether or not the particular parts of the instructions objected to were proposed by the party objecting.

In the bill of exceptions now before us it appears that the instructions were all given by the court, and under the law since 1909 each party has an exception thereto. Code Civ. Proc. § 647; Stats. 1909, p. 586. Without further showing in the bill of exceptions the plaintiff is entitled to attack the correctness of the instruction. If the instruction was given at the request of the plaintiff, that fact should have been made manifest by the incorporation of plaintiff's instruction in the bill of exceptions or by a statement that the instruction was given at plaintiff's request.

[3] It is true that by failure to present the alleged error in the instruction in plaintiff's brief the point may be deemed to have been waived (City Savings Bank v. Enos, 135 Cal. 167, 67 Pac. 52), and the court need not inquire into the correctness of the instruction (Rogers v. Schlotterback, 167 Cal. 35, 138 Pac. 728; De Sanchez v. McMahon, 35 Cal. 218; City of Alameda v. Cohen, 133 Cal. 5, 65 Pac. 127; Bird v. Potter, 146 Cal. 286, 79 Pac. 970; People v. Duncan, 22 Cal. App. 430, 134 Pac. 797; People v. Stein, 23 Cal. App. 108, 137 Pac. 271; Arnold v. Producers' Fruit Co., 141 Cal. 738, 75 Pac. 326; Hihn v. Courtis, 31 Cal. 399; Webber v. Clarke, 74 Cal. 11, 13, 15 Pac. 431; Moore v. San Vicente Lumber Co., 175 Cal. 212, 165 Pac. 687; A. B. Field & Co., Inc., v. Haven, 36 Cal. App. 669, 173 Pac. 108; Vance v. Gilbert, 178 Cal. 574, 174 Pac. 42.

The District Court of Appeal, however, predicated its judgment of reversal upon the relative rights of the parties in the real estate, pipe line and water, and thus in effect held the instruction in question erroneous. In the defendant's petition for transfer to this court, and in the oral argument of the parties, subsequently printed, the question as to the correctness of this instruction has been presented. In view of the fact that the question has been raised by the District Court of Appeal, and is now presented by the parties, and is properly based upon the record on appeal, we do not feel justified in dismissing the point from consideration for the mere reason that the plaintiff failed to make the point in his briefs prior to the decision of the District Court of Appeal.

Counsel for plaintiff have presented the point by adopting the reasoning of the District Court of Appeal as their own. That court assumed for the purpose of the decision, that the defendant had a right to the free flow of the water through the pipe line crossing plaintiff's land, and held that the interference of the plaintiff therewith was a wrongful invasion of the defendant's right, and therefore a private nuisance, and that the defendant had a right to enter the plaintiff's premises for the purpose of abating this nuisance, provided it could be done without a breach of the peace.

Defendant does not seriously attack the reasoning or conclusion of the District Court of Appeal upon the fact assumed by them, but insists that the defendant was in effect engaged in recapturing personal property (water) which was being stolen by the plaintiff, and for that reason he was entitled to use all necessary force to recapture the property, citing in support of this contention the following authorities upon the right to recap-

ture possession of stolen property and upon the right to maintain possession against a thief: 3 Blackstone, Com. 120; State v. Cessna, Ann. Cas. 1917D, 291; 2 R. C. L. p. 555, § 35; Barnes v. Martin, 15 Wis. 240, 82 Am. Dec. 670; Biggs v. Seufferlein, 164 Iowa, 241, 145 N. W. 507, L. R. A. 1915F, 673; Riffel v. Letts, 31 Cal. App. 426, 160 Pac. 845; Hodgeden v. Hubbard, 18 Vt. 504, 506, 46 Am. Dec. 167; Gyre v. Culver, 47 Barb. (N. Y.) 592; Johnson v. Perry, 56 Vt. 703, 48 Am. Rep. 826; Hopkins v. Dickson, 59 N. H. 235; Kirby v. Foster, 17 R. I. 437, 22 Atl. 1111, 14 L. R. A. 317; Sterling v. Warden, 51 N. H. 217, 12 Am. Rep. 80; 1 Waterman on Trespass, §§ 159, 167; Walker v. Chanslor, 153 Cal. 118, 94 Pac. 606, 17 L. R. A. (N. S.) 455, 126 Am. St. Rep. 61.

[4] If we assume, as contended by defendant, that the act of the plaintiff in opening the pipe line upon plaintiff's property and allowing the water to flow out upon his property was the unlawful taking of the personal property of the defendant, which defendant had a right to recapture by use of all force reasonably necessary for that purpose, still the battery in question cannot be justified. Defendant did not undertake to regain possession of the water which had overflowed on the lands of the plaintiff; that would have been an impossibility. Moreover, it is now settled that water in use for irrigation is not personal property. Stanislaus Water Co. v. Bachman, 152 Cal. 716, 725, 93 Pac. 858, 15 L. R. A. (N. S.) 359; Copeland v. Fairview Land, etc., Co., 165 Cal. 148, 153, 131 Pac. 119. On the other hand, if we accept defendant's view that he was merely trying to prevent the plaintiff taking the water which was flowing in the pipe line rather than to recapture the water that had already overflowed, it is clear that he could have accomplished this object without entering the premises of the plaintiff by merely stopping his pump. It is clear, then, that the defendant was not justified in using the force he did upon the person of the plaintiff in an effort to retain possession of the water, for such force was wholly unnecessary for that purpose. It is clear that what the defendant was insisting upon was not his right to regain the water which had overflowed on plaintiff's land or to retain the water in his possession, but rather his right to use the pipe line across plaintiff's land for the transmission of the water to Morro. He was perfectly willing that the plaintiff should use the water upon the terms agreed upon as soon as Morro had been supplied with the amount necessary for irrigating his place. The real question, then, is whether the defendant had a right to maintain his position upon the pipe line for the purpose of continuing the flow of water through the pipe line to the premises of Morro. For the purpose of its decision the District Court of Appeal assumes that the defendant had a right to maintain the flow of water in the pipe line, but denied him the right to maintain that flow by any action which involved a breach of the peace. It is true that the interference by the plaintiff with defendant's right to the free flow of the water would be a nuisance. Civ. Code, § 3479; 20 R. C. L. p. 401, § 22; Lytle Creek W. Co. v. Perdew, 65 Cal. 447, 455, 4 Pac. 426; Civ. Code, § 3502. If the defendant had been attempting to remove an obstruction in the pipe line to the flow of water, it may be that these authorities would apply, although this point need not be determined. The situation here, however, is quite different.

[5] The defendant had entered upon plaintiff's land and had re-established the free flow of water through the pipe line, and had already abated the nuisance involved in the interference by the plaintiff with this pipe line. It was at this juncture, while he was maintaining his right to the flow of the water by his personal presence on the pipe line and by the stoppage of the diversion of the water by plaintiff, that plaintiff interfered. The defendant did not attack the plaintiff for the purpose of maintaining his rights in the pipe line. He remained standing on the pipe line, and was attacked by the plaintiff, and the injury to the plaintiff arose in the repulsion of his assault upon the defendant. Assuming, as was done by the District Court of Appeal, that the defendant had a right to the flow of the water through the pipe lines, and that this was an irrevocable right, and that he had such remedies as the law gave him to protect that right, it is clear that the defendant was not only protecting his right in the water, but was also protecting his rights to the flow of water through the pipe line, and was actually in possession of and maintaining that right at the instant of the assault made upon him by the plaintiff. The property in his possession at that time, then, consisted not only in the corpus of the water, but also the pipe line and the right of way through that pipe line for the flow of that water then actually being used for that purpose by him. Under such circumstances the defendant had the undoubted right to protect the property in his possession by the use of all force reasonably necessary for that purpose.

In view of the fact that the plaintiff and appellant not only does not attack the conclusion of the District Court of Appeal that the respondent was entitled to the right to use the pipe line at the time in question, but also adopts the reasoning of the District Court of Appeal as his own, we do not feel required to enter into a consideration of the exact character and nature of the defendant's right in the pipe line.

[6, 7] The plaintiff's contention that the verdict of the jury is erroneous because of

the uncontradicted evidence that defendant used more force than was reasonably necessary cannot be sustained. The question of the amount of force justified in repelling an assault or maintaining the possession of property is one peculiarly within the province of the jury. It is true that defendant struck the plaintiff three terrific blows with his fist, but the defendant remained in his position upon the pipe line, and only struck one blow in each instance in defense of a separate assault by the plaintiff, who, three different times tried to push the defendant off the pipe line. The plaintiff was knocked down each time, but the defendant did not follow him up and continue the assault, but remained in place upon the pipe line. The verdict of the jury cannot be disturbed upon this ground.

[8, 9] It is claimed that an instruction invaded the province of the jury by instructing the jury on a question of fact. The instruction is as follows:

"Evidence has been introduced to the effect that the defendant appeared before a justice of the peace in the city of Burbank and entered a plea of guilty to a charge of assault and battery upon the person of the plaintiff herein. Such plea of guilty is not to be taken by you as being conclusive that the defendant was guilty of the crime of assault and battery against the plaintiff. This plea of guilty should only be regarded by you as an admission on the part of the defendant, and it is proper that you should consider all that was said by the defendant at that time."

The proposition advanced by the plaintiff is that it was for the jury after hearing all the evidence to determine what was proved by the plea of guilty. This is true, but it is also important that the jury should be advised that the plea of guilty and the judgment upon such plea were not conclusive and binding as a judgment fixing beyond question the fact that the encounter was an unjustifiable battery committed by Reynolds upon Fawkes, but that the jury was to determine that question, treating the plea of guilty as an admission of the defendant to be weighed in connection with his explanation thereof and all the evidence in the case. The instruction properly construed did not advise the jury as to the weight or effect of the admission, but, upon the contrary, left that question to the jury to determine under the instruction that as a matter of law the plea in the battery case was not conclusive, and that the whole matter was left open for their consideration. Under this instruction they were not precluded from determining the case solely upon the defendant's admission if they felt that the admission was in fact conclusive against the contentions advanced by the defendant in this case. The objection to this instruction is not well taken.

Judgment affirmed.

We concur: SHAW, C. J.; WASTE, J.; SHURTLEFF, J.; LAWLOR, J.; LENNON, J.

I dissent: SLOANE, J.

---

190 Cal. 187

## MARTIN v. HOWE et al. (Sac. 2905.)

(Supreme Court of California. Dec. 12, 1922.)

**1. Courts ⟸488(1)—Cause transferred to Supreme Court is decided on entire record.**

Where a cause is transferred to the Supreme Court by the District Court of Appeal of its own motion or on petition of any of the parties, the case is set at large for decision upon the entire record, and not limited to a decision of the questions affecting the parties who secured the transfer.

**2. Assignments ⟸129—Partial assignee can sue by joining assignor.**

Where a claim had been assigned in part, the assignee can sue the debtor for his part of the claim, provided he joins his assignor either as plaintiff or defendant, so that the rights of all parties to the entire claim can be determined in one action.

**3. Action ⟸53(1)—Defendant's objection to splitting of action is to the bringing of the second action.**

Even in a case where a single cause of action against defendant is split, his objection is not to the first suit by plaintiff for a less amount than his due, but to a second suit to recover the balance.

**4. Parties ⟸91—Other defendants cannot object assignors under partial assignment were joined as defendants, and not as plaintiffs.**

In an action by an assignee of part of a claim, the defendants, who were liable for the claim, cannot object that the assignors were joined as defendants, and not as plaintiffs, without having refused to join as plaintiffs.

**5. Parties ⟸96(3)—Joint owner of note can waive objection, if he is made defendant, without being asked to join as plaintiff.**

A joint owner of the note sued on can waive the objection that he was joined as a defendant, and not as plaintiff, without being notified to join as plaintiff and refusing to do so, and he does waive that objection by joining in the prayer for judgment against the other defendants.

**6. Limitation of actions ⟸197(1)—Evidence held to sustain court's findings as to date corporation debt was incurred.**

Evidence *held* to sustain the court's finding that a corporate debt was incurred on the date a defective note was executed, though no record was kept of the transaction at the meeting of the board of directors on that date, so that stockholders of the corporation, who were not sued by the holders of that note within three years from that date, were not liable therefor.

In Bank.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by J. D. Martin against E. H. Howe and others to enforce a stockholders' liability. Judgment for defendants, and plaintiff appeals. Affirmed as to some of the defendants, and reversed, with directions to enter judgment for plaintiff against other defendants.

Lamberson, Burke & Lamberson, of Visalia (Morrison, Dunne & Brobeck, of San Francisco, Roland C. Foerster, of San Francisco, of counsel), for appellant.

Everts, Ewing & Wild, of Fresno, and Power & McFadzean, of Visalia, for respondents.

WILBUR, J. [1] After decision in this action a petition for rehearing was filed in which it was claimed that the parties had not presented the question of the bar of the statute of limitations satisfactorily because the case was transferred to this court on petition of the defendants who were not involved in that question, and consequently it was believed that the matter would not be considered by this court, but that the conclusion of the District Court of Appeal on that branch of the case would be adopted without question. On the contrary, the transfer of the case here by the court of its own motion or on the petition of any of the parties set the case at large for the decision of this court upon the entire record. The liability of the defendants who did not appear in the petition for a transfer to this court turned upon the question of whether or not the liability of the corporation was created more than three years prior to the filing of the amended complaint in which they were joined as defendants for the first time in the action. This amended complaint was filed March 17, 1914. The note sued upon was dated April 22, 1911. This note was given to replace an earlier note of March 7, 1911, executed on behalf of the corporation by the president and secretary, and the question involved is as to whether or not this note was duly authorized and the original indebtedness thereby created. From an examination of the record we are satisfied that the finding of the trial court that the indebtedness accrued before the 17th of March, 1911, is sustained by the evidence, as it appears that this note was given at a meeting of the board of directors and then and there duly authorized, although no minutes of that meeting or of that authorization were entered upon the records of the corporation.

Upon other branches of the case we adopt the opinion heretofore prepared by Mr. Justice Lawlor as follows:

"This action was brought by the plaintiff, J. D. Martin, to recover from the defendants, as stockholders in the Lindsay Incorporated Oil Company, 44 per cent. of the amount due on a promissory note given to plaintiff and defendants B. B. Dudley and E. R. Dudley by that company, dated April 22, 1911, and secured by a mortgage. The cause was tried by the court sitting without a jury. Findings of fact and conclusions of law were made and filed, and judgment rendered thereon in favor of the defendants. From that judgment this appeal is taken.

"At the time the note was executed, appellant and respondents E. R. Dudley and B. B. Dudley were partners. The Lindsay Incorporated Oil Company, in which respondents were stockholders, purchased from the partnership a tract of oil land in Kern county for $32,000. On March 7, 1911, a promissory note for $4,000 was executed by three stockholders in favor of the partnership. For the balance of $28,000 a note was given, payable to the partnership, made under the corporate name, signed by the president and secretary of the company and indorsed by several of the stockholders, but not bearing the corporate seal. Some time between March 7, 1911, and March 11, 1911, a deed was given by the partnership to a committee appointed by the corporation, in return for these notes.

"On March 18, 1911, a note secured by a mortgage on the land purchased was regularly issued by the company, and the note of March 7 was taken up by the company. Because of some defect in the execution of the note of March 18, 1911, the note and mortgage of April 22, 1911, were executed and delivered to take their place.

"The partnership between appellant and respondents B. B. Dudley and E. R. Dudley was dissolved by agreement of the partners on June 27, 1911, and by the agreement of dissolution appellant became the owner of 44 per cent. of the promissory note of April 22, 1911, and each of the Dudleys of 28 per cent. In March, 1914, respondent B. B. Dudley transferred his interest in the note to respondent E. R. Dudley.

"Appellant commenced this action on October 23, 1913, against respondents E. H. Howe, Ernest Howe, W. A. Morley, H. E. Redmond, L. A. Sturgeon, L. G. Stallings, M. W. Grace, and W. K. Flynn. On March 17, 1914, an amended complaint was filed in which respondents C. B. Jackson, J. M. Birkhead, T. E. Winters, O. L. Flynn, H. Roth, A. P. Haliburton, and P. M. Northern were named as defendants for the first time. A second amended complaint was filed on May 16, 1914, in which E. R. Dudley and B. B. Dudley were made defendants. It was alleged that they had 'refused to join the plaintiff in the commencement of this action' and the prayer as to them was that they 'be required to answer herein, stating their rights in the premises, if any such they shall claim.' Respondents E. R. Dudley and B. B. Dudley in their answer alleged the transfer of B. B. Dudley's interest in the note and mortgage to respondent E. R. Dudley; denied that either of them had refused to join as plaintiffs; prayed that appellant have judgment against the other respondents; and that respondent E. R. Dudley have 56 per cent. of such judgment, or such other or further relief as is meet in the premises.

"The other respondents in their answer alleged the indebtedness was incurred on or about

February 2, 1911; that on or about August 3, 1911, by a settlement had between the oil company, appellant and respondents E. R. Dudley and B. B. Dudley, it was agreed the amount then unpaid on the note was $20,000 and interest; and that the action was barred by subdivision 1, section 338, of the Code of Civil Procedure. By way of special defense it was alleged that prior to their joinder as defendants in this action, respondents E. R. Dudley and B. B. Dudley had filed an action against the other respondents, in Tulare county, seeking to hold them on their stockholders' liability for the same indebtedness; and that prior to the filing of the complaint in this action, a suit was commenced by them in Kern county to foreclose the mortgage securing the note upon which this action is brought. Answering the prayer of respondents E. R. Dudley and B. B. Dudley, they pleaded the three-year limitation upon a liability created by statute, provided by subdivision 1, section 338, of the Code of Civil Procedure, and by way of special defense set up the institution of the two actions by the Dudleys in bar of their right to relief in this action.

"The only findings of the court which we need refer to were that the indebtedness of the oil company was incurred on March 7, 1911; that the note of April 22, 1911, was given as evidence of the debt previously incurred; that since the debt was incurred on March 7, 1911, the action was barred by subdivision 1, section 338, of the Code of Civil Procedure as to those respondents above named who were joined as defendants for the first time in the amended complaint of March 17, 1914; that neither the oil company nor the respondent stockholders ever consented to the division of the debt among the partners; that but $4,000 has been paid on the principal, and no interest has been paid on the remaining $24,000; that on March 7, 1911, there were 20,000 shares of stock outstanding, of which 2,000 shares were owned by each of the respondents named in the original complaint, and none by the respondents joined in the amended complaint; that neither respondent E. R. Dudley nor respondent B. B. Dudley was ever requested or ever refused to join with appellant in the commencement of this action.

"The conclusions of law were to the effect that appellant take nothing against respondents, and that respondents have judgment against appellant for their costs.

"From the opinion of the trial judge it appears that the judgment was rendered upon two grounds. The first was that the indebtedness was incurred by the oil company before March 11, 1911, and, therefore, in any event, was barred by the statute of limitations as to the respondents joined for the first time on March 17, 1914. Second, that appellant could not recover against any of respondents because he was suing for 44 per cent. of an entire demand and had split his cause of action; that, although the Dudleys were joined as defendants, they had not asked for anything more than a portion of such an amount as might be recovered by appellant; and that an action for a portion of a single demand cannot be maintained when the debtor has not consented to a division of the debt, which was not done in this case.

[2] "Appellant contends that under the facts of this case he is entitled to recover 44 per cent. of the amount of the note; that the evidence does not support the finding that the indebtedness was created before March 11, 1911; and that the statute of limitations has not been properly pleaded. Respondents 'submit that with this state of facts, where it clearly appears that an effort is being made in this suit to recover only a portion of a promissory note, * * * this action cannot be maintained, and a judgment cannot be rendered under the complaint on file herein.' We are of the opinion appellant's contention is correct. In 1 Corpus Juris, 1110, it is said: 'As a general rule, a single cause of action or claim arising out of an entire contract cannot without the debtor's consent be split up by means of partial assignments, so as to become the subject of different actions; but as in other cases this may be done with the debtor's consent, and even without his consent a partial assignment may be enforced in equity if the other persons interested are brought in as parties to the suit.'

"Fourth Street Bank v. Yardley, 165 U. S. 634, 644, 17 Sup. Ct. 439, 440 (41 L. Ed. 855), was a suit on an assignment of a part of a bank account. It was there held, 'That the owner of a chose in action or of property in the custody of another may assign a part of such rights, and that an assignment of this nature, if made, will be enforced in equity, is also the settled doctrine of this court. Trist v. Child, 21 Wall. 441, 447, 22 L. Ed. 623; Peugh v. Porter, 112 U. S. 737, 742, 5 Sup. Ct. 361, 28 L. Ed. 859.'

"In Chambers v. Lancaster, 160 N. Y. 342, a contractor subcontracted with another to furnish machinery for a third party, assigning to the subcontractor the right to collect the portion of the contractor's fee which he was to receive upon delivery of the machinery. The action was brought to collect that amount. In considering an objection that certain testimony was erroneously admitted, the court said: 'This testimony only bore upon the question of plaintiff's right to recover that which was but a part of an entire cause of action. This the defendant company insists the plaintiff cannot do. Such was formerly the rule, but it has long been settled in this state that a valid assignment of a part of an entire debt or obligation can be made, and since the decision of this court in Risley v. Phenix Bank of New York, 83 N. Y. 318, the right of an assignee to bring suit on the equity side of the court, making the assignor, as well as the debtor, a party, has been frequently resorted to, and is supported by the decision in Risley's Case, the court saying: "The tendency of modern decisions is in the direction of more fully protecting the equitable rights of assignees of choses in action, and the objection that to allow an assignment of part of an entire claim might subject the creditor to several actions to enforce a single obligation has much less force under a system which requires all parties in interest to be joined as parties to the action."'

"National Exchange Bank v. McLoon, 73 Me. 498, 40 Am. Rep. 388, was a case where a person who was entitled to certain property in the hands of trustees as administrators assigned an amount equal to what he thought was all of

such property to creditors. It later appeared the property held for him exceeded the amount assigned, and other creditors trusteed the administrators. In holding that the assignees might recover their portion of the money, the court said: 'In a court of equity, however, the objections to a partial assignment of a demand which are formidable in a court of law, disappear. In equity, the interests of all parties can be determined in a single suit. The debtor can bring the entire fund into court, and run no risks as to its proper distribution. * * * The debtor is not the only party whose interests should be considered. There is as much natural equity, in many cases, in protecting an assignment of a part of a claim as an assignment of the whole of it. Equitable assignments are the outgrowth of the requirements and refinements of the present business era. In many ways, directly and indirectly, do circumstances create assignments of parts of funds, in dealings through servants, tenants, consignees, bankers and other agencies.'

"In Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423, the plaintiff sued to recover part of an entire debt, without joining his assignor. The court said: 'Legal and equitable relief are administered in the same forum, and according to the same general plan. A party cannot be sent out of court, merely because his facts do not entitle him to relief at law, or merely because he is not entitled to relief in equity, as the case may be. He can be sent out of court only when, upon his facts, he is entitled to no relief, either at law or in equity. * * * Under the English practice, a court of equity would not grant the plaintiffs relief, as the case now stands; not, however, upon the ground that the facts do not entitle him to it, but because all of the parties interested in the subject-matter are not before the court. * * * Under our system of practice, then, the real objection in this case is not a want of facts, but a want of parties. The defendants are entitled, if they so desire, to have all the parties having an interest in the subject-matter before the court, in order that its judgment shall be a final determination of the whole matter, and leave nothing to be done by piecemeal.'

[3] "From these cases it follows that appellant was not required to ask for a recovery of the whole amount of the note. It was sufficient for him to join respondents E. R. Dudley and B. B. Dudley, the owners of the remainder of the obligation, as parties defendant. Once joined, it devolved upon them, as prayed in the complaint, to set up any claim they had in the subject-matter, the execution of the note and appellant's claim having already been set forth. The rights of all the parties could then be settled in the one action. It would have been necessary for appellant to have joined these respondents if he had sued for the entire amount, and the final judgment would have been the same in such a case as in this one, where they themselves can ask for such relief as they may desire. An entirely different situation is presented here, where these parties are joined, and can defend their rights in the subject-matter in the one action, than in the ordinary case of splitting a cause of action, where one person sues to recover part of his claim in one action, and later brings a second action to recover the remainder. Even in such a case, the defendant's objection would not be to the circumstance that the plaintiff brings the first suit for a less amount than is due, but that a second action is brought to recover the balance. Paladini v. Municipal Markets Co., 185 Cal. 672, 200 Pac. 415; Smith v. Vandalia Railroad Co., 188 Ill. App. 426, 429.

"Respondents have cited several authorities in support of their position, but in our opinion none of them is authority for their contention. The first of these is Nightingale v. Scannell, 6 Cal. 506, 65 Am. Dec. 525, wherein the question was presented whether or not in an action by one partner to recover damages for a trespass against partnership property, a partner joined as a defendant because he refused to join as a plaintiff could testify in the action. It was said that since in such a case 'the recovery must be entire for the whole injury' and 'the whole cause of action must be determined in one' and 'the partner recovering is liable to account to his copartner defendant,' the latter is 'interested immediately in the event of the suit, and is not therefore a competent witness for plaintiff.' But in that case the plaintiff was seeking to recover for an injury to the partnership property, on behalf of the partnership. As far as he was concerned personally, he only sought damages to the amount of his interest in the goods, and there was no objection to his recovering that amount. In Thomas v. Rock Island G. & S. Mining Co., 54 Cal. 578, an assignee of one-half a judgment sued to set aside an order and entry of satisfaction, and for a judgment for his interest in the first judgment. It was held such an action could not be maintained without the express agreement or distinct ratification of the judgment debtor, but it did not appear there that the judgment creditor had been joined as a party to the suit. Clancy v. Plover, 107 Cal. 272, 40 Pac. 394, involved the right of an assignor to recover what was due to him under a mechanic's lien after a subcontractor as an assignee had already recovered from the debtor the portion due him; the subcontractor not having joined the assignor in the first suit. That case is therefore not authority here, and it clearly appears from that case that the assignee in the previous action had been allowed to recover a part of the total amount due.

[4, 5] Respondents in this connection contend appellant has never properly joined respondents E. R. Dudley and B. B. Dudley as parties defendant under section 382 of the Code of Civil Procedure, which provides that 'if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint.' Respondents E. R. Dudley and B. B. Dudley in their answer denied they had been requested to join as plaintiffs, and it is insisted on behalf of all the respondents that the evidence showed clearly that they had not been requested and never refused to so join. As far as the respondents other than E. R. Dudley and B. B. Dudley are concerned, it is sufficient if the two latter respondents are made parties in some capacity, so that their rights may be determined in this action. In Patten v. Pepper Hotel Co., 153 Cal. 460, 96

Pac. 296, the junior pledgee of a promissory note, secured by a mortgage, commenced an action to foreclose the mortgage. The senior pledgee was made a party. The defendant demurred on the ground of defect of parties, in that there was no allegation that the senior pledgee had refused to join as plaintiff. It was said in that case that: 'All those, therefore, who were interested in enforcing the lien of the mortgage were before the court either as parties plaintiff or defendant. This was all that the appellant, as successor in interest to the mortgagor, could insist on. It was immaterial to the appellant, as such successor, whether the bank as first assignee of the note and mortgage, was a party plaintiff or defendant. If the bank did not object, it did not lie with appellant as successor of the mortgagor to raise the question.' With reference to respondents E. R. Dudley and B. B. Dudley, they in their answer alleged the same facts concerning the execution of the note and mortgage as did appellant, and they asked for general relief. The matter of requesting a person to become a plaintiff before joining him as a defendant closely resembles that of serving a party with process, and may properly be governed by the same rules. It is unquestioned that where a defendant appears and asks some relief which can only be granted upon the hypothesis that the court has jurisdiction of the cause and of his person, it is a submission to the jurisdiction of the court as completely as if he had been regularly served with process, whether such an appearance, upon its terms, is limited to a special appearance or not (Security Loan, etc., Co. v. Boston, etc., Fruit Co., 126 Cal. 418, 58 Pac. 941, 59 Pac. 296; Thompson v. Alford, 128 Cal. 227, 60 Pac. 686), and when a party appears generally he is deemed to waive service of process (Hibernia Savings & Loan Soc. v. Cochran, 141 Cal. 653, 75 Pac. 315). Respondents E. R. Dudley and B. B. Dudley must therefore be deemed to have waived the request by their appearance in the action and prayer for affirmative relief. They are in no way prejudiced, for they are in a position to protect their rights fully as well by their cross-complaint as they would have been had they been joined as plaintiffs. * * *"

[6] As above stated, we are satisfied that the evidence sufficiently shows that the obligation of the corporation accrued before March 17, 1911. That a deed was received by the corporation before that time, and that in consideration thereof a note was executed in the corporate name on behalf of the corporation by the president and secretary and indorsed by five of the directors is conceded. The only doubt as to the authority of the president and secretary to execute the note of March 7, 1911, on behalf of the corporation arises from the fact that no record was kept of the transaction at the meeting of the board of directors. Several witnesses, however, testified there was such a meeting, and that at such meeting the purchase of land and the execution of the note were authorized. This evidence was sufficient to sustain the finding of the court to the effect that the obligation was authorized by the corporation, and that its liability thereupon accrued more than three years before the amendment of the complaint joining the defendants first named in the amended complaint, filed March 17, 1914, to wit, C. B. Jackson, J. M. Birkhead, T. E. Winters, O. L. Flynn, H. Roth, A. P. Haliburton, and P. M. Northern. Gilson Quartz M. Co. v. Gilson, 51 Cal. 341; Boggs v. Lakeport A. P. Ass'n, 111 Cal. 354, 43 Pac. 1106; Lawrence v. Premier Indem. Assur. Co., 180 Cal. 688, 697, 182 Pac. 431; 6 Cal. Jur. (Corporations), §§ 130, 131; Thompson or Corps. (2d Ed.) vol. 2, §§ 1842, 1845, 1847. The obligation of the corporation was incurred before these last-named defendants became stockholders, and they are not liable, therefore, regardless of the bar of the statute of limitations. The judgment in their favor was correct.

The trial court found that the indebtedness of the corporation was incurred March 7, 1911. At that time there was outstanding 20,000 shares of the capital stock of the corporation, of which the defendants E. H. Howe, Ernest Howe, W. A. Morley, H. E. Redmond, L. A. Sturgeon, L. G. Stallings, M. W. Grace, and W. K. Flynn each owned 2,000 shares, so that each was liable for one-tenth of the indebtedness. The other 4,000 shares outstanding were owned, 2,000 by H. A. Briscoe and 2,000 by W. S. Berry, who were not made parties defendant in the second amended complaint. The court found that the total indebtedness of the corporation upon the note in question as $28,000, less certain payments which reduced the principal sum to $24,000. The trial court found that the plaintiff J. D. Martin owned 44 per cent. of the indebtedness and defendants B. B. Dudley and E. R. Dudley each owned 28 per cent. of the indebtedness. It is unnecessary that the case be retried.

The judgment in favor of defendants C. B. Jackson, J. M. Birkhead, T. E. Winters, O. L. Flynn, H. Roth, A. P. Haliburton, and P. M. Northern is affirmed. The judgment in favor of the other defendants is reversed. The trial court is directed to enter judgment in favor of the plaintiff and the defendants B. B. Dudley and E. R. Dudley against the defendants E. H. Howe, Ernest Howe, W. A. Morley, H. E. Redmond, L. A. Sturgeon, L. G. Stallings, M. W. Grace, and W. K. Flynn in accordance with their rights and obligations as fixed in this opinion; that is to say, the judgment against each defendant shall be one-tenth of the amount due on the obligation of the corporation as fixed in the findings of fact, and this amount shall be apportioned as follows, to wit: Forty-four per cent. to the plaintiff and 28 per cent. to defendant B. B. Dudley and a like amount to defendant E. R. Dudley. The amount of indebtedness found by the trial court to be due from the corporation shall be credited with the payments, if any, resulting from the

foreclosure of the mortgage securing such indebtedness. The court may permit such supplementary pleadings and evidence as may be necessary to establish such payments, if any have been made.

We concur: SHAW, C. J.; LAWLOR, J.; LENNON, J.; WASTE, J.; SLOANE, J.; SHURTLEFF, J.

190 Cal. 202

## FORWARD et al. v. SAN DIEGO COUNTY et al. (L. A. 7262.)

(Supreme Court of California. Dec. 18, 1922.)

**Hospitals ⇐2—County supervisors authorized to maintain hospitals and other buildings necessary to county government may construct residence for county physician.**

Under Pol. Code, § 4041, subd. 7, authorizing boards of county supervisors to erect and maintain hospitals and almshouses and "such other public buildings as may be necessary to carry out the work of the county government, * * *" such boards have power to erect and maintain a residence and garage for the county physician at the county hospital.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by John F. Forward, Jr., and others against the County of San Diego and others. A demurrer to the complaint was sustained, and plaintiffs appeal. Affirmed.

Haines & Haines, of San Diego, for appellants.

H. S. Utley, Dist. Atty., and E. S. Lovett, Asst. Dist. Atty., both of San Diego, for respondents.

WILBUR, J. The defendant supervisors were about to let a contract for the erection of a residence and garage at the county hospital for the county physician in charge of that hospital. Plaintiffs are taxpayers, and sought to enjoin the execution of the contract. A demurrer was interposed to the complaint and sustained, and plaintiffs appeal.

Section 4041 of the Political Code fixes the powers and duties of boards of supervisors, and subdivision 7 authorizes them, among other things, to construct hospitals and almshouses "* * * and such other public buildings as may be necessary to carry out the work of the county government. * * *" There can be no doubt that, under the power to construct and maintain a county hospital, such buildings as may be reasonably necessary for that purpose may be constructed by the board of supervisors, and if, in their judgment, the proper management and control of the county hospital requires that a residence and outbuildings be constructed for the county physician the supervisors would have the power so to do under the statute in question.

Judgment affirmed.

We concur: SHAW, C. J.; LAWLOR, J.; SLOANE, J.; SHURTLEFF, J.; WASTE, J.; LENNON, J.

190 Cal. 229

## In re SULLIVAN'S ESTATE. SULLIVAN et al. v. STATE. (S. F. 10242.)

(Supreme Court of California. Dec. 19, 1922.)

**Descent and distribution ⇐71(6)—Evidence held sufficient to establish claimants' identity as intestate's next of kin.**

Testimony of intestate's neighbors as to statements made by him as to his boyhood and family relations, and depositions of persons claiming to be his brother and sister, *held* competent and sufficient to establish the latters' right to the estate as next of kin, as against the state's right to distribution under Code Civ. Proc. § 1269, in the absence of any indication of collusion between the two sets of witnesses, though claimants were informed, before their depositions were taken, as to what facts could be shown by decedent's neighbors, and shaped their depositions accordingly.

In Bank.

Appeal from Superior Court, Marin County; E. I. Butler, Judge.

Proceedings by Dennis Sullivan and others for distribution of the estate of John Sullivan, deceased. From a decree denying distribution among claimants and distributing the estate to the State of California, claimants appeal. Reversed.

Byrne & Lamson, Wesley W. Kergan, and Gerald C. Halsey, all of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for the State.

SLOANE, J. The appeal in this matter is from a decree of the superior court of Marin county denying distribution of the estate of decedent to appellants.

The appellants claim as heirs at law and next of kin of decedent. The only question presented is as to the sufficiency of the evidence introduced on the hearing to establish such heirship.

The claimants are Dennis Sullivan, Annie Sullivan Glennon, alleged brother and sister of decedent, and three children of Mary Ann O'Brien, alleged to be a deceased sister of decedent.

It is not disputed that the establishment of this relationship would entitle the appel-

lants to this estate as next of kin to the decedent.

The court held the evidence insufficient, denied the claim of appellants, and, there being no other claimants, distributed the estate to the state of California, under the provisions of section 1269 of the Code of Civil Procedure.

There was no conflict in the evidence as given in testimony, and, if accepted as true, we are satisfied it was sufficient to establish the heirship as claimed.

John Sullivan, the decedent, lived for many years in California, first in San Francisco, and latterly at Novato, Marin county. He died August 3, 1920. All that is disclosed as to his early history and family is gleaned from the testimony of several of his neighbors in Marin county, who testified as to statements made by the decedent on various occasions as to his boyhood and family relations.

His own story of his boyhood and family, repeated in substantially the same way to the several witnesses, is that he was born and lived as a small boy at Bandon, County Cork, Ireland. The witnesses did not learn from him his father's name, but he gave his mother's name as Ellen. The family came to the United States when he was quite young and landed in Boston. That he had a brother named Dennis and two sisters, one named Annie and the other named Mary. That he learned the painter's trade in Boston. That when about 16 years of age or thereabouts he enlisted in the United States navy, and that after a few months' service there he was released from the service, his father having "brought him out," as he expressed it. That soon after he ran away, working his way overland to California, where he had lived ever since. That he had not communicated with his family for about 50 years. That he was related to the pugilist, John L. Sullivan.

This brief personal narrative from the decedent's own lips furnishes competent evidence, and was received and repeated by the witnesses under circumstances which support its genuineness.

The connecting story offered on behalf of the claimants to establish their relationship was furnished through the depositions of appellants, Dennis Sullivan and Annie Sullivan Glennon. Dennis Sullivan testified that he was born in Boston in 1858; that his father's name was John and his mother's name was Ellen; that his parents came from County Cork, Ireland, and located in Boston; that Annie Sullivan Glennon is his sister and that they had another sister, Mary O'Brien, who died, and who was the mother of the other claimants, and a brother John, who was born in Bandon, County Cork, Ireland; that John entered the navy in 1872; that deponent remembered his father telling him that he bought John off from the navy; that soon after, when about 18 years of age, John ran away from home, and that he eventually ended up in California, having left Boston on a merchant vessel. Their father was a cousin of John L. Sullivan, the pugilist.

Annie Sullivan Glennon testified: That she was born in Boston in 1856. That she had one brother living, Dennis; one brother, the decedent, was dead. That there were two other sisters, one Mary Ann, born about 1846, who died in 1915, and a sister Margaret, who was born in 1858 and died one year later. Their father was John Sullivan and their mother Ellen Mahoney Sullivan. Their father was born in County Cork, Ireland. The witness produced a photograph purporting to be of this brother John in the uniform of the navy. She testified that after the death of their mother, in Boston in 1860, John lived with his sister, Mary Ann, until he enlisted in the navy in 1872. While in the navy he was stationed at Portsmouth, N. H., for a short time, until his father had him released. That to the best of her knowledge John was born in Bandon, County Cork, Ireland, somewhere in the middle of the 1850s. He learned the trade of a carriage painter while in Boston. Soon after leaving the navy John left Boston in a sailing vessel, and they never heard of him after excepting incidentally to the effect that he was in California.

This is a meager biography, but if the points of identity in the two narratives are sufficiently established there can be no doubt that the decedent, John Sullivan, was the same person as the John Sullivan testified to as the brother and uncle of the claimants.

There is not much, perhaps, in the name John Sullivan, from County Cork, to establish identity; but when we have the circumstance that according to both stories he was born in Bandon, that the mother's name was Ellen, that the family migrated to Boston, that there were two sisters, Mary and Annie, and a brother, Dennis, that John was a painter by trade, that he served for a short time in the navy, and was "bought off" by his father, and afterwards ran away from home, and had no further communication with his family, although reputed to be in California, was related to the pugilist, and that the ages disclosed by the two narratives, though not explicitly stated, appear from the connecting incidents to closely correspond, we have circumstantial proof which approaches certainty.

It is only by rejecting some material part of this testimony as unworthy of belief that the conclusion indicated can be avoided.

There might be collusion between the two sets of witnesses, but there is no indication or intimation of this in any part of the record. The circumstance seems to be that

the width of the continent at all times separated the two sets of witnesses.

The depositions of the claimants had been taken long in advance of the oral testimony of the California witnesses, and presumably the depositions were not brought to the attention of the witnesses at the trial in advance of the hearing. There was no motive to influence the witnesses who gave oral testimony to deviate from the truth. The only theory of impeachment that can be suggested is that the claimants were informed before their depositions were taken as to what facts could be shown by decedent's neighbors, and that they shaped their depositions accordingly.

We do not believe that in the absence of any intimation or showing to raise such a suspicion that such a presumption could be indulged by the court to reject evidence otherwise competent and convincing.

The judgment is reversed.

We concur: SHAW, C. J.; WILBUR, J.; WASTE, J.; SHURTLEFF, J.; LENNON, J.; LAWLOR, J.

---

(190 Cal. 214)

## ATCHISON, T. & S. F. RY. CO. v. RAILROAD COMMISSION. LOS ANGELES & S. L. R. CO. v. SAME. SOUTHERN PAC. CO. v. SAME. (L. A. 7166, 7165, 10111.)

(Supreme Court of California. Dec. 19, 1922. Rehearing Denied Jan. 18, 1923.)

1. Commerce ⟸8(1) — Congress prescribes dominant rule where interstate and intrastate transactions so related that government of one involves control of other.

Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule.

2. Commerce ⟸85—Authority of Interstate Commerce Commission to compel interstate carrier to establish union depot is exclusive.

Interstate Commerce Act, § 5, par. 1, subds. 4, 5, as amended by Transportation Act, Feb. 28, 1920, § 407, and section 15a, as added by section 422, extending powers and duties of Interstate Commerce Commission, section 1, subd. 3, as amended by section 400, and subdivisions 10, 15, 18–20, as amended by section 402, investing the Commission with powers over the changes in lines, tracks, etc., of railroads engaged largely in interstate commerce, section 1, subds. 21, 22, as amended by section 402, and section 3, subds. 3, 4, as amended by section 405, limiting extension of authority of Commission to railroads wholly within a state not operated as part of the general systems, gives power and authority over the matter of union terminal depot facilities of railroads, largely engaged in interstate commerce, to the Interstate Commerce Commission and by the act the State Railroad Commission has been divested of power over the subject.

In Bank.

Separate certiorari proceedings by the Atchison, Topeka & Santa Fé Railway Company, by the Los Angeles & Salt Lake Railroad Company, and by the Southern Pacific Company to review orders of the Railroad Commission requiring the elimination of grade crossings and the establishment of a Union Depot. Orders annulled.

E. W. Camp, Paul Burks, M. W. Reed, Robt. Brennan, and E. T. Lucey, all of Los Angeles, C. W. Durbrow, of San Francisco, and A. S. Halsted and Fred E. Pettit, Jr., both of Los Angeles (Wm. F. Herrin, of San Francisco, of counsel), for petitioners.

Hugh Gordon and William W. Clary, both of San Francisco, for respondent.

Jess E. Stephens and Milton Bryan, both of Los Angeles (Max Thelen, of San Francisco, of counsel), for city of Los Angeles.

PER CURIAM. These three proceedings were instituted before this court for the purpose of having reviewed and annulled an order of the Railroad Commission made in certain proceedings before that body of the following nature: In 1916 the Civic Center Association of the city of Los Angeles filed a complaint before the Commission against the Southern Pacific Company, the Atchison, Topeka & Santa Fé Company, and the Los Angeles & Salt Lake Company, praying for an order providing for the elimination of certain grade crossings in said city and for the establishment of a union depot therein. Two other civic organizations of said city presently filed similar petitions asking for like orders. Four petitions were also filed from adjacent municipalities asking for the elimination of grade crossings and a reorganization of the track systems of these several railroad corporations. In addition to these the Southern Pacific Company and the Los Angeles & Salt Lake Railroad Company united in an application to the Commission for the establishment of a union terminal depot as to themselves upon a certain site, and also for the elimination of certain grade crossings as an incident to the location of said terminal. These eight proceedings were consolidated by the stipulation of all of the parties and heard as one proceeding before the Commission, which, after a prolonged and exhaustive consideration of the issues involved, made its order for the elimination of certain grade crossings and for the establishment of a union terminal depot for all of said railroads, to be located within a certain defined area. The present proceedings were instituted to review this order. Upon the filing of the return to the writ this court made an order consolidating these three proceedings for the purpose of hearing and decision.

This court has already had before it the question as to the power of the Railroad Commission to provide for the elimination of grade crossings as to all of the present petitioners, in the case of Civic Center Association, etc., v. Railroad Commission, 175 Cal. 441, 166 Pac. 351, in which case it was held as between itself and the city of Los Angeles the Railroad Commission possessed this power and was directed to exercise it. In proceeding to exercise said power pursuant to such direction the Railroad Commission, in the course of hearing upon the consolidated proceeding before it, concluded that as an indispensable element in the elimination of the proposed grade crossings it was necessary to provide for a union terminal depot for all three railroads, with such changes and extensions of the railroad lines of each as would be necessary for the utilization of said depot by each and all of these railroads; and it therefore assumed and exercised the power so to do, whereupon the present proceedings were instituted by the petitioners herein.

The main contention of the petitioners is that the Railroad Commission has no jurisdiction to make any order or orders relative to the establishment and construction of a union depot for part or all of the petitioners herein, for the reason that such power has been taken from the state and its agency and has been vested in the Interstate Commerce Commission by virtue of the amendment to the Interstate Commerce Commission Act made by Congress on February 28, 1920 (41 Stat. 456). This contention, standing, as it does, upon the threshold of the subject under review, will be first considered.

The act of Congress above referred to, and commonly known as the Esch-Cummings Act, is two-fold in its purposes and effects. Its first object was to accomplish the termination of the control of the railroads taken over by the federal government during the progress of the war by virtue of the "Federal Control Act," approved March 21, 1918, and by the later amendments to said act. The second of its main objects was to amend the act of Congress commonly known as the "Interstate Commerce Act," originally approved February 24, 1887, with its later amendments. It is with this latter purpose that we are concerned in this proceeding. An inspection of this portion of the said amendatory act discloses that it embodies a large number of amendments to the Interstate Commerce Act as it existed at the date of said amendment, and that many of these are of the most important and far-reaching character. The Supreme Court of the United States in the recent case of Railroad Commission of Wisconsin v. Chicago, B. & Q. R. R. Co., 257 U. S. 563, 42 Sup. Ct. 232, 66 L. Ed 371, in reciting the provisions and commenting upon the scope of said amendatory act, says:

"It is manifest from this very condensed recital that the act made a new departure. Theretofore the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in section 15a to be one of the purposes of the bill."

Turning to the provisions of said amendatory act which embody these radical extensions of the powers and duties of the Interstate Commerce Commission, we find that section 15a thereof (41 Stat. 488, § 422), to which the foregoing decision expressly refers, greatly enlarges the powers of the Commission with regard to the regulation of not only interstate but also of intrastate rates, whenever the control and regulation of the latter are necessary to the exercise of the affirmative powers of Congress in developing interstate commerce. The decision above referred to expressly deals with that phase of the question and upholds the powers with which the Interstate Commerce Commission is invested under said section of the amendatory act. Turning to the provision of said act amending the first paragraph of section 5 of the Interstate Commerce Act, we find in subdivisions 4 and 5 thereof (section 407) the following express statement of the scope and purposes of said act:

"(4) The Commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems. In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained. Subject to the foregoing requirements, the several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties."

"(5) When the Commission has agreed upon a tentative plan, it shall give the same due publicity and upon reasonable notice, including notice to the Governor of each state, shall hear all persons who may file or present objections thereto. The Commissioner is authorized to prescribe a procedure for such hearings and

to fix a time for bringing them to a close. After the hearings are at an end, the Commission shall adopt a plan for such consolidation and publish the same; but it may at any time thereafter, upon its own motion or upon application, reopen the subject for such changes or modifications as in its judgment will promote the public interest. The consolidations herein provided for shall be in harmony with such plan."

In the interpretation to be given to the further provisions of said act, having more particular reference to the immediate question before us, the foregoing provisions of said act expressive of its enlarged scope and purposes are to be borne in mind. Having these in view, the following provisions of the act are found to bear directly upon the powers and functions with which the Interstate Commerce Commission have been invested, with relation to any and all extensions and changes in the lines, tracks and facilities of railroads engaged wholly or largely in interstate commerce. The term "railroad" as used in said act is defined by subdivision 3 of section 1 of the Interstate Commerce Act as thus amended (41 Stat. 474, § 400), as including "all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property." The term "car service" as employed in said amendatory act is defined in subdivision 10 of section 1 of the Interstate Commerce Act as thus amended (section 402), to include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment and the supply of trains by any carrier by railroad, subject to this act. Subdivision 15 of said section 1 of the said original act as thus amended provides:

"Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: * * * (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable."

Subdivision 18 of said section 1 of said original act as thus amended further provides:

"(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

Subdivision 21 of said section 1 of said original act as thus amended in part provides:

"(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative, without complaint, authorize or require, by order any carrier by railroad subject to this act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this act, and to extend its line or lines: Provided, that no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public."

Subdivision 22 of said section 1 of said original act as thus amended provides:

"(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Subdivisions 3 and 4 of section 3 of the original act as thus amended (41 Stat. 479, § 405) provides:

"(3) All carriers, engaged in the transportation of passengers or property, subject to the provisions of this act, shall according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or un-

duly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

"(4) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be."

The foregoing excerpts from among the many provisions of said amendatory act would seem to fully justify the statement of Chief Justice Taft, above quoted from the decision of the Supreme Court of the United States, as to the radical departure effected by the said amendment to the Interstate Commerce Act in the direction of placing the entire control over the rates, properties, track, terminals, and facilities of the railroads engaged in interstate commerce in and under the jurisdiction of the Interstate Commerce Commission. That Congress had the full power so to do is established by a long line of judicial decisions reaching back to the leading case of Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23, wherein Chief Justice Marshall carved out the pathway for all later decisions by the declaration that the power of Congress to regulate commerce among the several states is supreme and plenary, "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." It is needless to cite in detail the almost numberless cases in which the doctrine enunciated in that early decision has been reiterated and applied, but among the more recent cases involving its application are the Minnesota Rate Cases, 230 U. S. 352, 432, 33 Sup. Ct. 729, 753 (57 L. Ed. 1511, 48 L. R. A. [N. S.] 1151, Ann. Cas. 1916A, 18), wherein the Supreme Court of the United States, Mr. Justice Hughes delivering the opinion, gives very full and exhaustive consideration to the question as to the scope and effect of the federal legislation upon the subject of interstate commerce, with special reference to its limitations upon the legislative or administrative power of the states to deal with any matters relating to interstate commerce coming within the terms and scope of such federal legislation. In the course of that decision Mr. Justice Hughes makes use of the following significant language in considering certain phases of those cases analogous to those presented in the case at bar:

"The interblending of operations in the conduct of interstate and local business by interstate carriers is strongly pressed upon our attention. It is urged that the same right of way, terminals, rails, bridges, and stations are provided for both classes of traffic; that the proportion of each sort of business varies from year to year and, indeed, from day to day; that no division of the plant, no apportionment of it between interstate and local traffic, can be made to-day, which will hold to-morrow; that terminals, facilities and connections in one state aid the carrier's entire business and are an element of value with respect to the whole property and the business in other states; that securities are issued against the entire line of the carrier and cannot be divided by states; that tariffs should be made with a view to all the traffic of the road and should be fair as between through and short-haul business; and that, in substance, no regulation of rates can be just which does not take into consideration the whole field of the carrier's operations, irrespective of state lines. The force of these contentions is emphasized in these cases, and in others of like nature, by the extreme difficulty and intricacy of the calculations which must be made in the effort to establish a segregation of intrastate business for the purpose of determining the return to which the carrier is properly entitled therefrom.

"But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce."

[1] Numerous other cases may be cited from both federal and state courts sustaining the rule that, wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the state, and not the nation, would be supreme within the national field. Houston, E. & W. Texas Ry. v. United States, 234 U. S. 342, 351, 34 Sup. Ct. 833, 58 L. Ed. 1341, and cases cited. The case of People ex rel. New York Central R. R. Co. v. Public Service Commission, 233 N. Y. 113, 135 N. E. 195, is a case

which nearly approaches identity with the case at bar. It involves the question as to whether under the Public Service Commission Law of the state of New York the Public Service Commission of that state had power to make an order directing two railroad companies, engaged in interstate and intrastate commerce within that state, to reconstruct a switch or track connecting their lines and install other tracks and facilities so as to furnish adequate and convenient interchange of freight between said railroads. Upon appeal from an order dismissing a writ of review instituted by the relator for the purpose of testing the power of the Public Service Commission to make said order, it was held by said court that the state Commission had no jurisdiction to make such order in view of the provisions of the act of Congress of 1920 amending the Interstate Commerce Law. The court said:

"The Transportation Act of 1920, § 405, amended the second paragraph of section 3 of the Interstate Commerce Act to provide: 'All carriers engaged in the transportation of passengers or property, subject to the provisions of this act, shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers or property, to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.' A violation of that provision of the act of Congress authorizes a complaint by any interested party to the Interstate Commerce Commission, and after a hearing before that Commission to such relief as the facts warrant. The Interstate Commerce Commission is clothed with authority by the section quoted to compel carriers to afford reasonable and proper facilities for the interchange of traffic between their respective lines. The order made by the Public Service Commission commands relator and the Lehigh Valley to make such track connections between their roads as shall be necessary or proper to establish and furnish adequate and convenient interchange of freight between said roads. To sustain the order of the Public Service Commission in the instant case would necessarily establish that the two several Commissions mentioned were clothed with jurisdiction to grant the relief sought and require us to ignore the well-established principle of law that the Congress having delegated to the Interstate Commerce Commission power to deal with the subject-matter of this proceeding, an exercise of like power by the state is thereby superseded"—citing Erie R. R. Co. v. People of the State of New York, 233 U. S. 671, 34 Sup. Ct. 756, 58 L. Ed. 1149, 52 L. R. A. (N. S.) 266, Ann. Cas. 1915D, 138; Chicago, R. I. & P. Ry. Co. v. Hardwick Elevator Co., 226 U. S. 426, 33 Sup. Ct. 174, 57 L. Ed. 284, 46 L. R. A. (N. S.) 203.

The respondents herein, however, contend that the Railroad Commission was empowered to make and enforce the order sought to be annulled in this proceeding under the authority of the case of Missouri Pac. R. Co. v. Larabee Flour Mills Co., 211 U. S. 612, 29 Sup. Ct. 214, 53 L. Ed. 352. That case held that the mere delegation by Congress to the Interstate Commerce Commission of power to act in a given matter did not prevent such action by the state authorities unless the Commission had taken action in the particular matter involved, quoting therefrom the following:

"Until then the authority of the state in merely incidental matters remains undisturbed. In other words, the mere grant by Congress to the Commission of certain national powers in respect to interstate commerce does not of itself, and in the absence of action by the Commission, interfere with the authority of the state to make those reguluations conducive to the welfare and convenience of its citizens."

In the matter of the extension of railroad facilities and in the abandonment of other railroad facilities, including terminals, not only is the Commission empowered to act upon the subject, but Congress has expressly prohibited the railroad companies from acting without the consent of the Interstate Commerce Commission. See section 1, subdivision 18 (section 402) supra. Subdivision 20 of that section (41 U. S. Stats, at Large, p. 478), construed in connection with subdivisions 19 and 21, authorizes the Commission to issue a certificate for the extension or abandonment of portions of railway lines and for the issuance of a certificate authorizing such work to be done or a line to be abandoned (subdivisions 18, 19, 20, 21), and with reference to such certificate provides as follows:

"From and after issuance of such certificate, and not before, the carrier by railroad may, *without securing approval other than such certificate*, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the state or states affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both." (Italics ours.)

It is clear from the foregoing that Congress has not only vested jurisdiction in the Interstate Commerce Commission over the

question of the extension of terminal facilities, such as contemplated by the order of the Railroad Commission in the case at bar, but has also prohibited the railroads from making such improvements without the consent of the Interstate Commerce Commission. This being true, Congress has fully occupied the field of regulation of such matters and the power of the state commission has thereby been terminated.

An examination of the case of Missouri Pac. R. Co. v. Larrabee Flour Mills Co., supra, further shows that it was decided in 1909, several years prior to the passage of the amendatory act of 1920, and at a time prior to any attempt on the part of Congress to invest the Interstate Commerce Commission with jurisdiction over the matter of changes or extensions in interstate railroad lines.

The respondents also urge the contention that, since this court has decided in the case of Civic Center Association v. Railroad Commission, supra, that the Railroad Commission of California had jurisdiction to make and enforce orders providing for the elimination of those certain grade crossings involved, in part, in the proceedings before the Railroad Commission, and since the said Commission had found and held in said proceedings that the establishment of a union terminal depot was an indispensable element in accomplishing the elimination of said grade crossings, the Commission had the power to include in its order for the elimination of such grade crossings the creation of such union terminal depot. There is no merit in this contention, for the reason, very aptly set forth in the extract above quoted from the decision of the New York Court of Appeals in the case of People, etc., v. Public Service Commission, supra. It is also without merit for the further reason that, notwithstanding the views expressed by the Railroad Commission in its findings and conclusions in the proceeding herein presented for review, we can perceive no indispensable relation between the elimination of grade crossings and the establishment of union depot facilities, nor can we see any insurmountable difficulty why jurisdiction over the matter of eliminating grade crossings may not be exercised in a proper case consistently, and it may be concurrently, with the exercise of the authority which is vested by the act of Congress of 1920 in the Interstate Commerce Commission over the subject of union terminal depot facilities.

[2] From the foregoing excerpts from the Act of Congress of 1920, amendatory of the Interstate Commerce law, and from the authorities above cited, we arrive at the conclusion that full power and authority over the matter of union terminal depot facilities of the railroads who are largely engaged in interstate commerce, and who are the petitioners herein, has been vested in the Interstate Commerce Commission under the terms of said amendatory act of 1920, and that by virtue thereof the Railroad Commission of California, one of the respondents herein, has been divested of the power, authority, and jurisdiction over that subject, sought by it to be exercised in the several proceedings before it and by the order presented for review herein. This disposition of the primary inquiry involved in these proceedings renders unnecessary a discussion of the several subsidiary questions presented for our consideration by the briefs of counsel herein.

The application is granted, and the order of the Railroad Commission annulled.

LENNON, WASTE, WILBUR, SHURTLEFF, SLOANE, and LAWLOR, JJ., concur.

SHAW, C. J. I concur in the foregoing opinion on the grounds therein stated. I wish to say, however, in addition, that the conclusion that the Railroad Commission has no power to order the terminal depot in question constructed can also be reached by resort to the principle laid down in Atchison, T. & S. F. Ry. Co. v. R. R. Com., 173 Cal. 577, 160 Pac. 828, 2 A. L. R. 975. That decision establishes the principle that railroads are private property which are devoted to public use, and that the state has no power to order the railroad company, without its consent, to establish a new line of railroad for the benefit of the public. The scheme here embraced in the order of the Railroad Commission contemplates the expenditure of a very large sum of money by the railroad companies in the construction of a new terminal depot for their joint use in a place where there is no existing depot and no tracks leading thereto. Entirely new tracks will have to be built to reach the new depot, and the land on which it is to be erected and on which the track is to be built will have to be acquired by the said companies, or by some subsidiary company in which they are all interested, and vast sums of money must be used in constructing the buildings and tracks required for the union depot.

If this be true it is equally beyond the power of the Interstate Commerce Commission to make the order. To require the railroad companies to construct this depot and the tracks necessary therefor is equivalent to ordering them to dedicate new property to a public use. I know of no power which will justify the state in commanding a railroad company to thus acquire and dedicate property to a public use.

59 Cal. App. 685

## MILLER v. LYNN. (Civ. 4295.)

(District Court of Appeal, First District, Division 2, California. Nov. 18, 1922.)

**Appeal and error ⊜1011(1)—Finding on conflicting evidence not disturbed.**

Finding of the trial court based on conflicting evidence will not be disturbed on appeal.

Appeal from Superior Court, Sonoma County; H. L. Preston, Judge.

Action by J. F. Miller against J. C. Lynn. From a judgment for defendant, plaintiff appeals. Affirmed.

Hiram E. Casey and L. R. Lambert, both of Santa Rosa, for appellant.

W. F. Cowan, of Santa Rosa, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to obtain a judgment declaring a certain blacksmith business to be the property of plaintiff and defendant as copartners; to have the partnership dissolved and the assets divided. Judgment went for the defendant, and the plaintiff has appealed. In support of his appeal the appellant has brought up the judgment roll and a transcript of the reporter's notes. The appellant does not call to our attention any erroneous ruling of the trial court, but contends that the evidence was such that the judgment should have been in favor of the plaintiff. In support of this contention much might be said. However, the evidence was conflicting, and this court is bound by the finding of the trial court.

It was the theory of the plaintiff, and he introduced his own testimony and the testimony of others, that the plaintiff and defendant entered into a contract on the 6th day of July, 1920, by the terms of which contract the plaintiff was to pay the defendant $265 and thereupon he would be a full partner with the defendant in said blacksmith business. It is not contended that the consideration was ever in fact paid, but the plaintiff contends that he is able and willing to pay the same and that the contract should be enforced. On the other hand, the defendant contended that the agreement between the plaintiff and himself was to the effect that the plaintiff would leave San Rafael, go to Sebastopol, and there go to work for the defendant at $5 per day. He further contended that he stated to the plaintiff that if the plaintiff would put up $300 or $350, something of that kind, for a half interest in the stock on hand, that amount of money would enable the defendant to pay off his debts and would enable the plaintiff to share in the profits. The defendant further contended that the plaintiff said he would do so as soon as he could sell his oil station or his cows, property which he owned at San Rafael. However, according to the testimony, the plaintiff never made the sales and never paid the defendant anything for the half interest in the stock and that the partnership, or profits sharing arrangement, never came into existence.

There were several inconsistencies in the testimony of the plaintiff, and several inconsistencies in the testimony tendered by the defendant; but the power to hear and determine the facts and to weigh the testimony rested with the trial court, and, as stated above, the findings made by the trial court are conclusive on this court when, as we have just shown, such findings are supported by the sworn testimony of creditable witnesses.

For the reasons which we have stated the judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

59 Cal. App. 572

## McCALLUM v. STULL et al. (Civ. 4197.)

(District Court of Appeal, First District, Division 2. California. Nov. 8, 1922.)

**Dismissal and nonsuit ⊜80—Improper order of dismissal without judgment thereon does not prevent subsequent entry of judgment.**

An entry in the clerk's minutes and in the register of actions that the cause was dismissed, undoubtedly made inadvertently, because a cross-complaint had been interposed which was at issue and had been set for trial so that the time to dismiss had passed, under Code Civ. Proc. §§ 581–581b, and the rule governing the procedure was that provided by section 582, without a judgment of dismissal having been entered in accordance with that section, did not dispose of the action, and the court thereafter had power to set aside the dismissal and try the action, and a judgment thereafter rendered in the action is valid, even though the order of dismissal was not expressly set aside.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by P. McCallum against G. L. Stull, sometimes known as Gertrude D. Stull, and others, to foreclose a judgment lien. Judgment for plaintiff, and the named defendant appeals. Affirmed.

Eloise B. Cushing, of Oakland, for appellant.

T. John Butler, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendants to foreclose a judgment lien. Judgment went for the plaintiff, and the defendant G. L. Stull has appealed under section 953a of the

Code of Civil Procedure. The record presents but one question, and that is the question of procedure. Before proceeding further it is necessary to state the facts concerning the history of this litigation.

Prior to the 9th day of July, 1915, G. L. Stull, the appellant, commenced an action against P. McCallum et al. to quiet title. Thereafter the defendant in that action appeared and answered and at the same time filed a cross-complaint. Later the plaintiff answered the cross-complaint. Thereafter the cause as made by the pleadings came on for trial, and on May 11 such proceedings were had that the cause was ordered dismissed. An entry was made by the courtroom clerk in his minutes, and an entry was made in the register of actions, "1916 May 11. Cause dismissed." Thereafter no proceedings were had until February 19, 1919. On that date findings of fact and conclusions of law were duly signed and filed and on the same date a judgment in due form was also signed and filed and the judgment roll was made up. When the instant case came on for trial, the plaintiff produced the judgment roll and evidence showing that no part of the judgment had been paid, and thereupon the plaintiff rested. The defendant thereupon offered in evidence the minute entry showing an order of dismissal and also the register of actions showing the order of dismissal, which is quoted in full above. Both offers on the part of the defendant were refused, and the defendant claims such refusals to be errors. It is patent that the appellant was contending in the trial court that the first action was dismissed and that therefore there was no judgment to be foreclosed. If such was the contention of the appellant, then the appellant should have produced a judgment roll showing that a judgment of dismissal was entered and that such judgment was within the jurisdiction of the court entering it. Harper v. Rowe, 53 Cal. 233; Simmons v. Threshour, 118 Cal. 100, 50 Pac. 312. But the appellant did not attempt to take any such course. The record on appeal shows that on May 11, 1916, the judge presiding at the trial ordered the action dismissed. Such order was undoubtedly inadvertently made because, as we have stated above, one of the defendants had interposed a cross-complaint, the cross-complaint had been answered, the case had been set down for trial, and trial had been had, at least in part, and the time to dismiss had passed, and the time had arrived to try the cause on its merits and render a judgment accordingly. Code Civ. Proc., secs. 581, 581a, 581b and 582. As recited above, the purported dismissal was ordered by the court, but the dismissal did not fall within the provisions of subdivision 3, subdivision 4, or subdivision 5 of section 581 of the Code of Civil Procedure. Such being the case, the rule governing the procedure is that provided in section 582 of the Code of Civil Procedure. If the clerk had proceeded to enter a judgment of dismissal pursuant to the order made May 11, 1916, the appellant's contention might have had some merit. However, as we have shown above, no judgment of dismissal was entered and the court had full power on the 19th day of February, 1919, to prepare and sign findings and judgment disposing of the case on its merits. At the same time it had the power, if it saw fit, to correct the order inadvertently made on May 11, 1916, which order directed a dismissal. Apparently that correction was not made, but such intermediate errors cannot be inquired into at this late date, when findings of fact and a final judgment were entered as early as February 19, 1919. Such an inquiry would be a collateral attack on the latter judgment.

The trial court did not err in refusing to receive the evidence offered by the appellant. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

---

59 Cal. App. 633

## PEOPLE v. SULLIVAN. (Cr. 902.)

(District Court of Appeal, Second District, Division 2, California. Nov. 14, 1922.)

**1. Jury ⊜103(9)—Disqualification of jurors for bias not based solely on public rumor not removed by statement that they could give fair trial.**

In a prosecution for criminal syndicalism, where the opinions of jurors examined on their voir dire as to whether the Industrial Workers of the World was a lawful organization, were not based solely on public rumor and public notoriety, Pen. Code, § 1076, was inapplicable and in disallowing challenges for actual bias under Pen. Code. § 1073, subd. 2, there was prejudicial error, even though they stated they could give defendant a fair trial.

**2. Jury ⊜99(5)—Juror holding settled opinion in relation to truth of facts going to foundation of case cannot render unbiased verdict.**

A juror is not in position to render an impartial and unbiased verdict who at the beginning of trial holds a settled opinion in relation to the truth of facts going to the foundation of the case required to be made by the prosecution.

**3. Criminal law ⊜421(1)—Testimony of witness as to acts of lawlessness, based on statements made to him by others, hearsay.**

In a prosecution for criminal syndicalism, where the ultimate fact which prosecution was endeavoring to establish was the illegal character and acts of the I. W. W., which could have been shown by literature authorized or issued by it or by witnesses whose past relation to the organization gave them first-hand knowledge, and by testimony of witnesses as to spe-

cific acts, evidence of a witness, based on statements made to him by others as to what they as members had done in the way of lawlessness, was hearsay.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

C. J. Sullivan was convicted of criminal syndicalism, and he appeals. Reversed and remanded.

R. W. Henderson, of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CRAIG, J. The defendant was convicted of criminal syndicalism. He appeals from the judgment pronounced thereon, and from the order denying his motion for a new trial. The information is substantially in the language of the statute. It charges the defendant with a violation of several inhibitions of the law known as the Criminal Syndicalism Act (St. 1919, p. 281). The information contains but one count.

[1] Complaint is made that the court committed prejudicial error in disallowing challenges to the jurors Rankin and Morstad. Rankin testified that he had formed an opinion as to whether the Industrial Workers of the World is a lawful and peaceable organization. That he based his opinion upon newspaper statements, some literature purporting to be of the I. W. W., which a hired man had shown him, and also statements made by this man about the organization to him and to other men. Morstad stated that he had an opinion on the question as to whether the Industrial Workers of the World advocate and teach violence and terrorism, based on information he had seen in the public press and pamphlets which he understood were issued by the I. W. W., and also upon statements of persons claiming to tell the facts from their own knowledge concerning the organization, and which statements he believed to be true.

The prosecuting attorney, against the objection of defendant's counsel, was permitted to draw from each of these prospective jurors a statement that, notwithstanding his opinion upon the matters in question, he could and would give the defendant a fair and impartial trial. These jurors were challenged for actual bias, under subdivision 2 of section 1073, Penal Code.

The jurors had formed and still possessed opinions as to the illegal character of the I. W. W. These opinions were not based solely upon public rumor, common notoriety, or statements in journals, and hence section 1076 of the Penal Code is inapplicable. They were founded in part upon what persons had said. Morstad's opinion was in part the result of what men had told him of things which they claimed to know of their own knowledge, and which he asserted were believed by him to be true. Therefore, no further inquiry was permissible. The disqualification of the jurors could not be removed by their statement that they could and would give defendant a fair and impartial trial, and set aside the opinions which they had formed. People v. Wells, 100 Cal. 229, 34 Pac. 718; People v. Miller, 125 Cal. 46, 57 Pac. 771; People v. Riggins, 159 Cal. 113, 112 Pac. 862; People v. Wismer (Cal. App.) 209 Pac. 259; People v. Helm, 152 Cal. 532, 93 Pac. 99.

[2] In the case of People v. Reed (Cal. App.) 207 Pac. 1025, cited by respondent, the juror's opinion was derived from public rumors and newspaper accounts, and is thus differentiated from that of the jurors in the one at bar. It is true that in the cases above cited the opinions of prospective jurors were upon the question of the guilt of the defendant. The provision of the Code is that it is a ground for challenge if the prospective juror has a state of mind "in reference to the case" which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party. In the instant case it was incumbent upon the prosecution to establish the illegal character of the I. W. W. organization. Without proof of this fact, the evidence would unquestionably be insufficient to sustain a verdict of guilty upon any one of the charges contained in the information. The defendant did not seriously dispute the fact of his membership in the I. W. W. Obviously the issue as to the character of the I. W. W. was the pivotal one in the case. Under the circumstances, for a juror to have an opinion concerning this vital issue would be as prejudicial, as a matter of principle, as though he had such an opinion concerning the guilt of the accused. The difference would be one of degree only. It cannot be said that a juror is in a position to render an impartial and unbiased verdict, who at the beginning of the trial holds a settled opinion in relation to the truth of facts going to the very foundation of the case required to be made by the prosecution. Davis v. Walker, 60 Ill. 452; Gray v. People, 26 Ill. 344. See, also, White v. Moses, 11 Cal. 68; People v. Din, 39 Cal. App. 695, 179 Pac. 713. The record shows that the defendant exhausted his entire quota of peremptory challenges. We conclude that he was denied a trial by a jury whose members possessed a state of mind in reference to the case of that entirely impartial and unprejudiced character required by the law to safeguard the substantial rights of the defendant.

[3] It will not be necessary to consider other points raised upon this appeal, except to say that certain parts of the testimony of the witness Vale were objectionable. This is true of the relation by him of what other persons had told him that they, as members

of the I. W. W., had done in the way of acts of sabotage and lawlessness. The ultimate fact which the prosecution was endeavoring to establish was the illegal character, teachings, and acts of the I. W. W. This could be shown by literature authorized or issued by it, by witnesses whose past relation to the organization gave them first-hand knowledge, and by testimony of witnesses as to the specific acts of sabotage, arson, and revolution within their own knowledge. People v. Roe, 209 Pac. 381.

But to go beyond this and relate purported incidents, not known to the witness, but being based upon statements made to him by others, would clearly be hearsay and as such inadmissible. Authorities cited by respondent do not justify the admission of such evidence. In the opinion in the Roe Case it is expressly stated that the witness Dymond testified that he personally knew of the facts which he related as to acts of sabotage by I. W. W. members.

We find no other error in the rulings of the trial court, but for the reasons we have stated the judgment must be reversed, because of prejudicial error in the disallowing of appellant's challenges to jurors for actual bias.

The judgment is therefore reversed, and the cause remanded.

We concur: FINLAYSON, P. J.; WORKS, J.

---

59 Cal. App. 683

## KRAUSKOPF v. BROOKING. (Civ. 3892.)

(District Court of Appeal, First District, Division 2, California. Nov. 17, 1922.)

**Malicious prosecution ⟸64(2)—Findings of malice and want of probable cause warranted.**

Evidence in action for malicious prosecution on a charge of embezzlement of crops *held* to warrant findings that defendant, actuated by malice, caused plaintiff's arrest without probable cause.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by H. F. Krauskopf against A. D. Brooking. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank J. Fontes and Henry Boyen, both of San Francisco, for appellant.

Milton A. Nathan, of San Francisco (Thomas Maul, of San Francisco, of counsel), for respondent.

NOURSE, J. Plaintiff obtained a judgment for $500 against the defendant as damages for malicious prosecution. The facts are that the defendant was the owner of a piece of realty in Solano county and plaintiff was his tenant under the terms of a written lease which provided for a division of the products of the ranch, one-third to the owner and two-thirds to the tenant; that in the year 1918, after the harvest, defendant went upon the leased premises to claim his share of the crop, and while there discovered some sacks of grain lying in the field covered with straw; that he thereupon complained to plaintiff that he was not receiving his share of the grain, and after some dispute consulted an attorney at law and a justice of the peace; that, acting upon their advice, he swore to a complaint charging the plaintiff with larceny; that the defendant thereafter consulted another attorney at law and also the district attorney of Solano county, and as a result of said consultation was advised to and did swear to a complaint charging the plaintiff with embezzlement; that the larceny charge was dismissed without examination upon motion of the district attorney, and that the embezzlement charge was heard by a justice of the peace, who found that the crime of embezzlement had not been committed, and that there was not sufficient cause to believe the plaintiff herein guilty of said charge. He was thereupon discharged from custody, and within time commenced this action for damages for the malicious prosecution.

The trial court found, among other things, that the justice of the peace had, after a full and thorough examination, found and held that the crime of embezzlement had not been committed; that plaintiff was not guilty of either of the charges preferred against him, and that in procuring the warrants of arrest the defendant had acted maliciously, and without probable cause; that by reason of the premises the plaintiff had been greatly humiliated and injured in his business, and had suffered damage to his good name and reputation; that, though the defendant had consulted a duly licensed attorney at law, and also the district attorney of the county of Solano and the justice of the peace of Vacaville township, before causing the arrest of plaintiff on either of said charges, he had not made to either of them a fair or full or complete statement of all the facts within his knowledge in relation to the crimes charged against the plaintiff; and, finally, that it was not true that before seeking the advice of said attorney and of the district attorney and of said justice of the peace defendant believed that plaintiff had committed each of the crimes charged against him.

The appeal from the judgment is confined solely to an attack upon these findings of the trial court. In each case appellant insists that the evidence is insufficient to support the finding. A full and thorough examination of the record convinces us that in each case there is sufficient evidence to support each finding. In some instances the trial court

found in accordance with the undisputed and uncontradicted evidence. In the instances where the findings are based upon conflicting testimony the great weight of the evidence bears most strongly in favor of the findings which the trial court made. It would serve no purpose to set out this evidence in full. From the entire record it is evident that the appellant, actuated by personal malice and ill feeling toward the respondent, caused his arrest without probable cause and with nothing more than a mere suspicion that he had been defrauded. Every opportunity had been given him to check up the grain and to determine for himself whether the respondent had made an honest division, but this he refused to do, choosing rather to put the respondent to the defense of a criminal charge.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

---

59 Cal. App. 678

## FERRARIS v. FERRARIS. (Civ. 4361.)

(District Court of Appeal, First District, Division 2, California. Nov. 17, 1922.)

**Divorce ⊂⊃184(10)—Findings on conflicting evidence not disturbed.**

In an action for divorce, where the evidence as to the grounds alleged were in direct conflict, the findings of the trial court will not be disturbed on appeal.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action for divorce by Charles Ferraris against Josephine Ferraris. From an interlocutory decree for plaintiff, defendant appeals. Affirmed.

Norris & Warth, of Salinas, and Emilio Lastreto, of San Francisco, for appellant.

Zabala & Sargent, of Salinas, and Albert Picard, of San Francisco, for respondent.

NOURSE, J. Plaintiff commenced this proceeding to obtain a divorce from the defendant on the ground of her adultery. She filed an answer to his complaint and also a cross-complaint based upon the ground of extreme cruelty. The interlocutory decree was rendered in favor of the plaintiff, and relief under the cross-complaint was denied. The defendant appeals from this decree. The only ground of the appeal is that the evidence is insufficient to support the findings made by the trial court.

We have made a thorough examination of the record, including the testimony of the various witnesses. This testimony presents the common story of a case of this nature. The witnesses called on behalf of the husband testified to facts and circumstances which were as positively denied by those called on behalf of the wife. It would serve no purpose to detail any of this testimony. The trial court had all the witnesses before it, and concluded that the husband's charges were true. When the evidence is in such conflict it is not for this court to set aside the finding of the trial court.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

---

59 Cal. App. 598

## PEOPLE v. TEIXEIRA. (Cr. 631.)

(District Court of Appeal, Third District, California. Nov. 13, 1922.)

**1. Perjury ⊂⊃21—Information, failing to charge that false affidavit was used or authorized to be used, held fatally defective.**

In a prosecution under Pen. Code, § 118a, for perjury, charged to have been committed by making a false affidavit in a criminal case, conviction could not be sustained, where the information failed to allege that the false affidavit was ever produced or used in court, or that defendant authorized its use or delivered it to any one to be used.

**2. Perjury ⊂⊃23—Information, charging making of false affidavit, held not defective as failing to allege that oath to testify truly was first taken.**

In a prosecution for perjury, brought under Pen. Code, § 118a, and based upon the making of a false affidavit to be used to obtain a new trial in a criminal case, an information, failing to allege that defendant first took the oath to testify or depose truly, was not defective for that reason, it sufficiently appearing that affiant had attested the truth of what was stated in the affidavit before a person authorized to administer oaths; section 118a only requiring the affidavit to be taken before an officer authorized to administer oaths, which under section 119 includes every mode authorized by law of attesting the truth of that which is stated.

**3. Perjury ⊂⊃22—Information, failing to show that court wherein perjured evidence was to be used had jurisdiction, held fatally defective.**

In a prosecution for perjury, brought under Pen. Code, § 118a, and charging that defendant made a false affidavit to be used in obtaining a new trial in a criminal case, the information was fatally defective, where it did not show that the superior court in which such criminal action was tried had jurisdiction thereof.

**4. Perjury ⊂⊃25(2)—Information, failing to allege materiality of perjured testimony, held fatally defective.**

In a prosecution for perjury brought under Pen. Code, § 118a, and based upon the making of a false affidavit to be used to obtain a new trial in a criminal case, the information

was fatally defective for failing to allege that the false affidavit was material to any issue in that case.

Appeal from Superior Court, Stanislaus County; J. S. Needham, Judge.

Emanuel Teixeira was convicted of perjury, and he appeals. Reversed.

L. J. Maddux and T. B. Scott, both of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was convicted of perjury, and he appeals from the judgment, the order denying his motion for a new trial, and his motion in arrest of judgment. The charging part of the information, under which the conviction was had, is as follows:

"The said Emanuel Teixeira, on or about the 1st day of March, 1921, at and in said county of Stanislaus, state of California, and prior to the filing of this information, did willfully make and execute a certain false instrument in writing, to wit, an affidavit with the willful intention to produce the said affidavit and allow the same to be produced and used on behalf of one Antone Vitro upon the hearing of a motion then and there pending for a new trial, made on behalf of one Antone Vitro in a certain criminal action then and there pending in the superior court of the county of Stanislaus, state of California, Department No. 1, wherein the people of the state of California was plaintiff and Antone Vitro was defendant, and for the fraudulent deceitful purpose of imposing the said instrument in writing upon said superior court as containing evidence competent to be received by said court upon hearing of a motion for a new trial, and to fraudulently affect and influence said court in deciding said motion for a new trial.

"That said affidavit in writing, so as aforesaid feloniously made and executed by him, the said Emanuel Teixeira, was and is in words and figures as follows, to wit:

" 'In the Superior Court of the State of California, in and for the County of Stanislaus.

" 'The People of the State of California, Plaintiff, v. Antone Vitro, Defendant. Affidavit.

" 'State of California, County of Stanislaus —ss.:

" 'Emanuel Teixeira, being first duly sworn, deposes and says: I live near Modesto, in the county of Stanislaus, state of California. I have lived in the county for 6 years. I am a single man, and am now 25 years of age. I have known Sarafina Enos for 5 years. I was working for John Vitro on the Leek ranch from April, 1916, to April, 1917. That during the time I worked for John Vitro I milked cows and did outside work on the ranch. That Sarafina Enos during the whole of that time was also working for John Vitro as cook. In the month of September, 1916, John Vitro had company, and Sarafina Enos slept on a sofa in the sitting room; it was a sofa that is let down like a bed. About 11 o'clock at night I went into the sitting room and went to bed with Sarafina Enos, and we had sexual intercourse twice. She made no objections. After that she fell in love with Mike Silva and went with Mike Silva, so that I had nothing further to do with her. After that Mike Silva came there every week. I saw him stay there as late as 11 o'clock at night many times. I also worked for John Vitro on the Ceres ranch for about five months, and Sarafina Enos was also working at the Ceres ranch at the same time I was. I used to see Mike Silva come there many times and visit with her at the Ceres ranch.

" 'Emanuel his X Teixeira.
mark

" 'Witness to mark and signature of Emanuel Teixeira:

" 'Vernon M. Gant.

" 'T. B. Scott.

" 'Subscribed and sworn to before me this 1st day of March, 1921. L. J. Maddux,

" 'Notary Public in and for the county of Stanislaus, State of California.

" 'Filed March 2, 1921.'

"That said affidavit was subscribed and sworn to before L. J. Maddux, Esq., notary public in and for the county of Stanislaus, state of California, a duly appointed qualified and acting notary public in and for the county of Stanislaus, state of California, an officer authorized by law to administer oaths and to administer an oath to the said defendant, Emanuel Teixeira, and did then and there, on the 1st day of March, 1921, in said county of Stanislaus, state of California, administer an oath in due form of law to said Emanuel Teixeira as the person who made and executed said affidavit above set forth.

"That in said affidavit the said Emanuel Teixeira did willfully, knowingly, corruptly, falsely, and feloniously swear and take oath that during the month of September, 1916, at the Leek ranch near the town of Hughson, county of Stanislaus, state of California, he had sexual intercourse with one Sarafina Enos twice during said month of September, 1916.

"Whereas, in truth and in fact as he, the said Emanuel Teixeira, then and there well knew that he, Emanuel Teixeira, never at said Leek ranch, in September, 1916, or at any time, or at any place, or at all, had sexual intercourse with the said Sarafina Enos, whereby the said Emanuel Teixeira did then and there as aforesaid feloniously, willfully, knowingly, and corruptly swear falsely and feloniously commit willful perjury."

It is conceded that the authority for the prosecution is found in section 118a of the Penal Code providing as follows:

"Any person who, in any affidavit taken before any person authorized to administer oaths, swears, affirms, declares, deposes, or certifies that he will testify, declare, depose or certify before any competent tribunal, officer or person, in any case then pending or thereafter to be instituted, in any particular manner, or to any particular fact, and in such affidavit willfully and contrary to such oath states as true any material matter which he knows to be false, is guilty of perjury."

With the preceding manifestly must be considered section 124, as follows:

"The making of a deposition, affidavit or certificate is deemed to be complete, within the provisions of this chapter, from the time when it is delivered by the accused to any other person, with the intent that it be uttered or published as true."

Appellant claims that the information is fatally defective in four particulars as follows:

"(1) There is no allegation that the false affidavit was ever produced or used in court or that the defendant authorized its use or delivered it to any one to be used. (2) There is no allegation in the information that the defendant first took oath to testify or depose truly. (3) It does not appear by said information that the superior court had any jurisdiction of the case of People v. Vitro. (4) There is no allegation in the information that the alleged false affidavit was material to any issue in the case of the People v. Vitro."

[1] In support of the first contention appellant cites People v. Robles, 117 Cal. 681, 49 Pac. 1042. Therein it was held, as stated in the syllabus, that—

"Before a party can be convicted of perjury in making a false affidavit, he must either use the affidavit for a purpose contemplated by section 118 of the Penal Code, or deliver it to some one for such use; and an indictment which merely shows that a false affidavit made by the defendant was used by another person on a motion for a new trial, without averring that the defendant so used it, or delivered it for such use, or that it was delivered by defendant to another person with the intent that it be uttered or published as true, does not state facts sufficient to constitute the offense of perjury."

It is to be observed that the information herein is more defective in that respect than was the indictment therein, for the reason that, besides the failure to allege that the affidavit was delivered by the defendant to another person with the intent that it be "uttered or published as true," or delivered to another at all, there is no allegation that said affidavit was actually used on said motion for a new trial.

In the opinion in the Robles Case, supra, it is declared:

"Here the indictment only charges the making of the false affidavit; it does not charge enough. It should have declared that the affidavit was delivered with the intent that it be uttered and published as true. Such a statement in the pleading is just as necessary as to charge that the affidavit was made by the accused, or that it was false; if it were possible, more necessary, for while the affidavit remains in the hands of the accused no mischief is done."

In reply to this point the Attorney General cites People v. John, 137 Cal. 220, 69 Pac. 1063, but that case does not overrule the Robles Case; in fact, the court said: "People v. Robles, 117 Cal. 681, has no application." In the John Case the affidavit constitutes the complaint, which was the basis of the criminal prosecution, and it appeared that it was in the custody of the committing magistrate, whose duty it was at once to issue the warrant of arrest. The offense of perjury was therefore complete when the defendant subscribed and verified the affidavit. Neither is the case of People v. Griesheimer, 176 Cal. 44, 167 Pac. 521, inconsistent with the contention of appellant herein. In that case it was held that the essential facts constituting the offense sufficiently appeared, although there was no direct averment of the causal connection between the false pretenses and the payment of the money, or that the money was received as a subscription to a certain corporation.

[2] In support of his second contention appellant cites People v. Simpton, 133 Cal. 367, 65 Pac. 834. Therein an affidavit was involved and the allegation of the indictment was that "the said G. W. Simpton did then and there willfully, corruptly, knowingly, falsely, and feloniously swear, take oath and make his affidavit," etc. The Supreme Court called attention to the fact that section 118 of the Penal Code requires that the person must be sworn to "testify or depose truly," and it is declared:

"The words, 'swear, take oath, and make his affidavit,' are not equivalent to an averment that he was 'duly sworn to testify truly.'"

It was held that the indictment was fatally defective in that respect. It is to be said, though, that section 118a of the Penal Code was enacted after the opinion was rendered in the Simpton Case, and the code commissioner states that "it is made necessary by the decision of the Supreme Court in People v. Simpton, 133 Cal. 367." There is a distinction in the language of the two sections, in that the latter does not contain the word "truly," and only requires that the affidavit be taken before an officer authorized to administer oaths, and that the affiant "swear" to the facts therein stated. Section 119, following, prescribes that—

"The term 'oath,' as used in the last two sections, includes an affirmation and every other mode authorized by law of attesting the truth of that which is stated."

We think it sufficiently appears that said affiant attested the truth of what was stated in the affidavit before a person authorized to administer oaths, and that this objection to the information relates to "form rather than to substance."

[3] The third point is more serious. There is nothing in the information to show that the superior court had jurisdiction to hear the motion for a new trial at which said affidavit was to be "produced and used." There is no direct allegation that the superior court had jurisdiction, nor are facts stated from which the inference would follow. The only

averment as to the character of the charge against Antone Vitro is that it was "a certain criminal action then and there pending in the superior court of the county of Stanislaus." Manifestly the foregoing is not sufficient, since there are many "criminal actions" of which the justice court has exclusive jurisdiction. If the affidavit was to be used in a proceeding of which the superior court had no jurisdiction, it could not constitute the basis for a charge of perjury. In other words, the legal authority of the court to hear and determine the motion for a new trial is one of the essential facts which must be affirmatively disclosed by the information, or else it is fatally defective. People v. Howard, 111 Cal. 655, 44 Pac. 342.

[4] The last point is equally serious. Said section 118a requires that the false statement must relate to a "material matter." This is one of the primary essentials of a charge of perjury, and it must appear in the information by specific averment or of such facts as necessarily to lead to the conclusion of law that the perjurious matter is material. People v. Ah Bean, 77 Cal. 12, 18 Pac. 815. In the Ah Bean Case it is said:

"There are two modes by which the materiality of the alleged false statement may be shown in criminal pleading: (1) By setting forth the nature of the issue, and the evidence given thereon so that, as a matter of law, it may be said the testimony upon which the perjury is assigned is material to the issue; (2) by showing an action at issue in a court of competent jurisdiction, the testimony given, its willful and felonious falsity, coupled with the averment that it was material to the issue."

As to said second method it must be said there was no attempt to allege that any of the statements in said affidavit was material to the determination of said motion for a new trial. It is true that the information contains a recital that it was "competent evidence to be received by said court" but "competent" and "material" represent two distinct and well-recognized features and the allegation of the former does not supply the lack of the latter. Nor is a single fact alleged from which we must infer that on the motion for a new trial it was important to inquire whether any fact stated in said affidavit was true. The nature of the charge against Vitro is not alleged, except that it was a criminal action. This is not sufficient, of course, to show whether it was material to inquire as to the truth of the statements in said affidavit. Nor is there any intimation as to any of the grounds for the motion for a new trial. It is conceivable that this might have been alleged in the information so as to indicate the materiality of the alleged false matter, but nothing of the kind appears. Nor is there anything to show that said statement was material to any collateral matter, such as the veracity of any witness at the trial or of any witness or affiant at the hearing of the motion for a new trial. In fine, there is an entire failure to allege any fact from which the inference would follow that such affidavit could have any legal potency in the determination of the motion.

We think these defects are too grave to be deemed cured by section 4½ of the Constitution. They relate to important and fundamental requirements of pleading, and it is of moment that at least a reasonable degree of uniformity should be maintained in a matter of practice of such significance to the orderly administration of justice.

The judgment and orders are reversed.

We concur: FINCH, P. J.; ANDERSON, Justice pro tem.

---

59 Cal. App. 623

## ALBERT STEINFELD & CO. v. BROXHOLME et al. (Civ. 3697.)

(District Court of Appeal, Second District, Division Two, California. Nov. 14, 1922. Rehearing Denied Dec. 13, 1922.)

**1. Principal and agent ⟸123(1)—Evidence held not to show authority to enter into contract.**

In an action for damages for breach of contract to install tiles, evidence *held* not to show any authority on the part of plaintiff's architect to enter into the contract in question.

**2. Principal and agent ⟸101(4)—Architect authorized to receive bids not authorized to contract.**

An architect who was told "to get other bids" for certain work to be done was not authorized to enter into a contract for such work.

On Petition for Rehearing.

**3. Principal and agent ⟸25(3)—Rule that one receiving benefits of contract cannot question authority of agent construed.**

The rule that, where one has accepted, acted upon, and received the benefits of a contract entered into by him with another as the agent of a third person, he is estopped to question the authority assumed by the agent, has no application where a person has entered into a contract with an unauthorized agent and then withdraws from it prior to its ratification or acceptance by the agent's principal without having acted thereon or receiving any benefit thereunder.

**4. Principal and agent ⟸101(4)—Authority of architect stated.**

Where an architect is employed to "prepare certain designs and sketches" for remodeling a building, his authority is no greater than that customarily exercised by an architect employed to draw plans and to supervise and direct the construction of a building, and in the absence of authority expressly or necessarily conferred by his contract of employment has no implied authority to bind his employer

by entering into a contract for the performance of labor or the furnishing of material.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

Action by Albert Steinfeld & Co. against J. W. Broxholme and another, copartners doing business under the firm name of the Los Angeles Mantel & Tile Company. Judgment for defendants, and plaintiff appeals. Affirmed.

Ward Chapman and L. M. Chapman, both of Los Angeles, for appellant.

Westervelt & Ball, of Los Angeles, for respondents.

FINLAYSON, P. J. Plaintiff, as the assignee of Harold Steinfeld and Andrew Pizzini, brought this action to recover damages claimed to have been occasioned by the breach of an alleged contract to install tiles in a flower store at Tucson, Ariz. The store was owned by plaintiff's assignors, and at the times in question was being remodeled by them. The defense was that, though defendants made an offer to install the tiles, the offer was revoked prior to its acceptance; wherefore defendants asserted that no agreement was consummated, and that therefore there was no breach of contract on their part. The trial court found for defendants, and entered a judgment in their favor accordingly. Plaintiff appeals from the judgment, claiming that the uncontradicted evidence shows that defendants' offer was accepted and that a valid and binding agreement was consummated. Whether the evidence does show this or not is the sole question in the case.

Steinfeld and Pizzini employed an architect of the name of Bray, whose place of business is at Tucson. Defendants' place of business is in Los Angeles. Some time in March, 1919, one of the defendants, J. W. Broxholme, while in Tucson informally submitted to Bray certain figures at which Broxholme said that he thought his firm might install the tiles. Bray submitted the figures to his employers, who said the amount was too high, and that they could not spend that much money. Thereafter Bray made certain changes in the plans for the purpose of reducing the cost of the tiling, and on June 10, 1919, sent the altered blueprints and sketches to defendants at Los Angeles with a request that they make a bid thereon. On June 23, 1919, one of the defendants saw Bray at Tucson, and on behalf of his firm offered to do the work under the altered plans for $1,080. Bray submitted this new bid to his principals, who rejected it and told the architect "to get other bids." They did not direct Bray to enter into a contract, but simply "to get other bids."

Somewhere about the middle of July, 1919, Bray, learning that a Mr. Watkins, a business man of Tucson, was going to Los Angeles, asked Watkins if he would call on defendants when in Los Angeles and see if they could do the work for $1,000. Pursuant to this request Watkins did call on defendants when in Los Angeles, and on July 23d saw the defendant J. W. Broxholme, discussed with him the matter of putting in another bid for the tile work, and was told by Broxholme that, if the latter's firm would be allowed to use the tiles which they then had on hand, leaving to their decision the determination of the color of the tiles, they possibly could make a bid to do the work for $1,000. Watkins then sent a telegram to Bray at Tucson as follows:

"Can arrange tile except shade. Wire Baltimore Hotel today."

In reply Bray immediately sent a telegram to Watkins simply saying, "O. K." Thereupon Watkins again called on J. W. Broxholme, told the latter that he was about to return to Tucson, and inquired whether he might tell Bray that defendants would do the work for $1,000. Broxholme told Watkins that he might so inform Bray. Whereupon Watkins asked Broxholme if he would make the offer in writing. Broxholme said he would, and thereupon wrote, signed and delivered to Watkins the letter which plaintiff claims embodies the terms of defendants' proposal. That letter is as follows:

"Los Angeles, Cal., 7/23/19. Mr. J. S. Watkins, Tucson, Ariz.—Dear Sir: Confirming our conversation of recent date, we herewith agree to furnish and install the tile work in the building for the flower store as designed by Mr. Wm. Bray at your city for the sum of $1,000.00 (one thousand dollars). All to be done as per his plans using white tile on the stairway, but it is understood that on account of the present condition for getting colored tile that we are allowed to use tile out of our present stock, matching the colors desired by Mr. Bray as near as possible. Yours very truly, L. A. Mantel & Tile Co. By J. W. Broxholme."

It does not appear when, if ever, this letter was brought to the attention of the owners of the building.

Four or five days later Watkins delivered to Bray at Tucson defendants' written offer of July 23d, and Bray, on August 1st, mailed to defendants at Los Angeles a letter reading as follows:

"Tucson, Ariz., August 1, 1919. Los Angeles Mantel & Tile Co., 1113 S. Hill Street, Los Angeles, California. Attention Mr. J. W. Broxholme: Dear Sir: Mr. Watkins has informed me that you are willing to go ahead with the tile work for job 210, 44–46 North Stone avenue, for the consideration of $1,000.00. Please find enclosed blueprints for work, and kindly mail upon receipt contract and detail for rough measurements for stairs, etc., giving us the necessary depth to keep back from face of finished work. This work is well along and I trust you will use every endeavor to expedite

your portion of it. Yours respectfully, William Bray."

On August 8, 1919, defendants mailed a letter to Bray wherein they advised him that on account of the labor situation they would be unable to do the flower store job. This letter was received by Bray in due course. Ever since sending this letter defendants have refused to recognize themselves as bound by any contract with plaintiff's assignors. Wherefore this action to recover damages for breach of the alleged contract.

[1] Appellant's claim is that defendants' letter of July 23, 1919, signed by J. W. Broxholme and by him delivered to Watkins, was an offer to do the work for $1,000, and that such offer was accepted by Watkins on the spot, or, if not, then that it was accepted on August 1, 1919, when Bray mailed to defendants his letter of that date. It is not necessary to decide whether the facts show an acceptance by either Watkins or Bray, for there is a total lack of any evidence of authority on the part of Bray to accept defendants' offer or to deputize Watkins to do so.

The only evidence to which our attention has been called respecting the nature and scope of Bray's employment is the following: Harold Steinfeld, one of plaintiff's assignors, testifying as a witness for plaintiff, was asked in what capacity and for what purpose Bray was employed, and in reply said: "To represent me in making certain improvements in the referred to property"—the Tucson property known as the "Flower Store." Bray, when on the witness stand, upon being asked what he was employed by Steinfeld and Pizzini to do, replied: "To get up some designs for remodeling the premises known as Howe's Flower Store, on Stone avenue, in Tucson." It will be recalled that Bray did not take it upon himself to accept either of the two earlier bids submitted by defendants, but that he laid each before his principals for their acceptance or rejection. And when he presented defendants' bid of $1,080 to his employers the latter did not tell him to enter into a contract at a lower and more satisfactory sum; they merely told him "to get other bids."

[2] The foregoing seems to be all the evidence bearing upon the subject of Bray's authority. At most it shows no more than that Bray was employed to render services as an architect in the remodeling of the store. As such architect he had no authority to enter into any contract for any part of the work. He might receive bids and submit them to his employers for their acceptance or rejection, but he had no authority to bind them by accepting a bid from any source. He possessed only such powers as were given him by his contract with the owners. If, without the knowledge or consent of his principals, he could contract for tiles that were agreeable to his taste and at a price which accorded with his ideas of reasonableness, he could bind his employers to pay for tiles of a color and character which they, perchance, might deem inappropriate, and he might obligate them to pay a price which might far exceed their means or their expectations. We do not think that one employed simply as an architect possesses any such wide range of authority. His duty is limited to the supervision and direction of the work that is to be done by the contractor or those acting under him.

"The authority of an architect" says the Supreme Court of Washington in Schanen-Blair Co. v. Sisters of Charity, 77 Wash. 256, 137 Pac. 468, "is not absolute. He is bound by the general rules of agency. It is nowhere made to appear in the record that the architect had any authority to bind the respondent beyond the terms of its contract with the principal contractors. * * * In the absence of an express contract, or compelling facts, it is never held, as a matter of law, that an architect has any implied power to purchase materials or to enter into a contract for or on behalf of the owner. His duties are well defined and well understood, and there is nothing pertaining to his engagement that is calculated to mislead any one dealing with him."

See, also, 5 C. J., p. 256. Bray, being without power to enter into a contract for and on behalf of his principals, was without authority to accept the offer contained in defendants' letter of July 23, 1919, or to deputize Watkins to do so. And, since defendants revoked their offer before any attempt to accept it was made by Bray's principals, it follows that there never was a consummated contract, and hence that defendants are not guilty of any breach of contract.

The judgment is affirmed.

We concur: WORKS, J., CRAIG, J.

On Petition for Rehearing.

PER CURIAM. In an application for rehearing by this court appellant claims: (1) That respondents are estopped from questioning the authority of Bray to enter into the contract on behalf of his principals, Steinfeld and Pizzini; and (2) that, even if respondents were not so estopped, there still is evidence sufficient to show that Bray did have authority to make the contract. We find no merit in either contention.

[3] 1. The doctrine of estoppel invoked by appellant in its petition for a rehearing is not applicable to the facts of this case. We do not question the rule that, where one has accepted, acted upon, and received the benefits of a contract entered into by him with another as the agent of a third person, he is estopped to question the authority assumed by the agent. That, however, is not this case. Cassin v. Marshall, 18 Cal. 689, cited by appellant, deals with facts very different from those in the case at bar. The present case

is controlled by the rule which obtains where the person who has entered into a contract with the unauthorized agent withdraws from it prior to its ratification or acceptance by the agent's principal without having acted thereon or received any benefit thereunder.

By their letter to Bray of August 8, 1919, respondents withdrew from the alleged contract which forms the basis for this action, and there is nothing in the record before us tending to show that Steinfeld or Pizzini had any knowledge of that contract prior to respondents' withdrawal therefrom. There is nothing in the record which tends to show that Bray's principals at any time prior to respondents' repudiation made any attempt to ratify their agent's unauthorized contract —assuming, without deciding, that Bray's conduct and respondents' letter of July 23, 1919, would have constituted a contract had the former possessed the necessary authority. Indeed, so far as our attention has been called to the testimony, there does not seem to be any evidence of ratification of the contract by Bray's principals prior to the commencement of the action. Until a ratification by them there was no contract binding on Bray's principals. Until, by ratifying the contract, they placed themselves in such a position that respondents could enforce it against them, Steinfeld and Pizzini were not in a position to enforce it against respondents. Until then there was no contract binding on either party. Defendants, therefore, were at liberty to withdraw when they mailed their letter of August 8, 1919, to Bray advising him that they could not do the work.

When a contract is entered into in the name of a principal without his authority, he is in no way affected thereby unless he shall choose to ratify it. If it is binding on the other party in advance of such ratification by the agent's principal, then that other party is bound by a contract which his adversary may treat as void or valid at his pleasure. On principle a contract so executed seems, at most, to amount to no more than a proposal on the part of him who executes it, from which he should have the right to recede until it has been ratified or accepted by the party whose agent exceeded his authority, when, for the first time, it becomes binding on the principal as well as on the person who dealt with the agent in ignorance of the latter's want of authority. This is the view which has received the stamp of approval by our Supreme Court. In Salfield v. Sutter, etc., Co., 94 Cal. 546, 29 Pac. 1105, the unauthorized agent had signed the name of the defendant, a corporation, to a paper which purported to be an agreement by the corporation to sell its lands. In stating the principle applicable to such a situation as is presented by the facts in the case before us, the Supreme Court in that case says:

"No doubt the corporation could have ratified it [the unauthorized contract] before the plaintiffs signified their intention not to be bound thereby, but so far as the averments of the complaint show, they did not do so. *As the corporation could have elected not to be bound, the same privilege must be accorded the plaintiffs.*" 94 Cal. 550, 29 Pac. 1106. (Italics ours.)

To the same effect is Baldwin v. Schiappacasse, 109 Mich. 170, 66 N. W. 1091. In Corpus Juris (volume 2, p. 524) the author of the article on Agency says:

"As to whether or not an unauthorized contract entered into by an agent on behalf of his principal is binding on the third party by the mere fact of ratification without any further action on his part, or whether he has a right to withdraw therefrom, the authorities are conflicting. * * * The better rule, and that supported by the weight of authority, is that until ratification the third person is free to withdraw from the contract, and if he does not do so the principal's ratification cures the defect in authority and the third person becomes thereafter bound as though the authority had been previously conferred, and he cannot thereafter withdraw except on grounds entitling him to a rescission; but if *before* the principal elects whether he will ratify, the other party signifies his intention not to be bound, *there can be no ratification*"—citing in support of this last clause Salfield v. Sutter, etc., Co., supra. (Italics ours.)

2. Were it not for the earnestness with which appellant urges upon us the contention that the evidence shows that Bray did possess authority empowering him to consummate the contract with respondents, we should not deem it necessary to add aught to what was said by us in the opinion which we handed down when we originally passed upon the merits of the appeal. After a most careful consideration of the able argument advanced by appellant's counsel in their petition for a rehearing, we find it impossible to give our assent to their contention.

[4] In the findings filed by the trial court the scope of Bray's authority is expressly defined. That court found that Steinfeld and Pizzini "employed one William Bray as their agent to prepare certain designs and sketches for remodeling said store building for and under the direction of said Harold Steinfeld and Andrew Pizzini." If this finding is justified by the evidence there can be no question as to Bray's lack of authority to enter into the contract with respondents. Where one who is an architect is employed to "prepare certain designs and sketches" for remodeling a building, his authority is certainly no greater than that customarily exercised by an architect employed to draw plans and to supervise and direct the construction of a building; and, as shown in the opinion heretofore filed, citing Schanen-Blair Co. v. Sisters of Charity, 77 Wash. 256, 137 Pac. 468, in the absence of authority expressly or necessarily conferred by his contract of employment, it never is held as a matter of law that

one who is employed simply to perform the usual services of an architect has any implied authority to bind his employer by entering into a contract with third persons for the performance of labor or the furnishing of material. It only remains, therefore, to consider whether the court's finding defining Bray's authority is supported by the evidence.

Bray himself gave an unequivocal and explicit definition of his authority by testifying that he was employed "to get up some designs for remodeling the premises known as Howe's Flower Store." The trial court accepted this definition of Bray's authority—a definition given by the agent himself—and found the fact accordingly. This the court was justified in doing, in the absence of some compelling fact or facts necessitating a different finding, and the record does not disclose any facts necessitating, or, we might even go so far as to say, warranting, a different finding. It is true that, as pointed out by appellant in its petition for a rehearing, Harold Steinfeld testified that Bray was employed "to represent me in making certain improvements in the referred to property." But this testimony by one of Bray's principals does not necessitate the conclusion that the scope of Bray's authority at all exceeded the limits specified in the finding made by the trial court. Steinfeld did not tell the court how Bray was to represent him "in making certain improvements in the referred to property." For aught that is disclosed by Steinfeld's testimony, Bray may have been employed by his principals to represent them in any one of a number of possible ways "in making certain improvements" on the property. But Bray, who was an architect, not a builder, tells us exactly how he was to represent his employers and what he was to do "in making certain improvements in the referred to property." He tells us that he was employed to represent them by getting up "some designs for remodeling the premises." When considered in the light of all the evidence in the case, the most logical inference to be deduced from Steinfeld's testimony that Bray was employed to represent him "in making certain improvements in the referred to property" is that Bray, an architect, was simply employed to "prepare certain designs and sketches," just as the court found. And, even if Bray did receive bids prior to the making of the contract sued upon, and even if he did submit such bids to his employers for their approval, his conduct in that regard would indicate no more than that his principals recognized him as possessing the powers usually exercised by an architect employed to draw plans and to supervise and direct the erection of a building. One so employed, as we have shown, does not possess any authority to bind the owner by entering into contracts in the owner's name, for and on the owner's behalf.

The petition for rehearing is denied.

---

59 Cal. App. 674

## MacKEOWN v. BALDWIN. (Civ. 4308.)

(District Court of Appeal, First District, Division 2, California. Nov. 17, 1922.)

**Physicians and surgeons ⟹18(4)—Complaint for malpractice held not to state cause of action.**

Complaint in action for malpractice consisting in injury to leg during treatment for strained ligaments *held* insufficient to show that defendant did anything which under the particular circumstances he should not have done or omitted to do something which he should have done.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Lillian B. MacKeown against Dr. Walter I. Baldwin. Judgment for defendant, and plaintiff appeals. Affirmed.

Southard M. Modry, of San Francisco, for appellant.

Hartley F. Peart, of San Francisco (Charles V. Barfield, of San Francisco, of counsel), for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover damages for alleged malpractice. To plaintiff's seventh amended complaint the trial court sustained a demurrer without leave to amend, and later signed and caused to be entered a judgment in favor of the defendant for his costs. From the judgment so rendered, the plaintiff has appealed.

In her seventh amended complaint the plaintiff inserted formal allegations to the effect that the defendant was a physician and surgeon; that on the 12th day of July, 1919, the plaintiff injured her right leg by straining the ligaments; that about the 1st day of September, 1919, she employed the defendant; that at that time one Sigrid Stohl was a nurse in the employ of the defendant, and then the plaintiff states the charging part of her cause of action in paragraph V as follows:

"That on or about the 1st day of September, 1919, said defendant entered upon said employment as physician as aforesaid, to treat, heal and cure the right leg of said plaintiff. That at or about said time said defendant instructed the said Sigrid Stohl, who was then and there in his employ as aforesaid, to bend the right leg of plaintiff backward and forward a great many times. That defendant so instructed the said Sigrid Stohl to bend the leg as aforesaid to the right and left, which bending caused said

leg to tear the ligaments thereof at a point near the knee and caused the said ligaments to become broken and torn from the flesh. That the said twisting and bending of the said knee by the said Sigrid Stohl was so done by the expressed orders of the said defendant and that the said defendant was careless and negligent in this, to wit, the said defendant told the said Sigrid Stohl to bend the right leg of plaintiff to the right and left, backward and forward, as aforesaid. That the bending, twisting, and exercising the right leg as aforesaid caused the tearing of the ligaments as aforesaid, and said ligaments would not have been torn if the said defendant had not instructed the said Sigrid Stohl to treat said leg as aforesaid. That the said defendant was negligent and careless in prescribing said treatment as aforesaid."

The defendant demurred on numerous grounds. Among others, the defendant alleged:

"That said seventh amended complaint is uncertain in this, that it does not appear therein, nor can it be ascertained therefrom, what act or conduct on the part of this defendant is inconsistent with due and proper care of the plaintiff; how or in what way or manner this defendant was negligent, or careless, or of what his said alleged negligence or carelessness consists; how or in what way or manner defendant could have been negligent in merely instructing the masseuse to bend the leg of plaintiff; whether said alleged bending was not the proper treatment of plaintiff; whether the condition of plaintiff's leg was such that it was improper to bend the same; whether defendant ever instructed the said masseuse to twist plaintiff's leg or knee; and whether she ever, in fact, twisted plaintiff's leg or knee."

Turning to the charging part of the complaint quoted above, it is patent that the defendant's instruction to his assistant was "to bend the right leg of plaintiff backward and forward a great many times." It is true that the pleader in the next sentence charges:

"That defendant so instructed the said Sigrid Stohl to bend the leg as aforesaid to the right and left which bending caused said leg to tear the ligaments," etc.

But further down such expression is clarified as showing the pleader did not mean to state that the leg was to be bent sideways to the right and sideways to the left, but the bending to the right and left was to be backward and forward. It is clear that the pleader does not aver that the leg was to be twisted, although the pleading contains language from which that inference might be drawn. The pleader evidently thought he was within his rights in averring that a ligament was torn by reason of the operation, but the pleader evidently overlooked the fact that in many proper operations it is an essential part of the operation to tear ligaments. In other words, the mere matter of the tearing of a ligament is not actionable. If by reason of a spraining or some other injury an adhesion has taken place, it would seem to be elementary that relief can be had only by forcibly and with more or less violence tearing the ligament loose. It is not, therefore, malpractice to tear loose a ligament, but many other factors must be considered to constitute such an act malpractice.

"Negligence on the part of a physician consists in his doing something which he should not have done, or in omitting to do something which he should have done." McGraw v. Kerr, 23 Colo. App. 163, 128 Pac. 870.

Now in the pleading before us there is no averment of any fact or facts showing that the defendant did anything which under the particular circumstances he should not have done, nor is there any averment that under certain circumstances he omitted to do something which he should have done. These omitted circumstances should have been enumerated (if in fact they existed), and thereupon the pleader should have predicated his contention that under such circumstances, naming them, the alleged bending was not the act of a person reasonably skillful in his profession. Thereafter, on the trial of the case, experts could be called to give testimony for and against such contention. In no other way can some cases sounding in malpractice be proved. McGraw v. Kerr, 23 Colo. App. 163, 128 Pac. 870. Taking the appellant's pleading by and large, and supposing that hereafter the plaintiff should take the stand and prove every single word which she has directly alleged, her proof would not constitute a cause of action to go before the jury, for there would be nothing to guide the jury as to whether the defendant had skillfully prescribed a bending, or whether his prescription was not reasonably skillful. In what we have just said we do not mean to be understood as stating that a doctor may prescribe a violent bending of the leg from side to side, and that such bending, if alleged, must be followed by additional averments, but in that behalf we do not understand the plaintiff by her complaint to make any such allegation, and, furthermore, the defendant's demurrer was directly addressed to that subject and to the subject of twisting. As the plaintiff's complaint was her eighth attempt, it is not reasonable to believe that the defendant was being charged with either a side bending or a twisting as lastly referred to by us.

The trial court did not err in sustaining the demurrer. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

(59 Cal. App. 590)

**CRAIN v. SUMIDA et al. (Civ. 3680.)**

(District Court of Appeal, Second District, Division 2, California. Nov. 10, 1922. Rehearing Denied by Supreme Court Jan. 8, 1923.)

**1. Trial ⟸331—Verdict held not inconsistent.**

A verdict in favor of plaintiff for loss of use of automobile against a certain defendant, and "in favor of defendant that plaintiff take nothing," *held* not to contain a fatal inconsistency where, from a consideration of the whole record, it was clear that the concluding sentence of the verdict was intended to refer solely to another defendant, and was a finding or verdict in his favor.

**2. Trial ⟸331—Verdict certain if it can be made certain.**

A verdict is sufficiently certain if it can be made so by reference to the pleadings or the record, and the entire record should be searched and all parts interpreted together, so that a possible deficiency in one place may be cured by what appears in another.

**3. Appeal and error ⟸1073(1)—A defendant cannot complain that judgment made no disposition as to another defendant.**

Failure to enter judgment determining the right of one defendant was an illegality which did not affect any of the substantial rights of another defendant, and he could not complain thereof on appeal.

**4. Trial ⟸326—Form of verdict given to jury held not erroneous.**

In an action for injury to an automobile and for loss of use, defendant was not prejudiced by form of verdict suggested to the jury, "We, the jury, find for plaintiff against defendant ——— (naming him), and fix plaintiff's damages for injury to his automobile in the sum of $——— (naming amount), [and] further find in favor of plaintiff for loss of use of automobile * * * and fix plaintiff's damages therefor in the sum of $———," in that it in effect charged the jury that if they found for plaintiff they must allow him damages both for injury to his automobile and for loss of its use, where it was established by uncontradicted evidence that plaintiff's automobile did sustain injuries in the collision, and that he was deprived of its use while it was being repaired.

**5. Master and servant ⟸330(3)—Sufficient evidence to show automobile driver's agency.**

The fact that defendant was the owner of a motor truck, and that the chauffeur driving it at time of collision had been employed to drive it, if it stood as the sole evidence of agency, would have sufficed to justify an inference that such chauffeur was acting as defendant's agent at the time of the collision.

**6. Master and servant ⟸330(3)—Evidence held to show chauffeur's agency.**

In an action for injuries to an automobile in a collision, evidence *held* to warrant a finding that defendant's driver was acting within the scope of his employment at the time of the accident.

**7. Damages ⟸174(1)—Rental value admissible on question of damages for loss of use of automobile.**

In action for damages for injury to automobile and loss of its use, testimony as to rental value of such an automobile was admissible, not as furnishing the exact measure of damages for loss of use, but as a fact to be considered in ascertaining the extent of the injury due to plaintiff's being deprived of the use of the car while it was undergoing repairs.

**8. Damages ⟸188(1)—$300 held not excessive for loss of use of automobile.**

In an action for injury to automobile and for loss of use during one month when repairs were being made, evidence *held* sufficient to sustain a finding that plaintiff was damaged in the sum of $300 for loss of use.

**9. Damages ⟸188(2)—$1,150 not unwarranted nor excessive for injury to Chalmers car.**

A verdict for $1,150 was not unwarranted by the evidence, nor excessive, for injuries to a Chalmers automobile in a collision, where an expert testified that in his opinion the market value of the automobile immediately prior to accident was $1,950, and that immediately thereafter it was not worth more than $300 or $400.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by W. R. Crain against H. Sumida and another. Judgment for plaintiff, and named defendant appeals. Affirmed in the District Court of Appeal, and hearing denied in the Supreme Court.

Bradley & Bradley, of Visalia, for appellant.

D. E. Perkins and Farnsworth, McClure & Burke, all of Visalia, for respondent.

FINLAYSON, P. J. This action was brought against H. Sumida and K. Sumida to recover damages alleged to have been sustained by plaintiff in a collision between his automobile and an auto delivery truck, the driver of which was alleged by plaintiff to be an employee of both defendants. Plaintiff recovered a verdict against the defendant H. Sumida for the sum of $1,450. From a judgment entered on that verdict, H. Sumida has taken this appeal.

It developed at the trial that the delivery truck, instead of being the property of both defendants, was the property of H. Sumida only, by whom it was used in a general merchandise business of which he was the sole proprietor. The business was conducted under the fictitious name of "H. Sumida Company," and was managed by appellant's brother, the defendant K. Sumida. The truck was used in the business for the purpose of delivering groceries and other general merchandise. At the time of the accident it was being driven by an employee of appellant, one G. Takeshita, who was em-

ployed to solicit for and take orders from customers and to make deliveries. Defendants' main contention at the trial was that Takeshita was ill on the day of the accident, and that he was not then acting within the scope of his authority as agent for either defendant. In addition to an answer denying any liability on the part of either of them, defendants filed a cross-complaint wherein they alleged that the collision was due to plaintiff's negligence, and prayed that the defendant H. Sumida, the owner of the truck, recover damages for the injuries which were received by his vehicle when it collided with plaintiff's automobile.

Before the jury retired it was furnished with certain blank forms of verdict. These forms were worded in such a way that the jury might make its verdict conform to any one of the three or four possible conclusions at which it was conceivable they might arrive. The jury filled out all but one of the blank spaces in one of the forms of verdict so provided them, and returned a verdict as follows:

"We, the jury, find for plaintiff that defendants take nothing by their cross-complaint in this action. We, the jury, find for plaintiff against defendant H. Sumida, and fix plaintiff's damages for injury to his automobile in the sum of $1,150. We, the jury, further find in favor of plaintiff for the loss of use of his automobile against said defendant H. Sumida, and fix plaintiff's damages therefor in the sum of $300. And we further find in favor of defendant ——— that plaintiff take nothing."

[1, 2] Appellant earnestly insists that there is a fatal inconsistency between that part of the verdict wherein the jurors find that plaintiff recover of the defendant H. Sumida the sums of $1,150 and $300 and the concluding part wherein they declare that they "find in favor of the defendant ——— that plaintiff take nothing." From a consideration of the whole record, we think it clear that this concluding sentence of the verdict must be taken as referring solely to the defendant K Sumida, and that it is a finding or verdict in his favor only. If this be so, then there is no conflict between the concluding sentence and those preceding portions of the verdict whereby the jurors find for plaintiff against appellant, the defendant H. Sumida, and fix the damages recoverable against him at $1,150 and $300, respectively. "Id certum est quod certum reddi potest;" and a verdict is sufficiently certain if it can be made so by reference to the pleadings, the evidence or the record. 38 Cyc. pp. 1877, 1878. In determining the sufficiency of the verdict the entire record should be searched, and all the parts interpreted together, so that if possible a deficiency in one place may be cured by what appears in another. It appears from the record before us that the blank forms with which the jurors were furnished before retiring to deliberate were given them with certain appropriate instructions as to filling in the blank spaces. Thus, among other things, the jurors were instructed as follows:

"If you find for plaintiff, and also find that the driver of said delivery car was in the employ of only one of said defendants at the time of said accident, then the form of your verdict should be: 'We, the jury, find for plaintiff against defendant ——— (inserting name) and fix plaintiff's damages for injury to his automobile in the sum of $———. We, the jury, further find in favor of plaintiff for loss of use of automobile against said defendant ——— (inserting the name) and fix plaintiff's damages therefor in the sum of $———. And we further find in favor of defendant ——— (inserting the name of defendant not liable).'"

This was the form of verdict adopted by the jury, showing thereby that they concluded that the driver of the truck did negligently collide with plaintiff's automobile while acting in the course of his employment, but that he was in the employ of only one of the defendants, and that therefore they intended to return a verdict against that defendant only. By specifically finding against appellant and fixing the damages which he should pay it is manifest that, when the jurors declared that they "find in favor of defendant ———," they meant thereby that they found in favor of K. Sumida, the only defendant in the action other than appellant, and that as to the defendant K. Sumida, and as to him only, the plaintiff was to take nothing. This construction is fully justified by the record, and accords with the rule that verdicts are to receive, if possible, such a construction as will uphold rather than defeat them. 38 Cyc. p. 1878.

[3] The judgment recites the verdict and adjudges that plaintiff recover of the defendant H. Sumida a total of $1,450, together with plaintiff's costs, but it fails to make any mention of the defendant K. Sumida, as to whom the jury had found, in effect, that the plaintiff take nothing; and no judgment has been entered either in favor of or against K. Sumida. A judgment is defined by our statute (Code Civ. Proc. § 577) to be "the final determination of the rights of the parties in an action or proceeding"; and appellant now claims that there can be but one judgment rendered on a verdict, and that such judgment should be one which finally determines the rights of all the parties in accordance with the verdict. Without doubt the defendant K. Sumida was entitled to have the judgment adjudicate that plaintiff take nothing as against him; but the failure to enter a judgment which determines the rights of K. Sumida as well as the rights of each of the remaining parties to the action was an irregularity which did not affect any of the substantial rights

of H. Sumida, the only party who is here seeking a reversal of the judgment. Appellant is not prejudiced by the irregularity, and he therefore may not successfully assign it as reversible error.

[4] The complaint alleges two distinct items of damage. It alleges, first, that the automobile was damaged in a certain sum, and, secondly, that plaintiff was further damaged by being deprived of its use while it was undergoing repairs. Though the answer does not directly and specifically deny the second item of damage, the case seems to have been tried upon the theory that the denials are sufficient to raise an issue as to both classes of damage, and we therefore shall assume that both were properly denied. As we have seen, the court instructed the jurors that, if they found that plaintiff was entitled to recover, but that the driver of the delivery truck was in the employ of only one of the defendants, then the form of their verdict should be, in part, as follows:

"We, the jury, find for plaintiff against defendant ——— (naming him) and fix plaintiff's damages for injury to his automobile in the sum of $——— (naming amount), * * * [and] further find in favor of plaintiff for loss of use of [his] automobile * * * and fix plaintiff's damages therefor in the sum of $———."

Appellant argues that by submitting this form of verdict to the jurors they were in effect instructed that, if they found for plaintiff, they must allow him damages both for injury to his automobile and for loss of its use, even though thy might believe that plaintiff suffered damage as to one only of the two alleged items of injury.

It was established by uncontradicted evidence that plaintiff's automobile did sustain injuries in the collision, and that he was deprived of its use while it was being repaired. The form of verdict given to the jury could not possibly have injured appellant when considered in the light of this evidence and in connection with the court's whole charge. Elsewhere in its instructions the court was careful to say that it was the duty of the jury to determine whether plaintiff's car was injured as the result of the alleged negligence, and that, if it was injured, but not totally destroyed, the measure of damages for such injury was the difference between the market value before and after the collision; also that, if plaintiff was entitled to any damage for the loss of the use of his automobile, the damage for such loss should be estimated upon the basis of the period of time it was necessary for plaintiff to repair his car, and that the damages therefor should not exceed the reasonable rental value during that period. In view of these instructions we fail to see how appellant could have been prejudiced by the suggested form of verdict.

[5, 6] It next is contended that the evidence is insufficient to sustain the implied finding that Takeshita, the driver of appellant's auto delivery truck, was acting within the scope of his employment at the time of the accident. The fact that appellant was the owner of the truck, and that Takeshita had been employed to drive it, if it stood as the sole evidence of agency, would have sufficed to justify the inference that Takeshita was acting as appellant's agent at the time of the accident. McWhirter v. Fuller, 35 Cal. App. 288, 170 Pac. 417. But K. Sumida, the resident manager of the business, as well as K. Sumida's wife and a young man employed in appellant's store, testified that Takeshita was ill on the day of the collision, and that for that reason he had "laid off" and was not working for his employer on that day. Another witness testified that Takeshita visited his ranch on the day in question, and that he did not come there to deliver any goods for his employer. Takeshita was not produced as a witness. K. Sumida and his wife, both of whom seem to have worked in the store on the day of the accident, and also the young man who worked about the store, may have learned from some source that Takeshita was ill, and they may have been told that he was unable to work during any part of the day in question, and they may honestly have believed that he performed no duty whatever for his employer during any part of that day. Nevertheless, they were not with Takeshita when he carelessly collided with plaintiff's automobile, and it is possible that, as the day wore on, Takeshita felt so much better that he was able to and in fact did seek orders from his employer's customers or make deliveries of groceries. There is no testimony that is necessarily, directly, and inherently inconsistent with this possibility, and, on the other hand, there is testimony which tends to support it and to show that it was an actuality. In support of plaintiff's case the following facts were testified to: It is customary to put in little boxes the groceries which are to be delivered to appellant's customers. It also is the custom of the driver to solicit orders on one day and to deliver the goods on the next. Immediately after the collision there were found in the truck a few groceries and some boxes with Sumida's name thereon, apparently ready for delivery, and also some oil cans. There also was found in the truck the order book with the name "H. Sumida Company" written on it. From these facts we cannot say that the jury was not warranted in inferring that Takeshita was engaged in delivering groceries for appellant at the time of the accident.

[7, 8] Appellant's next point is that there is no evidence to support the verdict for the amount awarded as damages by reason of

plaintiff's loss of the use of his automobile. Plaintiff did not have his car repaired until about two months after the accident, and it seems that when it was taken to the repair shop it took about a month to do the necessary work. For this deprivation of use during the month that his property was being repaired the jury awarded plaintiff the sum of $300. Plaintiff testified that prior to the accident the injured automobile had been used by him as a demonstration car in making sales of Chalmers automobiles, for which make of car he seems to have had the agency. He also testified that his damage by being deprived of the use of the car in his business during the time that the repairs were being made amounted to $400 a month. Another witness testified that the reasonable rental value of such a car during the time that the repair work was being done was $20 a day. This testimony as to rental value was admissible, not as furnishing the exact measure of damages, but as a fact to be considered in ascertaining the extent of the injury due to plaintiff's being deprived of the use of the car while it was undergoing repairs. Dettmar v. Burns Bros., 111 Misc. Rep. 189, 181 N. Y. Supp. 146; Meyers v. Bradford (Cal. App.) 201 Pac. 471. We think that the evidence as to rental value was sufficient to sustain a finding that plaintiff was damaged in the sum of $300 by reason of being deprived of the use of his car during the month that the needed repairs were being made.

[9] Lastly, it is claimed that the amount allowed for injuries to plaintiff's car, $1,150, was excessive and not warranted by the evidence. Plaintiff, who qualified as an expert, testified that in his opinion the market value of his automobile immediately prior to the accident was $1,950, and that immediately thereafter it was not worth more than $300 or $400. This was sufficient to justify a finding of $1,150 as the amount of damages to the car. Appellant calls our attention to the fact that after the car was repaired plaintiff refused an offer of $1,000 for it. But manifestly the car was worth much more after the repairs were made than it was immediately following the accident.

We find no reversible error in the record. The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

On Petition for Rehearing in Supreme Court.

PER CURIAM. The petition for a rehearing in this action is denied.

The opinion contains the following paragraph assumed to be taken from 38 Cyc. pp. 1877, 1878, to wit:

"And a verdict is sufficiently certain if it can be made so by reference to the pleadings, the evidence or the record."

We withhold our approval of this statement so far as it purports to say that the verdict can be made certain by reference to the evidence.

SHAW, C. J., and LAWLOR, WILBUR, LENNON, WASTE, SEAWELL, and KERRIGAN, JJ., concur.

190 Cal. 233

## In re UNDERHILL'S ESTATE.

## BRYSON v. UNDERHILL et al.

(L. A. 7317.)

(Supreme Court of California. Dec. 26, 1922.)

**Descent and distribution ⊜56—Issue of predeceased spouse do not participate in estate of surviving spouse leaving issue by an earlier marriage.**

Where a widow with two children marries a widower with one son, who predeceases her, leaving her and his son equal shares of his estate, and she marries again and predeceases her third husband, there being no issue by either the second or third marriages, *held*, under Civ. Code, § 1386, subd. 8, that her estate went to the surviving third husband and the two children by the first marriage, excluding the son of the deceased second husband.

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Proceeding by Frank Bryson against J. C. Underhill, administrator of the estate of Elizabeth M. Underhill, and another. From an order denying petitioner any participation in the estate, he appeals. Affirmed.

George L. Greer, of Los Angeles, for appellant.

G. P. Adams, W. W. Orme, and C. E. Spencer, all of Los Angeles, for respondents.

WASTE, J. This is an appeal from an order denying petition for final distribution. Elizabeth M. Underhill, the decedent, was married three times. She was first the wife of one Macy, by whom she had two children, Paul Macy and Grace Park, both of whom are living. Upon the death of Macy she married John Bryson, whose wife was dead. Bryson had one son by his former wife, Frank Bryson, the appellant herein. Of the marriage of Elizabeth and Bryson there was no issue. John Bryson died, leaving a last will, by the terms of which his wife, Elizabeth, and his son, Frank Bryson, were made residuary legatees. Upon distribution of his estate the sum of $6,597.93, and certain personal property, were distributed to Elizabeth. After the death of Bryson, Elizabeth married J. C. Underhill, who survives her, and by whom she had no issue. She died intestate. In due time J. C. Underhill, the surviving husband and the administrator of her estate, who is one of the respondents here, filed his final account and petition for the distribution of her estate, alleging himself and Paul Macy and Grace Park, the surviving children of Elizabeth by her first marriage, to be the only heirs at law. Frank Bryson, the appellant, thereupon filed a petition, alleging himself to be an heir at law of Elizabeth Underhill by reason of her marriage to his father, and prayed for distribution to himself of a share of the estate, consisting in part of the money and personal property distributed to his stepmother upon the death of his father, which has already been mentioned. The court settled the account of the administrator and determined J. C. Underhill, the surviving husband, Paul Macy and Grace Park, the son and daughter of the decedent, to be the only heirs at law, ordered distribution of the residue of the estate to them, and denied the petition of Frank Bryson for partial distribution to himself. From this order the appeal is taken.

In contending that he is an heir at law of Elizabeth M. Underhill, deceased, in that he is a son of John M. Bryson, the predeceased spouse of the decedent, and is therefore entitled to that portion of her estate that was received by her upon distribution of the estate of said Bryson, appellant relies upon section 1386, subd. 8, of the Civil Code, relating to succession and distribution of property of deceased persons who die without disposing thereof by will, which provides in part, so far as this case is concerned, that if the deceased is a widow, and leaves no issue, and the estate, or any portion thereof, was common property of such decedent and her deceased spouse, while such spouse was living, such property goes in equal shares to the children of such deceased spouse. If the estate, or any portion thereof, was separate property of such deceased spouse, while living, and came to such decedent from such spouse by descent, devise, or bequest, such property goes in equal shares to the children of such spouse.

Appellant contends that the decedent, although the wife of J. C. Underhill, was, for the purposes of distribution of her estate, the widow of John Bryson. Even if this were so, a point which we do not now need to decide, the decedent was assuredly not a widow who left no issue. In its narrowest sense the word "issue" has been held to mean "children." The more liberal tendency is "to construe 'issue,' where its meaning is unrestricted by the context, as including all lineal descendants." Jackson v. Jackson, 153 Mass. 374, 377, 26 N. E. 1112, 1113 (11 L. R. A. 305, 25 Am. St. Rep. 643).

Subdivision 8 of section 1386, when first enacted as part of the Civil Code (designated subdivision 9), provided that, if the decedent be a widow, or widower, and left "no kindred," the estate should be distributed in a certain manner. Am. to Civ. Code 1880, p. 14. The word "kindred" was used until 1905, when the section was amended to read, "If the decedent is a widow, or a widower, and leaves no issue," distribution shall be in accordance with its provision. Stats. 1905, p.

608. The change was made for a purpose. Before the amendment the "kindred" of the decedent, however remote and collateral, would succeed to the estate to the exclusion of the children of the deceased spouse. The amendment restricted such right of succession to the "issue" of the decedent. There is nothing in the subdivision or in the section which leads to the conclusion that the Legislature intended to provide that, if the decedent, a widow or widower, died without issue by her or his deceased spouse, the succession should be to the kindred of such spouse. We do not feel impelled to write such a condition into the section, for the other provisions of the statute relating to descent and distribution do not require the adoption of such a construction. None of the California cases construing this provision of the Code involved the rights of children of the decedent, but the court has, in a number of instances, assumed that its provisions applied only in the absence of a will and issue. Estate of Page, 181 Cal. 537, 539, 185 Pac. 383; Estate of Simonton, 183 Cal. 53, 55, 190 Pac. 442; Estate of Brady, 171 Cal. 1, 4, 151 Pac. 275.

The order appealed from is affirmed.

We concur: SHAW, C. J; SLOANE, J.; LENNON, J.; LAWLOR, J.; WARD, J.; WILBUR, J.

---

190 Cal. 236

## PEOPLE v. WELTON et al. (Cr. 2471.)

(Supreme Court of California. Dec. 29, 1922.)

**1. Indictment and information ⟹154—Objection that information does not substantially conform to statute, if not taken by demurrer, waived.**

Under Pen. Code, §§ 950–952, the objection to an information that it does not substantially conform to the requirements of the statute is one which must be taken by demurrer, and, if not so taken, the objection is waived.

**2. Criminal law ⟹300, 970(7)—Indictment and information ⟹154—Objection that information does not state a public offense not waived by failure to demur, but may be taken under plea of not guilty or by motion in arrest.**

Under Pen. Code, § 1012, the objection to an indictment or information that the facts stated therein do not constitute a public offense is not waived by failure to demur, but may be taken at the trial under a plea of not guilty or after the trial in arrest of judgment.

**3. Indictment and information ⟹154—Objections to information as to form not demurred to held waived.**

In a prosecution for syndicalism where a defect in the information to which the defendants for the first time pointed out in their motion in arrest of judgment was not a defect of substance, but of form, consisting in the absence of that particularity, which, in view of the peculiar nature of the offense, might be necessary in order to enable the defendants to properly prepare for and make their defense, it was such a defect as the defendants should have urged upon demurrer, and, not having done so, such objection was waived under the express provisions of Pen. Code, §§ 1004, 1012, and 1185.

**4. Criminal law ⟹1167(1)—Defendants held not prejudiced by failure of information to particularly describe documents.**

In a prosecution for criminal syndicalism where, in his opening statement, the district attorney announced that the particular books, papers, pamphlets, documents, and written and printed matter advocating and advising criminal syndicalism, and referred to in the information, were the literature taken from the headquarters of defendants at the time of the arrest, and such documents were introduced in evidence and identified without objection on the part of defendants, the defendants were not prejudiced by reason of the alleged defect in not particularly describing such documents in the information.

In Bank.

Appeal from Superior Court, Alameda County; George Samuels, Judge.

Howard Welton and others were convicted of the crime of syndicalism, and they appeal. Affirmed.

Wm. F. Cleary and Wm. B. Cleary, both of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

RICHARDS, Justice pro tem. This is an appeal prosecuted on behalf of all of the defendants from a judgment of conviction for the violation of certain of the provisions of the act of the Legislature approved April 30, 1919, commonly known as the "Criminal Syndicalism Act" (Stats. 1919, p. 281). The information in which the defendants were jointly charged embraced five counts charging a violation by the defendants of each of the five subdivisions of said act, each in the language of the act. No demurrer was interposed to the information in this form, but the defendants went to trial upon the general plea of not guilty. After a lengthy trial the jury returned a verdict finding the defendants not guilty upon the first four counts in said information, but guilty as charged in the fifth count thereof. The charging portion of the fifth count in said information was in the following form:

"The said Howard Welton, Michael J. Dunn, Patrick Casey, James McLaughlin, John Hannan and George Ryan, prior to the time of filing this information, and on or about the 26th day of June, A. D. nineteen hundred and twenty-one, at the said county of Alameda, state of California, did then and there unlawfully, willfully, wrongfully, deliberately and feloniously print, publish, edit, issue, circulate and publicly display books, papers, pamphlets, documents,

posters and written and printed matter containing and carrying written and printed advocacy, teaching and aid and abetment of and advising criminal syndicalism."

Upon motion in arrest of judgment the defendants for the first time urged:

"(3) That the said information or the fifth count thereof does not substantially conform to the requirements of section 950 and 951 of the Penal Code; (4) that the said information, or the fifth count thereof, does not substantially conform to the requirements of section 952 of the Penal Code, in that the particular circumstances of the offense are not alleged with certainty in the following particulars; (1) Count 5 fails to set forth the words, language and matter either in their very words and language, or in the substance thereof, of the written and printed matter, magazines, pamphlets, documents and publications, and which it is alleged contain and carry written and printed matter advocating, teaching, aiding, abetting and advising criminal syndicalism; that the said count fails to give the names, dates of issue or editions of said printed matter, magazines, pamphlets, documents and publications alleged therein; that the said count is not a statement of ultimate facts, but merely conclusions of law as to the nature and character of said written and printed matter, etc., alleged therein."

The defendants' motion for a new trial and also their motion in arrest of judgment upon the foregoing grounds was denied by the trial court and the judgment upon conviction followed, from which judgment this appeal has been taken.

[1] The first contention presented by the defendants upon this appeal is that the information is fatally defective in the respects urged in their motion in arrest of judgment. Section 1185 of the Penal Code provides for a motion in arrest of the judgment and for the grounds on which said motion may be based. It reads in part as follows:

"It may be founded on any of the defects in the indictment or information mentioned in section 1004 unless the objection has been waived by a failure to demur."

Section 1004 of the Penal Code provides for demurrer to the indictment or information on five separate grounds, the two of which are applicable to the instant situation, being subdivisions 2 and 4 thereof, which read as follows:

"(2) That it does not substantially conform to the requirements of sections 950, 951 and 952. * * * (4) That the facts stated do not constitute a public offense."

Section 1012 of the Penal Code reads as follows:

"When the objections mentioned in section one thousand four appear on the face of the indictment or information, they can only be taken by demurrer, except that the objection to the jurisdiction of the court over the subject of the indictment or information, or that the facts stated do not constitute a public offense, may be taken at the trial, under the plea of not guilty, or after the trial, in arrest of judgment."

It appears from the foregoing excerpts from the Penal Code that as to the two separate grounds of demurrer above referred to, the objection that the indictment or information does not substantially conform to the requirements of sections 950, 951, and 952 of the Penal Code is one which must be taken by demurrer and that it is waived if not so taken (People v. Jim Ti, 32 Cal. 60; People v. Swenson, 49 Cal. 388; People v. Chuey Ying Git, 100 Cal. 437, 34 Pac. 1080; People v. Ellenwood, 119 Cal. 166, 51 Pac. 553; People v. Rodley, 131 Cal. 240, 63 Pac. 351); while the objection that the facts stated do not constitute a public offense is not waived by failure to demur, but may be taken at the trial under a plea of not guilty, or after the trial, in arrest of the judgment.

[2] The information was, as we have seen, as to those counts in the language of the statute. In the early case of People v. Saviers, 14 Cal. 29, it was held that where a statute introduces a new offense it will be sufficient if the indictment described the offense in the terms of the act. In the case of Ackley v. United States, 200 Fed. 217, 221, 118 C. C. A. 403, 407, the rule is thus stated:

"If the crime charged existed at common law, and is denounced by name only by statute, then the indictment must contain averments covering the common-law ingredients. If the crime is statutory, the indictment is sufficient if the averments are in the language of the statute, unless generic or general or common-law terms are used, in which case the indictment must be more specific, so that a defendant of ordinary understanding may comprehend what is charged."

In the case of People v. Cronin, 34 Cal. 191, this court upheld an indictment for murder in the language of the statute, notwithstanding the rule of the common law that the manner and means by which a homicide was committed should be stated in the indictment, and in so doing said:

"The only reason assigned by the common law, why the manner and means by which the homicide was committed should be stated in the indictment, was that the defendant might be fully informed as to the case against him, and thereby enabled to prepare for his defense. As we had occasion to remark in the case of People v. King, 27 Cal. 510, this reason of the common law was but a flimsy pretext, for, if the defendant was guilty, he stood in no need of information [as to the means by which he committed the crime]; and if not guilty, the information, that he did the act in a particular way, or by the use of particular means, could not assist him in the preparation of his defense."

The case of People v. Cronin has been generally followed by this court in later decisions. People v. Murray, 67 Cal. 103, 7 Pac.

178; People v. Giacamella, 71 Cal. 48, 12 Pac. 302; People v. Rozelle, 78 Cal. 84, 20 Pac. 36; People v. O'Brien, 96 Cal. 171, 31 Pac. 45; People v. Frigerio, 107 Cal. 151, 40 Pac. 107; People v. Page, 116 Cal. 386, 48 Pac. 326; People v. Hunt, 120 Cal. 281, 52 Pac. 658; People v. Witt, 170 Cal. 104, 148 Pac. 928; People v. DeMartini, 25 Cal. App. 9, 142 Pac. 898. See, also, State v. Hennessy, 114 Wash. 351, 195 Pac. 211.

[3] In the light of these authorities it must be held that the defect in the information which the defendants for the first time point out in their motion in arrest of judgment was not a defect of substance, but of form, consisting in the absence of that particularity, which, in view of the peculiar nature of the offense, might be necessary in order to enable the defendants to properly prepare for and make their defense. This being so, it was such a defect as the defendants should have urged upon demurrer. Not having demurred to the information upon that ground, the objection must be held to have been waived under the express provisions of sections 1185, 1004, and 1012 of the Penal Code. In making the contention that the information herein is fatally defective the appellants rely upon certain expressions of this court in the case of People v. Taylor, 187 Cal. 378, 203 Pac. 85, to the effect that an indictment or information charging a violation of this subdivision of the criminal syndicalism act would be insufficient in the absence of a particular statement of the pamphlets, papers, or other writings, or of their contents, the circulation of which was alleged to constitute a violation of the terms of said act. In that case, however, there was a demurrer to the indictment upon the ground that the same did not substantially conform to the requirements of sections 950, 951, and 952 of the Penal Code. In the case of People v. Wieler (Cal. App.) 204 Pac. 410, upon which the appellants also rely, there was also a demurrer to the information upon the same ground. The other decisions by the courts of this state cited by the appellants as seeming to support a different rule were either cases of prosecutions for offenses sounding in fraud, which require a particular statement of the facts constituting the fraud under well-settled rules of pleading, or were libel cases wherein the statement of the particular words of the alleged libel is necessary in order to state the gravamen of the offense; or else are cases wherein demurrers were presented to the pleadings which were the subject of criticism upon appeal.

[4] There is another sufficient answer to the appellants' contention that they are entitled to take advantage of the alleged defect in the information herein upon this appeal. When the cause was called for trial, the district attorney in his opening statement to the jury announced that the particular books, papers, pamphlets, documents, and written and printed matter advocating and advising criminal syndicalism as defined in the statute and referred to in the information were the literature taken from the headquarters of the I. W. W. at the time of the arrest of the defendants and, also, particularly that taken from the rooms of certain of the defendants immediately following their arrest. The first witness called by the prosecution was one of the arresting officers, and he identified with much particularity this literature, and the same was then introduced in evidence without any objection on the part of the defendants save and except an objection as to the method by which the prosecution had obtained certain portions of the said literature by what was claimed to have been an illegal search and seizure. The defendants not only did not object to the introduction of this literature at the inception of the trial of the cause upon the grounds stated in their motion in arrest of judgment, but later in the trial in making their defense they introduced and had read into the record extensive excerpts from said literature in their endeavor to show that it was not revolutionary in character. Under these circumstances, it is clear that these defendants have suffered no prejudice by reason of the alleged defect in particularity in the information, and that the cases of People v. Taylor, 187 Cal. 378, 203 Pac. 85, and People v. Whitney (Cal. App.) 207 Pac. 698, with respect to the reversal of said causes upon appeal upon records substantially similar to that presented in the case at bar, must be given full application to the instant case.

The only other contention of the appellants herein is that the evidence is insufficient to justify their conviction. We are entirely satisfied from an examination of the entire cause, including the evidence, that there is not only no merit in this contention, but that there has been no such miscarriage of justice as would entitle or permit this court to set aside the judgment herein on account of the alleged error in the information.

The judgment is affirmed.

We concur: SHAW, C. J.; LENNON, J.; WASTE, J.; SLOANE, J.; LAWLOR, J.

WILBUR, J. (concurring). I concur in the judgment upon the ground first stated in the opinion, namely, that in the absence of a demurrer the fifth count of the information stated an offense. I also concur in the conclusion that there was evidence sufficient to establish the commission of such offense. The evidence shows that certain literature was displayed at a meeting conducted by the Industrial Workers of the World upon a table at which the defendant Casey was seated. The defendants claim that the evidence is

insufficient to establish the connection of the other defendants with such display. The evidence showed that the defendants were all furthering the meeting in question and that they were thus aiding and abetting Casey. It is true that the verdict is not strictly logical, for the jury acquitted the defendants of the charge that they belonged to the Industrial Workers of the World, but for the purpose of determining whether or not the defendants all participated in the crime of displaying the literature in question, the jury were entitled to consider all the evidence before them tending to show that the defendants were co-operating together in the display and sale of the literature in question.

The defendants refused the aid of counsel in the trial court. They did not call upon the district attorney to elect the particular book, document, or circular relied upon by him for conviction, but allowed the case to be presented to the jury both in the evidence and in the instructions without specification of the particular instrument or instruments relied upon by the prosecution to establish the general charge set forth in the fifth count of the information. They do not now complain of this failure of the district attorney to elect and the court to point out in its instructions the particular instrument relied upon to establish the defendants' guilt under the fifth count of the information. In view of the failure of the defendants to request any more definite specification by the district attorney or by the court in its instructions, the judgment must be affirmed.

---

(59 Cal. App. 621)

## KOHN v. KEMPNER et al. (Civ. 2525.)

(District Court of Appeal, Third District, California. Nov. 14, 1922.)

**1. Trusts ⟸110—Evidence held sufficient to show that property was conveyed to wife on express promise to reconvey to husband on demand.**

In a husband's action, after his wife's death, to set aside conveyances to her, evidence *held* sufficient to warrant findings that the property was conveyed to her on her express promise to reconvey to plaintiff on his demand, and that such promise was made in bad faith and without any intention of performing it.

**2. Trusts ⟸96—Husband's conveyances to wife promising to reconvey set aside after her death, whether property was community or separate property.**

A husband's conveyances of property to his wife on her express promise to reconvey on his demand may be set aside after her death, whether the property was community property (Civ. Code, § 1401) or the husband's separate property held in trust for him by his wife; he being entitled thereto by reason of her fraud, if her promise was made without intention to perform, while, if made in good faith, equity, by reason of the confidential relation of husband and wife, will enforce it, though oral.

**3. Pleading ⟸34(7), 205(5)—Allegation that conveyance was made on wife's promise to reconvey held sufficient averment that husband believed and relied on such promise as against objection by general demurrer or on appeal.**

In a husband's action, after his wife's death, to set aside conveyances of property to her, an allegation that the conveyances were made on her express promise to reconvey on his demand was a sufficient averment that he believed and relied on such promise, as against a general demurrer or an objection raised on appeal.

**4. Appeal and error ⟸1036(3)—Refusal to make administrator party to husband's action to set aside conveyances to deceased's wife held not prejudicial to latter's heirs.**

In a husband's action, after his wife's death, to set aside conveyances to her on her express promise to reconvey on his demand, where defendants defended as heirs merely, their rights were not prejudiced by denial of their motion to make deceased's administrator a party to the action.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by Morris Kohn against Philip Kempner and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Loutitt & Stewart, of Stockton, F. I. Lemos, of Hayward, and Rose, Silverstein & Collier, of Oakland, for appellants.

A. H. Carpenter, of Stockton, for respondent.

FINCH, P. J. Plaintiff and Tillie Kohn were married April 3, 1919. They lived together as husband and wife until the death of the latter on August 3, 1920. At the time of Tillie Kohn's death, her mother, Rosie Kempner, since deceased, and her brothers, Philip and Edward Kempner, defendants and appellants, were living.

At the time of the marriage the plaintiff was the owner of three parcels of land in which he thereafter conveyed a half interest to his wife. He also during the marriage purchased, with his separate funds, a fourth parcel and caused an undivided half thereof to be conveyed to his wife. He testified that his wife persistently importuned him to convey a half interest in the property to her, in order that she might have the same for her support in the event of his death, and declared that she would not continue to live with him unless he complied; that she promised him that if he would convey such interest to her she would reconvey the same to him at any time he might request her to do so; that the conveyances to her were made without consideration, and not as a gift, in

reliance upon her promise to reconvey upon request; that in June, 1920, he desired to exchange one parcel of the land for other land, but that she refused, and said she would not reconvey the land to plaintiff, but desired to sell for cash so that she could give money to her brothers. Three other witnesses testified that Mrs. Kohn promised to reconvey the property at any time the plaintiff asked her to do so. One of these witnesses testified that Mrs. Kohn refused to reconvey and said she would give the property to her brother.

The court found, in accordance with the allegations of complaint, that the property was conveyed to Mrs. Kohn "upon her express promise to reconvey to plaintiff upon his demand, therefor, * * * and which said promise was made in bad faith and without any intention of performing it," and that such conveyances were not intended as gifts, that she held the property so conveyed in trust for plaintiff, and that the same was community property of plaintiff and his wife. Judgment was entered in favor of plaintiff in accordance with the foregoing facts and findings.

[1, 2] There is no doubt that the evidence is sufficient to warrant the findings and judgment. If the property held by the wife was community property, then the judgment is clearly right. Civ. Code, § 1401. If it was not community property, then under the facts proved and the findings it was the separate property of the plaintiff, held in trust for him by his wife. If her promise to reconvey was made without intention to perform, then the husband was entitled to the property by reason of the wife's fraud. If the promise was made in good faith, then by reason of the confidential relation of husband and wife, equity will enforce the promise, though it was oral. Brison v. Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; Adams v. Lambard, 80 Cal. 426, 22 Pac. 180; Butler v. Hyland, 89 Cal. 575, 26 Pac. 1108; Taylor v. Morris, 163 Cal. 717, 127 Pac. 66; Bradley Co. v. Bradley, 165 Cal. 237, 131 Pac. 750.

[3] Appellants contend that the complaint is insufficient because it does not allege that the plaintiff relied upon the promise of his wife to reconvey or believed that she would perform it. The allegation in this connection is that the conveyances were made to Mrs. Kohn "upon her express promise to reconvey to plaintiff upon his demand." The defendants demurred generally on the ground that the complaint does not state facts sufficient to constitute a cause of action. The allegation that the conveyances were made upon Mrs. Kohn's express promise to reconvey is a sufficient averment that the plaintiff believed and relied on the promise as against a general demurrer or an objection raised on appeal. It cannot be said that there is an entire absence of allegation of such belief and reliance.

[4] It is urged that the court erred in denying defendants' motion to make the administrator of Mrs. Kohn's estate a party to the action. The appellants defended as heirs merely, and their rights were in no wise prejudiced by the ruling.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

---

59 Cal. App. 703

## ADAIAN v. BORANIAN. (Civ. 4230.)

(District Court of Appeal, First District, Division 2, California. Nov. 20, 1922.)

**Vendor and purchaser ⊜75—Compliance with obligation in land contract to furnish abstract showing title in vendor free from incumbrance condition precedent to first payment thereunder by purchaser.**

Under Civ. Code, § 1498, the purchaser of lands under a contract that vendor furnish an abstract of title showing title in himself free and clear from all incumbrances has the right to insist upon the performance of such obligation as a condition precedent to his first payment under the contract upon the land.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by A. H. Adaian against Arpenig Boranian, executrix of the last will and testament of A. Boranian, sometimes known as Ardash Boranian, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

Arsen Yeretzian, of Fresno, for appellant.

G. Levin Aynesworth and Astor Elmassian, both of Fresno (L. N. Barber, of Fresno, of counsel), for respondent.

LANGDON, P. J. The defendant has appealed from a judgment against her as executrix of the last will and testament of A. Boranian, deceased, by which plaintiff recovered $600, the amount of money paid by him as a deposit upon the purchase price of certain land, together with the value of his labor and materials furnished upon said land in reliance upon a contract for the purchase and sale of the same made with the defendant's testator.

The action was tried upon an amended complaint for money had and received. The trial court found, upon substantial evidence, as follows: During the year 1920, plaintiff and A. Boranian, defendant's testator, entered into a contract for the sale and purchase of certain real and personal property for the sum of $26,000. Plaintiff deposited with Boranian $500 on account of the purchase price. The written contract between the par-

ties was offered in evidence, and in accordance therewith the trial court further found: The purchase price was to be paid in installments, $5,500 on the execution and delivery of a good and sufficient contract for a deed; $1,500 on or before the 5th of November, 1920, and $1,500 on or before the 15th day of November in each and every year thereafter until the whole of the purchase price had been paid. The plaintiff was to receive a deed when one-half of the purchase price had been paid, and plaintiff was to take the premises subject to a certain contract outstanding with the California Associated Raisin Company. In the event the sale was consummated, the $500 deposit was to be applied upon the initial payment of $5,500. Boranian agreed to furnish an abstract of title to said property, showing title in him clear of incumbrances, said abstract to be furnished within 15 days from the date of said agreement, to wit, on February 24, 1920. In the event plaintiff failed to comply with his agreement, he was to forfeit the $500 deposit. By agreement between the parties, Boranian furnished to plaintiff, in lieu of an abstract of title, a certificate of title, which showed that the title to the property was vested in Gustaf Pearson; that the title was subject to a contract with the Fresno Canal & Land Corporation for a water right appurtenant to said land and rights of way thereover to convey water to contiguous lands; that it was also subject to a mortgage dated December 4, 1916, for $3,300, due three years after date, which said mortgage had been assigned to John D. Patterson; that said premises were also subject to taxes for the fiscal year 1920–22; that Boranian's only title to said premises was a contract executed by Gustaf Pearson and his wife in favor of Boranian for the sale and purchase of said premises.

At the time the plaintiff and Boranian entered into the contract involved here, plaintiff, at the request of Boranian, went upon the premises, took charge of the same, and performed work and labor thereon of the reasonable value of $50, and he also purchased for the use and benefit of Boranian certain supplies of the reasonable value of $50. On March 13, 1920, plaintiff offered and tendered to Boranian the balance of the initial payment on the purchase price provided for by the terms of the contract, and demanded that Boranian perform his obligations thereunder, but said Boranian then and there refused to do so. Thereupon plaintiff demanded the return of his $500 and payment for his labor and supplies purchased for the property and used for the benefit of Boranian, which was refused. The trial court also found that plaintiff had surrendered the possession of the property to Boranian, and had been able, ready, and willing at all times to perform his part of the contract.

The only point urged by appellant for a reversal of the judgment entered herein is that, because plaintiff did not make an unconditional tender of the first installment of the purchase price, Boranian was not in default in refusing to furnish evidence of a clear title in himself. The objection is entirely without merit. Boranian was obligated by his contract to furnish an abstract of title showing the title in himself, free and clear of all incumbrances, within fifteen days from the date of the contract between the parties. That time had expired, and Boranian furnished a certificate of title which did not meet his obligations under the contract. The plaintiff had a right to insist upon the performance of this obligation as a condition precedent to his first payment upon the land. Section 1498, Civ. Code.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

---

59 Cal. App. 616

## In re MINOR'S ESTATE.

## HUXLEY et al. v. MINOR et al.

### (Civ. 4075.)

(District Court of Appeal, Second District, Division 1, California. Nov. 14, 1922.)

**1. Wills ⟸524(2) — Construction annulling limitation of beneficiaries to those surviving testatrix untenable.**

Where testatrix made bequests to such certain persons "as may be living at my decease, their heirs and assigns respectively," the heirs of one of such persons who had predeceased testatrix were not entitled to take, since to hold otherwise would necessitate a construction of the phrase "their heirs and assigns" as if preceded by the word "or," thereby rendering the phrase "as may be living at my death" of no effect, which would violate Civ. Code, § 1325, requiring words in a will to be so interpreted as to give every expression some effect.

**2. Wills ⟸462, 463—Words eliminated or added only to remove ambiguities.**

The elimination or addition of words in a will, for the purpose of construction, is not permitted except to remove ambiguity in expression of intention.

**3. Evidence ⟸16—Common knowledge that phrase "heirs and assigns" is used by conveyancers, though unnecessary.**

It is common knowledge that the phrase "heirs and assigns" continues to be used by many conveyancers, although it has ceased to be necessary.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

---

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

**In the matter of the estate of Mary T. Minor, deceased. From a decree of distribution in favor of John B. Minor and others, Henry M. Huxley and others appeal. Affirmed.**

Adams, Adams & Binford, of Los Angeles, for appellants.

Ward Chapman and L. M. Chapman, both of Los Angeles (Selden Bacon and M. J. Byrne, of counsel), for respondents.

CONREY, P. J. Appeal from decree of distribution. The questions presented for discussion require an interpretation of the residuary clause in the will of the decedent. The estate consists of both real and personal property, all situated in the state of California.

On the 2d day of April, 1898, when the will was made, the decedent, Mary T. Minor, was the widow of Samuel Minor, deceased. All of the estate came to her from him, under his will. At the date when Mrs. Minor's will was made there were living two sisters of Samuel Minor, whose names were Mary M. Huxley and Emily J. Benham. His two brothers, John B. Minor and Henry Minor, died prior to April 2, 1898. John B. Minor left, him surviving, a son, John B. Minor. Henry Minor left, him surviving, three daughters. Mary T. Minor died January 31, 1906, leaving no surviving husband nor any descendant. Emily J. Benham died June 7, 1904, leaving no surviving husband nor any descendant. Mary M. Huxley died December 2, 1904, leaving two children.

The will of Mary T. Minor, after disposing of part of her estate by certain provisions, contains in the third paragraph of the will the following:

"Second. The remainder I give, devise and bequeath as follows: To each of the following named persons as may be living at my decease, their heirs and assigns respectively—my husband's sister, Mary Huxley, now of Waterbury, Conn., my husband's sister, Emily J. Benham, now of Woodbury, Conn.—my husband's nephew, John B. Minor, now of Plainville, Conn.—the children of my husband's deceased brother, Henry Minor."

Applying to the foregoing clause of the will, the facts hereinabove stated, the court by its decree awarded all of the residue of the estate to the descendants of John B. Minor, deceased, and Henry Minor, deceased, and excluded therefrom the descendants of said Mary M. Huxley. Appellants are the heirs at law of Mary M. Huxley and the administratrix of the estate of her deceased son, Edward.

The matter in dispute was submitted to the superior court on an agreed statement of facts in which the legal questions at issue were thus stated:

"Question has arisen under the will of said Mary T. Minor by reason of the death of said Mary M. Huxley prior to the death of said Mary T. Minor, whether the heirs and next of kin of Mary M. Huxley took under the second subdivision of the third clause of the third paragraph of the said will, and likewise whether the interest which would have passed to Emily J. Benham, had she survived the testatrix, passed to her heirs and next of kin, or whether the said share bequeathed to Emily J. Benham lapsed, by reason of her death prior to the death of the testatrix, Mary T. Minor. Question has further arisen under the same second subdivision of the third clause of the third paragraph of the will whether the children of Henry Minor took thereunder per capita or per stirpes, that is, whether said Mary J. Buell, Emily L. Minor and Julia B. Esterly each were given a share equal to that given to said John B. Minor, or all together were given a share equal to that given to said John B. Minor, and concerning the consequent results of the division of the residue of this estate of Mary T. Minor."

The parties joined in submitting these questions to the court for its decision and construction of the will. On the first of the questions thus submitted the court determined that the heirs or next of kin of Mary M. Huxley were not entitled to take any share in the estate. On this appeal they claim that the court erred in so deciding.

Concerning the personal relations existing between the testatrix and her husband's relatives, the statement of facts says:

"At the time of making her said will, Mrs. Mary T. Minor had but comparatively slight personal acquaintance with her husband's relatives; they residing chiefly in the East, and she in California. Prior to her death, however, Mrs. Emily J. Benham spent several months with Mrs. Mary T. Minor, but Mrs. Minor had no personal intimate acquaintance with any other of the surviving members of her husband's family."

[1] Appellants direct attention to the rule of construction of wills that, in order to enable the court to place itself in the position of the testator, evidence of all the circumstances surrounding him at the time he wrote his will is permissible to aid in its construction. They argue that the fact that she used the words "their heirs and assigns respectively" immediately following the words "to each of the following named persons as may be living at my decease," shows that the testatrix had in mind the contingency that one or more of these persons named by her as legatees might not be living when the will should take effect; that it was in her mind to treat all of the relatives of her late husband alike; that having expressly provided for the then living nephews and nieces whose parents had died, she at the same time made equal provision for the two sisters of her late husband who were then living; but that, having in mind the possibility that issue would survive these two sisters, she inserted the words, "their heirs and assigns respectively," for

the purpose of providing for the successors of these two sisters if they, or either of them, should die before the time of death of the testatrix.

The construction contended for by appellants requires that the word "or" be implied before the words "their heirs and assigns respectively," and that thereupon the phrase be construed as one whereby the heirs of Mrs. Huxley (upon her death prior to the death of the testatrix) would be substituted for Mrs. Huxley. In support of this position they refer to certain decisions which, they insist, are in line with this contention. Wren v. Hynes, 2 Metc. (Ky.) 129; Ebey et al. v. Adams, 135 Ill. 80, 25 N. E. 1013, 10 L. R. A. 162; In re Paton, 111 N. Y. 480, 18 N. E. 625; Keay v. Boulton, 25 Chancery Div. (Eng.) 212; Wingfield v. Wingfield, 9 Chancery Div. (Eng.) 658; King v. Cleveland, 4 De Gex and J. 477 (Eng.); In re Philp's Will, English Law Reports, 7, Eq. 151. But in order to adopt this view we would find it necessary to eliminate the phrase "as may be living at my decease." In effect, we are asked to reconstruct the sentence, so that it will read, "to each of the following named persons * * * *or* their heirs and assigns respectively."

[2] This we cannot reasonably do. The elimination or addition of words in a will, for purposes of construction, is not permitted, except where that is necessary for the purpose of removing some ambiguity in the testator's expression of intention. "The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative." Civ. Code, § 1325. It is only by giving to the words "their heirs and assigns" their usual meaning, expressive of an intention to pass the fee, or the entire ownership, to the named donees, that those words are consistent with the gift as made to each of the persons named "as are living at my decease."

[3] The fact that the words "heirs and assigns" were not necessary to make a gift of the fee, or complete ownership, does not make their use an indication of some other purpose. It is common knowledge that this phrase continues to be used by many conveyancers, although it has ceased to be necessary. In this case, the mere fact that all of the persons named in the will were sisters of the husband of testatrix, or descendants of his deceased brothers, is not, in our judgment, a sufficient reason for eliminating definite and plain words from the will in order to avoid their effect in the event of the death of the sisters before the death of the testatrix. Therefore, we adopt and apply here the conclusion at which the Supreme Court arrived in Estate of Sessions, 171 Cal. 346, 153 Pac. 231, where the court had under examination a will giving the residue of an estate to "William Jackson and to his heirs and assigns forever." The court said:

"Furthermore, the word 'heirs' occurs only in the phrase, 'and to his heirs and assigns forever.' This phrase is the regular ancient formula in a conveyance of the fee in real estate. No reason appears for giving to the word 'heirs,' as used therein, any greater significance than should be given to the word 'assigns.' The latter word would have been meaningless if used as a word of substitution. The most reasonable conclusion from the whole will is that the residuary clause was made without any intention at all concerning the destination of the property in case Jackson should outlive the testatrix."

The court, we think, must have intended to say, in the last clause, "in case Jackson should *not* outlive the testatrix." Otherwise it is not consistent with the other parts of the decision, which held that the words "and to his heirs and assigns forever" were merely descriptive of the estate of inheritance given to Jackson, and that, Jackson having died prior to the death of testatrix, his heirs acquired no rights under the will.

We therefore conclude that the provision made in the said will, in favor of Mary M. Huxley, lapsed by reason of her death during the lifetime of the testatrix. It follows that appellants, who claim only as heirs and next of kin of Mrs. Huxley, take nothing.

The decree is affirmed.

We concur: SHAW, J.; JAMES, J.

---

59 Cal. App. 606

## ISAAC UPHAM CO. v. UNITED STATES FIDELITY & GUARANTY CO.
(Civ. 4284.)

(District Court of Appeal, First District, Division 2, California. Nov. 14, 1922. Hearing Denied by Supreme Court Jan. 11, 1923.)

**1. Insurance ⇐179—Fidelity bonds held independent contracts.**

Where the practice of a fidelity company was to issue a new bond or a continuation certificate, as might be requested by the insured, and, no request to the contrary being made, issued a new bond at the expiration of an old bond which contained no reference whatever to the first bond, and contained no language whatever to the effect that it was a continuation of the first bond, the two bonds were independent contracts, and any defalcation during the period covered by the first bond could not be recovered where the same was not discovered and noticed to the fidelity company within the time designated in the bond.

**2. Insurance ⇐668(3)—Construction of fidelity bonds for the court.**

Where it was the practice of a fidelity company to issue a new bond or a continuation certificate, as might be requested by the insured, whether or not a new bond was an inde-

pendent contract or a continuation of the old contract was a question for the court, and not the jury, where a new bond was issued, no request to the contrary being made, and there was no evidence introduced to show that the second policy continued the first.

**3. Insurance ⟸508½—Fidelity bond held to cover losses sued on.**

Where insured in fidelity bond was a corporation which transacted business for itself and for another corporation, and the business transactions of both corporations were kept on the books of the insured, and the stock of both corporations was owned in equal parts by two brothers, and during the period covered the employee was cashier, credit man, and general accountant for the plaintiff, the bond which undertook to reimburse insured for any pecuniary loss sustained by reason of the fraud or dishonesty of such employee indemnified against losses of money in the hands of insured, no matter to which corporation it belonged.

**4. Trial ⟸133(2)—Argument of counsel held not prejudicial error.**

In an action on a fidelity bond, prejudicial error was not committed by attorney for plaintiff in saying in his opening statement, "We will show you further that when he (the employee) came to our employ he was then indebted to his former employer, which we did not learn until after the termination of his employment with us, * * * on a shortage of approximately over $500," where the trial court forthwith admonished the jury that the attorney for the plaintiff was but making an opening statement, and that the jurors were not to take the same as evidence, and that, when the evidence was introduced, the court would definitely rule thereon.

**5. Insurance ⟸264(1)—Statements in application for policy held not warranties.**

Statements in application for fidelity bond were not warranties where the policies did not contain any reference whatsoever to them, though the application ended with the language, "It is agreed that the above answers are to be taken as conditions precedent," etc., in view of Civ. Code, § 2605.

**6. Fraud ⟸31—Remedies of defrauded party.**

As to contracts generally, the party claiming that he has been defrauded by false representations or concealment has three remedies.

**7. Insurance ⟸640(2)—Insurer must plead fraudulent representations.**

Where insurer in fidelity policy intends to defend on ground of fraudulent representations, it must plead them and introduce evidence in support.

**8. Insurance ⟸436—Negligence of insured as defense.**

If insured in fidelity bond did any act in violation of the terms of the policy, and thus produced a loss, he could not recover whether the act were negligent or otherwise, but, if the act of the insured is not covered by the terms of the policy, the insurer is not exonerated because the insured is negligent in view of Civ. Code, § 2629.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the Isaac Upham Company against the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Frank J. Mahoney, and Thomas, Beedy & Lanagan, all of San Francisco, for appellant.

Lent & Humphrey, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant on an indemnity insurance policy. The plaintiff had judgment, and the defendant has appealed under section 953a of the Code of Civil Procedure.

[1, 2] In pleading its case the plaintiff set forth its claims in two separate counts. In the first count it pleaded certain facts, and sought to recover the sum of $2,000. In the second count it pleaded certain other facts, and sought to recover an additional $11,003.44. During the period that the defendant carried insurance for the plaintiff such insurance was evidenced by a policy dated January 12, 1917, a policy dated December 19, 1917, and a certificate of continuation dated the 7th day of January, 1919. The plaintiff contended in the trial court and contends in this court, that all of said papers constituted but one policy. If this were so it would be entitled to recover on the first count. If, on the other hand, the policy dated January 12, 1917, is a separate and independent contract, then the plaintiff was not entitled to recover on the first count pleaded in this complaint. The loss pleaded in the first count was an item of $2,000, which the plaintiff's agent embezzled on December 31, 1917, one of the dates covered by the first policy. That policy by its terms insured the plaintiff from the 8th day of January, 1917, to the 8th day of January, 1918, and covered losses "occurring during the term of this bond, or any continuations thereof, and discovered and notified to the surety within six months after the expiration or cancellation of this bond. * * *" No loss whatever was notified to the defendant until the 15th day of April, 1919. The policy contained a passage:

"This bond may be continued from year to year by the payment of the annual premium to the surety, and the issuance by the surety of its continuation certificate."

Other papers in the record show that the practice of the defendant was to issue a new bond or a continuation certificate as might be requested by the insured. No request to the contrary being made, the defendant issued a new bond December 19, 1917, which

contains no reference whatever to the first bond, and contains no language whatever to the effect that it is a continuation of the first bond. It is patent that the two bonds are independent contracts, and the defalcation of December 31, 1917, may not be recovered because the same was not discovered and noticed to the defendant within the time designated in the bond. The trial court submitted to the jury for its determination the question as to whether the parties intended that the second bond should continue the first bond. The intention of the parties was reduced to writing. It was the duty of the trial court to construe the written instruments, and advise the jury as to such construction. There was no evidence of any kind introduced that showed, or tended to show that the second policy continued the first, or that any recovery could be had under the facts on the first policy.

[3] The appellant contends that there is no evidence to show that the plaintiff sustained a loss of $13,003.44. We think the contention is without merit. The evidence shows that Isaac Upham Company is a corporation, and that the Estate of Isaac Upham is another corporation which owns certain real estate which is income property. Isaac Upham Company transacts the business for itself and for the other corporation, Estate of Isaac Upham. The business transactions of both corporations are kept on the books of the plaintiff. The stock of both corporations is owned in equal parts by two brothers, Isaac O. Upham and Benjamin P. Upham. During the period covered by this litigation H. B. Smith was cashier, credit man, and general accountant for the plaintiff. The defendant's bond undertook to reimburse Isaac Upham Company, the employer, for any pecuniary loss sustained by reason of the fraud or dishonesty of its employee, H. B. Smith. The evidence showed that Smith embezzled June 26, 1918, $2,786.62; October 30, 1918, $3,800; January 31, 1919, $3,000; March 24, 1919, $1,415.70. As between the parties to this litigation all of that money was the money of the plaintiff. The bond, by its terms, covered such items, whether the moneys were received for either corporation. Alabama Fidelity & Casualty Co. v. Alabama P. Sav. Bank, 200 Ala. 337, 76 South. 103, 109.

[4] The appellant contends that prejudicial error was committed by the attorney for the respondent in making his opening statement. The language complained of was:

"We will show you further that when he came to our employ he was then indebted to his former employer, which we did not learn until after the termination of his employment with us, Messrs. Kohler & Chase, on a shortage of approximately over $500.

"Mr. Presley: Now, we will object to the remarks of counsel and assign them as misconduct and prejudicial error."

We see no error in this matter. The trial court forthwith admonished the jury that the attorney for the plaintiff was but making an opening statement, and that the jurors were not to take the same as evidence, and that, when the evidence was introduced, the trial court would definitely rule thereon. Furthermore, if the word "shortage" had been omitted, we do not understand that the defendant would contend that such evidence was not admissible. 20 C. J. 484; People v. Rowland, 12 Cal. App. 6, 19, 106 Pac. 428. Because, perchance, the indebtedness arose by reason of a tort committed by Smith, such additional fact did not destroy the probative force and effect of the evidence. If for any reason the testimony was admissible, it should have been received at least for the purpose for which it was admissible. Cooney v. Glynn, 157 Cal. 583, 588, 108 Pac. 506; People v. Rowland, 12 Cal. App. 6, 18, 106 Pac. 428. While counsel in opening statements should not, of course, include testimony which they know will not be received, and state the testimony for the purpose of prejudicing the jury, it is perfectly clear from the record before us that the attorney for the plaintiff was not guilty of any such act.

[5] In its answer the defendant pleaded that the plaintiff had breached certain warranties alleged to have been contained in the policy. After the evidence had all been introduced it appeared that the alleged warranties were contained in the application for insurance. Among other things questions 12 (a) and 12 (b) called for replies as to what supervision would be had over the person employed, H. B. Smith. The paper ended with this language:

"It is agreed that the above answers are to be taken as conditions precedent and as the basis for the said bond applied for or any renewal or continuation of the same, or any other bond substituted in place thereof. * * * *"

Neither one of the policies, nor the certificate of continuation, contained any reference whatsoever to the statements contained in the application. Such statements, therefore, are not warranties:

"Every express warranty, made at or before the execution of a policy, must be contained in the policy itself, or in another instrument signed by the insured and referred to in the policy, as making a part of it." Civ. Code, § 2605.

That language was quite different under the Code as adopted in 1872; it then read:

"Every express warranty, made at or before the execution of a policy, must be contained in the policy itself, and another instrument, whether upon the same paper or not, cannot be referred to as making a part of the policy for this purpose, even by agreement of the parties."

That language was found too harsh as to the insurance company. "The Code Examiner's Notes from the Draft of an Act to Amend the Civil Code Submitted October 13, 1873," states:

"The amendment restores the law as it existed previous to the Code. See 2 Parsons on Maritime Law, pp. 51 and 106 (1859); 1 Phillips on Insurance, § 756 (1867)."

An examination of the cases cited by those authors does not disclose that prior to the Code a statement would be held to be a warranty if the statement was contained in a separate paper not referred to in the policy. The passage above referred to in Phillips on Insurance was worded by the author as follows:

"Any express warranty or condition is always a part of the policy, but, like any other part of an express contract, may be written in the margin, or contained in proposals or documents expressly referred to in the policy, and so made a part of it."

The cross-reference was inserted in the policies considered by the court in Young v. Pacific Surety, 137 Cal. 596, 70 Pac. 660, and Larrimore v. United States F. & G. Co., 21 Cal. App. 767, 132 Pac. 1050. That fact does not appear on the face of the decision in each case, but it is disclosed by the record in each case. Finally, the case entitled Employers' L. A. Corp. v. Indus. Acc. Com., 177 Cal. 771, 776, 171 Pac. 935, is directly in point to the effect that the statements contained in the paper which was not expressly referred to in the policy in the instant case are not warranties.

[6-8] As we understand the appellant, it claims that, if it be held that the statements made in the application are not warranties, in any event, they are false representations, and in this connection the appellant also calls attention to other alleged false representations which were made about the same time, but are contained in yet other papers not referred to in the policy. To this contention there are many complete answers. The defendant in its pleadings has not attempted to plead fraudulent representations nor a rescission of its contract, nor did it attempt to introduce evidence along those lines. As to contracts generally, it is settled law that the party claiming that he has been defrauded by false representations or concealment has three remedies. Field v. Austin, 131 Cal. 379, 382, 63 Pac. 692. Assuming, without deciding, that the appellant had three remedies as against the policy in suit, it did not plead any one of those three remedies. As we understand the appellant, it is its contention on this branch of the case that the insured did not exercise ordinary care in the supervision of Smith's work, or in the examination of his accounts. In its brief it does not specifically call our attention to the evidence supporting such contention. We have examined the record, and we do not find such evidence in the record. Moreover, section 2629 of the Civil Code was enacted to eliminate just such a controversy. That section provides:

"An insurer * * * is not exonerated by the negligence of the insured. * * *"

If the insured did any act in violation of the terms of its policy, and thus produced a loss, the insured could not recover whether the act were negligent or otherwise. On the other hand, if the act of the insured is not covered by the terms of the policy, under the Code section the insurance company is not exonerated. Waters v. Merchants' Louisville Ins. Co., 11 Pet. 213, 219, 9 L. Ed. 691; Gates v. Madison County Ins. Co., 5 N. Y. 469, 478, 55 Am. Dec. 360; May on Insurance (2d Ed.) 614.

What we have just said answers the next attack made by the appellant. That attack is that the court erred in charging the jury that the negligence of the insured was no defense. The trial court did not commit an error in giving that instruction.

The appellant complains of certain other instructions which the trial court gave or refused to give. Each and all of the instructions so complained about were addressed to the alleged warranties which we have considered above. The trial court did not err in concluding that the warranties claimed were not proved, and it did not err in instructing the jury accordingly.

The verdict of the jury and the judgment based thereon was for the full amount claimed by the plaintiff. As we have shown, that claim included $2,000 more than the plaintiff was entitled to. The judgment should be modified by deducting $2,000 from the principal sum therein mentioned so that the language will read:

"* * * The sum of $11,003.44, with interest thereon at the rate of 7 per cent. per annum. * * *"

And as so modified the judgment should stand affirmed. It is so ordered.

We concur: LANGDON P. J.; NOURSE, J.

(59 Cal. App. 574)

## PEOPLE v. DUNSTAN. (Cr. 629.)

(District Court of Appeal, Third District, California. Nov. 9, 1922. Hearing Denied by Supreme Court Jan. 8, 1923.)

**1. Perjury ⇐25(3) — Indictment held sufficient.**

An indictment averring that defendant testified "in a manner material" to an issue in a case *held* sufficient to charge perjury, though it did not directly state that the testimony related to a "matter" material to the case, under Pen. Code, §§ 118, 966; the use of the word "manner" being clearly a clerical mistake, and any error being purely technical, and not calculated to result in the miscarriage of justice, under Const. art. 6, § 4½.

**2. Perjury ⇐11(2)—Alleged false testimony held material.**

False testimony to the effect that defendant did not meet certain persons at a certain time and place *held* to relate to a material issue in a prosecution for a violation of the liquor laws, a sale of liquor taking place at such time.

**3. Perjury ⇐11(8)—Test as to materiality of testimony.**

The test of materiality of alleged false testimony is whether the statement made could have influenced the tribunal upon the question at issue before it, and any statements made in a judicial proceeding for the purpose of affecting the decision, and upon which the judge acted, are material.

Appeal from Superior Court, Glenn County; H. C. Bell, Judge.

Arthur W. Dunstan was convicted of perjury, and he appeals. Affirmed.

R. L. Clifton and W. T. Belieu, both of Willows, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. Under an indictment purporting to charge him with the crime of perjury, the defendant was convicted in the superior court of Glenn county of the crime so charged, and this appeal is prosecuted by him from the judgment and the order denying his motion for a new trial. The indictment alleges that the defendant on the 9th day of January, 1922, having duly taken an oath before the superior court of the said county of Glenn that he would testify truly to the whole truth and nothing but the truth in the case then and there pending and at issue in said court, to wit, The People of the State of California v. J. H. Heusers, did willfully, unlawfully, and feloniously, in a manner material to such case, and to the issue therein, declare and testify the truth to be that he, said Arthur W. Dunstan, "did not see one G. L. Budd in front of Tom's Pool Room or the Popular Restaurant on Tehama street, in the town of Willows, county of Glenn, state of California, on Saturday evening, November 19, 1921, and talk to him at said place, and, further, that he did not talk to said G. L. Budd, or one J. H. Heusers, the defendant in the above-mentioned case, in front of said restaurant, or in front of said Tom's Pool Room on Tehama street, in the presence of or with said J. H. Heusers, at all; and that he, the said defendant, Arthur W. Dunstan, did not, in the company of said G. L. Budd and J. H. Heusers, talk together at said place, all of which is false, the defendant well knowing such statements to be false and untrue, and all of which is contrary to the form, force, and effect of the statute," etc.

The defendant demurred to the indictment on the general ground that the same "does not state facts sufficient to constitute a public offense or at all," and thus the point first made by him on this appeal is raised. The specific contention is that the indictment does not aver that the alleged false testimony given by the defendant related to a matter material to the issue involved in the case, and that the indictment does not otherwise state facts which in themselves disclose that said testimony was material to the issue or to the case.

Section 118 of the Penal Code defines perjury as follows:

"Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury."

[1] The above definition of perjury is only a restatement of the offense as it was defined by the common law; and it will be observed that one of the essential elements of the offense as it is so defined is that the alleged false testimony shall be material to the issue tendered and tried in the case. In this state it has been said that there are two modes by which the materiality of the alleged false testimony may be shown in a criminal pleading:

"1. By setting forth the nature of the issue, and the evidence given thereon, so that, as a matter of law, it may be said the testimony upon which the perjury is assigned is material to the issue; 2. By showing an action at issue in a court of competent jurisdiction, the testimony given, its willful and felonious falsity, coupled with the averment that it was material to the issue." People v. Ah Bean, 77 Cal. 12, 15, 18 Pac. 815, 816.

The indictment here, it will be noted, does not directly state that the alleged false testimony given by the defendant in the case of People v. Heusers related to a matter ma-

terial to the case or any issue therein, but states that said testimony was "in a manner" material to the case, etc. Nor do the facts set out in the indictment and which follow the averment that the defendant testified "in a manner material" to an issue in the case themselves disclose that the alleged false testimony related to a material matter therein, although the facts so alleged set forth the controversy in respect to which the offense is alleged to have been committed, to wit, the case of People v. Heusers. Section 966, Pen. Code; People v. Ah Bean, supra. The section just named reads as follows:

"In an indictment or information for perjury, or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the offense was committed, and in what court and before whom the oath alleged to be false was taken, and that the court, or the person before whom it was taken, had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment or information need not set forth the pleadings, record, or proceedings with which the oath is connected, nor the commission or authority of the court or person before whom the perjury was committed."

It is very clear that the indictment here contains all that the above section requires to be set forth in a criminal pleading charging the crime of perjury, although we would not say that that section is not to be considered in connection with section 118, defining the crime of perjury, and thus its meaning intended to be that, in addition to the facts which it provides shall be stated, it must also be shown that the matter as to which the testimony is given is material to the issue in the case or proceeding in which the perjury is alleged to have been committed. But we are of the opinion that the circumstances of the case as tried are such as to justify us in holding that the indictment was sufficient, or at least that the defendant cannot complain of the defective statement of the crime thus attempted to be charged against him. It is quite obvious that the use of the word "manner" was a clerical mistake, and inadvertently inserted in the indictment in place of the word "matter" by the party who prepared that pleading. And, while it does not precisely express in the indictment the fact which the word "matter" would express when used in the connection in which it (the word "manner") is used in said pleading, it must be admitted, upon a fair consideration of the indictment, that it does not go far afield in charging the crime of perjury. Indeed, while we do not regard a criminal pleading in such a case wherein the word "manner" is used in the place of the word "matter" strictly proper, nor sanction the carelessness in the preparation of criminal pleadings resulting in such a defective statement of a public offense as appears in this case, still we are unable to perceive why the word "manner" does not in a measure express the fact thus sought to be stated with sufficient clearness or intelligibleness to apprise the accused of the nature of the charge which he will be required to meet or defend against. The word "manner" is defined in part as "mode of action; way of performing or effecting anything." Thus, if it be said that a party gives false testimony in a manner material to the issue of a case, such language may reasonably be understood or construed to mean that the way in which such party testified rendered his testimony material to the issue or issues to be decided. But, aside from this reasoning, or independently of a consideration of the strict lexicology of the word "manner," it is clear from the whole record that the defendant in this case was not misled or under any misapprehension as to the nature of the charge which the indictment makes a reasonably fair attempt to state. While it is stated in the brief of the defendant that, in the argument on the demurrer, the deficiency of the indictment in the particular here considered was pointed out to the trial court by counsel, still the trial of the case plainly discloses that the defendant labored under no mistake as to the meaning of the indictment; for at no stage of the case was there a single objection by him to the testimony offered by the people in support of the charge of perjury upon the ground that the indictment failed in the statement of a public offense or said crime. Indeed, the case was tried as though the crime of perjury was charged against him in a proper manner or according to legal requirements in such a case. The defendant had the benefit of every right which under the law should be accorded a person accused of and on trial for a public offense as fully and effectually as if the crime had been stated according to legal formalities in such a case. See People v. Tomsky, 20 Cal. App. 672, 685, 130 Pac. 184. At any rate, we are of the opinion that the error predicated upon the defectiveness of the indictment, being purely technical, could not have resulted in a miscarriage of justice, since, upon a full view of the evidence, we are convinced that the defendant was clearly shown to be guilty of the crime with which it is sought by the indictment to charge him. Const. art. 6, § 4½. As our Supreme Court declared in People v. Hitchcock, 104 Cal. 482, 484, 38 Pac. 198, so we here declare:

"We do not intend to encourage carelessness in criminal pleading, but, where a defect in an indictment or information is merely technical, and does not affect the substantial rights of the parties, we are not at liberty to reverse the judgment"—citing section 1258 of the Penal Code.

It is well here to note that the error to which the Supreme Court in that case was referring was precisely the same error to which we are presently giving attention, to wit, the use of the word "manner" in the place of the word "matter" in an indictment charging the crime of perjury, and used in precisely the same connection in which the word "manner" is used in the indictment involved herein.

In the case of Smith v. Territory, 14 Okl. 164, 77 Pac. 187, the defendant was prosecuted for murder, and convicted of the crime of manslaughter. On appeal he assailed the indictment on the ground that the facts stated were insufficient to state the crime of murder under the statute of Oklahoma in this, that the indictment alleged that the homicide was perpetrated "with the premeditated design to affect" the death of the deceased, while the language of the statute defining the crime of murder was that the homicide should have been committed "with the premeditated design to effect" the death of the person alleged to have been killed. In the trial court there was neither a motion made by the defendant to quash the indictment nor a demurrer interposed thereto upon the ground that it failed to state the offense thereby sought to be charged, but the defendant, upon the people offering their first witness, objected to the introduction of any testimony for the reason that the indictment did not state facts sufficient to constitute a public offense. The Supreme Court held that the mistake was that of the pleader, and a mere clerical error, which could not have prejudiced the substantial rights of the defendant upon the merits.

[2] The defendant, however, makes the further point that the alleged false testimony given by him in the case of People v. Heusers was not material to any issue arising in said case. In the case of People v. Heusers the defendant was charged with, tried for, and convicted in the superior court of the county of Glenn of the crime of violating the so-called Wylie Liquor Law. It appears that one G. L. Budd, an officer or detective acting for the State Law and Enforcement League, among the purposes of which was the business of enforcing the laws and ordinances prohibiting the traffic in intoxicating liquors within the limits of cities, towns, and counties of the state, went to the town of Willows to investigate conditions with respect to "bootlegging" in that community; that he received information which gave him good reason to know or believe that one J. H. Heusers was engaged in the illicit liquor traffic in said town.

At the trial of said Heusers, and also at the trial of the present case, Budd testified that he met the defendant Dunstan and asked him if he knew where he could procure some liquor; that Dunstan replied that he could get liquor from Heusers, and thereupon either volunteered or agreed upon the solicitation of Budd to introduce the latter to Heusers and to assure him (Heusers) that Budd "was all right." Budd testified at said trial of Heusers that he met Heusers in the early part of the evening of the 19th of November, 1921, in the Popular Café; that he was introduced to him by the defendant Dunstan; that they had some conversation inside the restaurant, but within a few minutes after they started the conversation the three (Heusers, Dunstan, and Budd) stepped out on the sidewalk, stood in front of Tom's Pool Room, which is next door to the Popular Café, and resumed their conversation about the proposed purchase of liquor from Heusers by Budd. These negotiations, so Budd testified both in the Heusers and in the present case, occurred in the presence and the hearing of the defendant Dunstan, and the result thereof was that Budd purchased from Heusers a quart bottle of "jackass," for which he paid Heusers the sum of $5.

J. H. Heusers, the defendant in the case of People v. Heusers, testifying in his own behalf in said case, stated that he did not know said witness Budd; that he never sold Budd any liquor on the 19th day of November, 1921, or at any other time; that, although he had seen Budd in the Popular Café, he never had talked to him either in said café or on the sidewalk outside of and in front of the restaurant on Saturday evening, November 19, 1921.

The defendant, Dunstan, supporting the foregoing testimony of Heusers, testified in said case of People v. Heusers, and in response to the cross-examination to which he was subjected by the district attorney, in part as follows:

"Q. Did you see Mr. Budd down in front of the pool room or the restaurant (referring to Tom's Pool Room and the Popular Restaurant) that night (November 19, 1921), and talked to him at all? A. I did not. Q. Did you talk to him that night in front of the pool room or in front of the restaurant in that block on Tehama street in the presence of Mr. Heusers at all? A. I did not. Q. Did all three of you talk together there? A. We did not."

In the present case the witnesses Frank Mursa and Newt Power, the latter sheriff of Glenn county, each testified that on the evening of the 19th of November, 1921, between 6 and 7 o'clock, he saw Budd, the defendant Dunstan, and Heusers standing together and in conversation on the sidewalk in front of and near Tom's Pool Room on Tehama street, in the town of Willows. Mursa stated that he was about 60 feet from where the trio were standing, and he observed from the movement of their lips that they were carrying on a conversation. Power testified that he stood 30 or 35 feet

from where the three men were standing, and that, while he was unable to hear what they were saying, he did observe from the movement of their lips that they were engaged in conversation.

Upon the testimony given by the defendant in the case of the People v. Heusers, as presented above, the indictment was predicated and, as to said testimony, the counsel for the defendant in his brief says:

"The matter of Budd having talked to or seen appellant in front of the restaurant on this particular night was a mere incident occurring during the progress of the trial of J. H. Heusers, and had no bearing one way or the other upon the issue as to the guilt or innocence of the defendant, J. H. Heusers."

In other words, the contention is that Dunstan's testimony as given in the Heusers Case and as hereinabove set forth was wholly collateral to any issue raised in the case, and not material thereto, and that therefore the evidence is wholly insufficient to support the verdict.

It may be conceded that the testimony was upon a collateral question in the case, but it does not follow that the question to which it related did not involve a material issue within the meaning of the law. Budd had testified to the circumstances leading to the commission of the crime charged against Heusers, and among these was the circumstance that the defendant Dunstan introduced him (Budd) to Heusers and was present and engaged in a conversation held in front of the pool room referred to on the evening of the 19th of November, 1921, between him (Budd), Dunstan, and Heusers, and which conversation led to the consummation of the crime with which Heusers was subsequently charged, and upon which he was later tried and convicted. It will therefore readily be perceived that the testimony of Dunstan denying that he was present with Budd and Heusers at the time and place mentioned involved a direct attack upon the credibility of the whole testimony of Budd in the Heusers Case, and also involved the credibility of his own testimony. And, of course, it related to a matter most material to the case. If the jury had believed Dunstan, they could have justly repudiated the entire testimony of Budd, and have returned a verdict of not guilty in the Heusers Case, since it was principally upon Budd's testimony that the verdict in said case was founded.

In the case of the People v. Barry, 63 Cal. 62, the defendant, who was a witness in a murder case, testified upon cross-examination that he did not state in a conversation held at a particular time and place and in the presence of certain named persons that upon the occasion of the shooting of the deceased he, said Barry, saw the defendant fire the first shot. Claiming said testimony to be false, the people proceeded against Barry for the crime of perjury, and he was convicted upon a trial. It was contended upon appeal that his testimony was not material to any issue in the case in which he gave the alleged false testimony. The Supreme Court stated:

"For the purpose of impeaching the witness it was certainly competent for the prosecution to prove that the defendant had, on an occasion prior to the trial, made the statement imputed to him, and before this could be done it was required of the prosecution to lay a foundation for such impeachment. This could only be done by calling the attention of the witness to the contradictory statement and interrogating him respecting it. It therefore became a matter material to the credibility of the witness; it was a circumstance material to the issue or point of inquiry, and a false oath respecting it was perjury."

Again, the court in that case quoted approvingly the following language from the case of Wood v. People, etc., 59 N. Y. 123:

"It is not necessary that the false statements should tend directly to prove the issue in order to sustain an indictment. If the matter falsely sworn to is circumstantially material or tends to support and give credit to the witness in respect to the main facts, it is perjury."

The court adds:

"And it is equally perjury if the false evidence tends to discredit the witness. To the same effect is the rule laid down by the Supreme Court of Massachusetts in the case of Commonwealth v. David Thompson, 12 Mass. 225."

In Rex v. Glepe, 1 Ld. Raym. 256, it was said:

"It is not necessary that it should appear in an information for perjury to what degree the point in which the man is perjured was material to the issue, for if it is but circumstantially material it will be perjury. * * * So if a witness swears to the credit of another witness, if it be false it will be perjury if it conduced to the proof of the point in issue."

And we may subjoin to the latter statement the suggestion that, conversely, if the witness swears to the discredit of another witness, and it be false, it will be perjury "if it conduce to the proof (or disproof) of the point in issue."

In 22 Am. and Eng. Ency. of Law, 687, the rule is thus stated:

"The matter sworn to need not be directly and immediately material. It is sufficient if it be so connected with the fact directly in issue as to have a legitimate tendency to prove or disprove such fact by giving weight or probability to the testimony of a witness testifying thereto, or otherwise."

See, also, People v. Senegram, 27 Cal. App. 301, 303, 149 Pac. 786; People v. Metzler, 21 Cal. App. 82, 130 Pac. 1192.

[3] In fine, the test of materiality is whether the statement made could have influenced the tribunal upon the question at issue before it. Any statements made in a judicial proceeding for the purpose of affecting the decision, and upon which the judge acted, are material. In other words, evidence affecting the credibility of a witness usually tends to strengthen the case of a party to an action, or to weaken the defense of his adversary and, therefore, such evidence is material. People v. Brilliant, 58 Cal. 214; People v. Von Tiedeman, 120 Cal. 128, 52 Pac. 155; People v. Prather, 134 Cal. 436, 66 Pac. 589, 863; People v. Macard, 109 Mich. 623, 67 N. W. 968.

There can be no doubt that, for the reason already stated, the alleged false testimony in this case tended to weaken the case of the People in the prosecution of Heusers, and, consequently, under the rule as enunciated in the above cases, it was material to a vital issue in the case.

No other points are discussed in the briefs. The judgment and the order are affirmed.

We concur: FINCH, P. J.; BURNETT, J.

---

59 Cal. App. 718

## ANHEUSER-BUSCH BREWING ASS'N v. AMERICAN PRODUCTS CO. (Civ. 4269.)

(District Court of Appeal, First District, Division 1, California. Nov. 22, 1922.)

**1. Landlord and tenant ⟸195(1)—Tenant for definite term cannot terminate liability by abandonment without landlord's consent.**

A tenant for a definite term cannot divest himself of his right to possession or terminate his liability for the stipulated rental therefor by a mere abandonment of the premises without the landlord's consent.

**2. Landlord and tenant ⟸194(3)—Acceptance of keys by landlord not sufficient in itself to prove acceptance of surrender of lease.**

Where premises were let for a two-year term beginning November, 1918, and rents were collected by drafts drawn on tenant through a bank, and on payment of draft in June, 1919, tenant left keys to the premises with the bank, which wrote landlord, asking what disposition should be made, and landlord directed that keys be turned over to an agent, but continued to draw drafts on tenant for the rentals, the delivery of the keys by tenant and the keeping of them by landlord or its agents was not sufficient in itself to prove an acceptance on landlord's part of a surrender of the premises so as to relieve tenant of liability for rent.

**3. Landlord and tenant ⟸194(2)—Passive permission by agent to third person to use surrendered premises not effective as acceptance thereof.**

Where a real estate agent had no authority from the landlord to accept a surrender of premises by tenant, and landlord had manifested intention not to accept tenant's attempted surrender by insisting that tenant pay rentals during the succeeding months, a passive permission of the agent to a third person to store some hay in the premises was not indicative of an acceptance of tenant's surrender so as to relieve tenant of liability for rent.

**4. Landlord and tenant ⟸194(2)—Final acquiescence in termination of lease held not to relate back to tenant's attempted surrender.**

Where premises were let for two years, and during the first year tenant attempted to surrender lease and gave keys to the landlord, which surrender was not accepted, and landlord continued to demand rentals, letting of the premises to another tenant six months thereafter *held* not to relate back to the date of attempted surrender.

Appeal from Superior Court, City and County of San Francisco; G. A. Sturtevant, Judge.

Action by the Anheuser-Busch Brewing Association, a corporation, against the American Products Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Gerald C. Halsey and Frederic T. Leo, both of San Francisco, for appellant.

Goodfellow, Eells, Moore & Orrick, of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment in favor of the plaintiff in an action to recover $2,500.02, with interest alleged to be due plaintiff according to the terms of a lease of certain premises in which the plaintiff is lessor and the defendant lessee; the above sum being the aggregate of the stipulated monthly rental of $416.67 for the months from July to December, inclusive, 1919. The defense to said action proffered by the defendant in its answer and at the trial was that it had delivered up and surrendered said premises during the month of June, 1919, and had then vacated and abandoned the same, and that said plaintiff had then and there accepted and agreed to said surrender of said premises, and had taken possession of the same and had thereby terminated said lease and relieved said defendant of the obligation thereunder for the payment of any rent after the date of the said surrender and of the plaintiff's acceptance of the same. Upon the trial of the cause the court found against this contention on the part of the defendant; its finding in that respect reading as follows:

"Said defendant did not deliver up or surrender possession of the said premises to the plaintiff, and the said plaintiff did not unqualifiedly or at all take or accept in its own right, or in any right, or for its own use or benefit, or any use or benefit, or at all, the pos-

session of said premises. That said defendant did not deliver up to said plaintiff the said premises, and said plaintiff did not acquiesce in or agree to any surrender of said premises by said defendant; and said plaintiff did not unqualifiedly enter into or unqualifiedly take possession of the premises in its own right, or in any right, or for its own use or benefit, or any use or benefit. That the said lease was not, in the month of June, 1919, or at any other time, or at all, terminated by the mutual consent or any consent, or at all, of the parties thereto, to wit: The said plaintiff, and the said defendant."

The sole contention of the appellant upon this appeal is that the evidence is insufficient to sustain the foregoing findings of the trial court. The facts of the case which are practically undisputed, are summarized as follows: The lease between the parties was entered into November 19, 1918, and was for a period of two years at the stipulated monthly rental above stated. The lessor, and plaintiff herein, was a nonresident corporation. The real estate agent who had acted for the lessor in negotiating said lease was one Allen Moyer, who had procured the same subject to the approval and ratification of the lessor. This being obtained and the lessor having prepared and executed the lease in question, and the lessee having gone into possession, Moyer collected the first month's rent, when he was notified by the lessor that it would itself thereafter collect the rent by means of drafts on the lessee through the Anglo California Trust Company of San Francisco. The rents were so collected until the 24th day of June, 1919, when the defendant moved out of the premises, and its president appeared at the office of said trust company and paid the draft for the rent covering the month of June and left some keys to the premises with the trust company. The latter wrote to the lessor, informing it that the keys had been left with it, and asking what disposition should be made of them, to which letter the lessor replied, directing that the keys be turned over to Allen Moyer. The lessor, however, continued to forward drafts on the lessee covering the monthly rental as it fell due, which the lessee refused to pay, for the months of July and August; the drafts being returned to the lessor and plaintiff herein unpaid. It then wrote a letter to Moyer, directing him to call upon the lessee and insist upon the payment of the drafts. He did so, and was informed by the lessee and defendant herein that it had given up the keys and abandoned the premises, and that it refused and would refuse to pay any more drafts. In the meantime, in November, 1919, a third party named Panerio called up Allen Moyer by telephone, stating that he had some hay in the vicinity of the premises out in the rain which was going to be spoiled, and asking permission to store it in said premises. Mr. Moyer replied that he could not give him such permission because there was likely to be some trouble about it, to which Panerio replied: "Well, the place is open, and if I put it in there will you put it out?" Moyer said "No," and the result was that Panerio placed his hay temporarily in the premises. The plaintiff knew nothing of this episode and in the meantime in December, 1919, commenced this action for the recovery of the accumulated rent up to the date of its institution. In the meantime, in February, the plaintiff relet the premises to another tenant for a one-year term commencing March 1, 1920.

[1, 2] Basing its contention upon the foregoing facts, the appellant herein insists that they affirmatively show that the lease was terminated by its abandonment and the surrender of the premises in June, 1919, and by the plaintiff's acceptance thereof, as shown by its receipt and disposition of the keys to the premises at that time, and by the subsequent occupancy of the premises by Panerio. We cannot give our assent to the contention. A tenant of premises for a definite term cannot divest himself of his right to the possession of the same or terminate his liability for the stipulated rental therefor by a mere abandonment of the premises without the consent of the lessor. Bonetti v. Treat, 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151. Nor is the delivery up of the keys to the premises by the lessee, and even the keeping of the keys by the lessor or its agents sufficient of itself to prove an acceptance on the lessor's part of such surrender of the premises by the lessee, nor can it be clearly made to appear that such was the intention of the parties at the time. In Jones on Landlord and Tenant, § 548, the law is thus stated:

"The delivery of the key by the tenant and keeping it by the landlord are not sufficient to show a surrender of the premises by the tenant and an acceptance by the landlord, unless that appears to be the intention of both parties. * * * The landlord's failure to return keys which have been sent to him by a tenant who is vacating the leased premises does not effect a surrender by operation of law. The court remarked in one case: 'We are by no means prepared to concede that an abandonment of the premises by the tenant, and a delivery to and acceptance of the keys by the landlord, would alone necessarily amount to a surrender. The mere act of the landlord and his wife in picking up the key of the demised premises from the doorstep of his house, where the tenant had thrown it, and keeping it, does not show an acceptance of the tenant's abandonment. Whether landlord's acceptance of keys and resumption of possession amounts to a surrender of a lease depends on the intention of the parties. The landlord has a right to accept the keys and take possession of the premises to protect them from waste. The law does not necessarily infer a surrender from such act.'"

The following authorities fully support this view: Bonetti v. Treat, supra; Sessinghaus v. Knocke, 127 Mo. App. 300, 105 S. W. 283; Thomas v. Nelson, 69 N. Y. 118; Smith v. Hunt, 32 R. I. 326, 79 Atl. 826, 35 L. R. A. (N. S.) 1132, Ann. Cas. 1912D, 971.

[3] As to the episode wherein Panerio, by a sort of sufferance on the part of Allen Moyer, stored his hay for a brief period in the premises without taking on the quality of a tenant and without any knowledge on the part of the owner as to his occupancy of the same we attach little or no significance to the occurrence. The real estate agent, Moyer, had no authority to bind the owner of the premises to any such arrangment or to the acceptance of the lessee's abandonment of the premises in any such manner, and the owner had clearly manifested its intention not to accept the lessee's attempted surrender of the premises by insisting upon the payment of its drafts for the rental thereof during the months succeeding such attempted surrender. The findings of the trial court are fully supported by the evidence in the case to the effect that there was no acquiescence on the lessor's part in the lessee's effort to surrender said premises prior to the institution of the present action.

[4] There is no merit in the appellant's further insistence that the plaintiff's final acquiescence in the termination of the defendant's lease as shown by its letting of the premises to another tenant should have relation back to the date of its attempted abandonment of the premises; nor do the cases relied upon by the appellant sustain such a contention. The case of Welcome v. Hess, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145, chiefly relied upon by the appellant as supporting this claim, is distinguishable from the instant case by the very important fact that the landlord retook possession of the premises and relet the same without in any way notifying the tenant that in the interim between the lessee's surrender of the premises and the landlord's reletting thereof he would continue to hold the defendant liable for the rental according to the terms of his lease: while in the instant case the contrary clearly appears. The case of Phene v. Popplewell, 15 Eng. Ruling Cases, 518, is also distinguishable as to its facts from the case at bar. On the other hand, the cases cited in Ruling Case Law, p. 197, in support of the rule that a re-entry on the part of the landlord and his resumption of the benefits, use, and enjoyment of the premises, while it terminates the lease as to the landlord's right to rentals subsequent to such re-entry, does not affect the tenant's liability for rent accrued prior to such re-entry, fully sustain the rule, and have full application to the facts of the case at bar. Oastler v. Henderson, 2 Q. B. 575; Schuisler & Donnell v. Ames, 16 Ala. 73, 50 Am. Dec. 168; Barlow v. Wainright, 22 Vt. 88, 52 Am. Dec. 79; Edmonds v. Mounsey, 15 Ind. App. 399, 44 N. E. 196; In re Sherwoods, 210 Fed. 754, 127 C. C. A. 304, Ann. Cas. 1916A, 940; American Bonding Co. v. Pueblo Inv. Co., 150 Fed. 17, 80 C. C. A. 97, 9 L. R. A. (N. S.) 557, 10 Ann. Cas. 357; Rockwell v. Eiler's Music House, 67 Wash. 478, 122 Pac. 12, 39 L. R. A. (N. S.) 894.

The judgment is affirmed.

---

59 Cal. App. 714

## HOUGHTON v. KLUEGEL. (Civ. 4243. S. F. 10504.)

(District Court of Appeal, First District, Division 1. California. Nov. 22, 1922. Hearing Denied by Supreme Court, in Bank. Jan. 20, 1923.)

**1. Contracts ⊜193—Telegram construed as offer to repay salary as inducement to employer to accept proposed settlement with third person.**

A telegram, sent an employer who had performed services for a public utilities commission by an employee, negotiating with the commission for an adjustment of the employer's claim for compensation, *held* to amount to an offer by the employee to repay salary already paid him, if the employer would accept the sum offered by the commission.

On Hearing in Supreme Court.

**2. Contracts ⊜52—Detriment to employer from acceptance of third person's offer of settlement held sufficient consideration for employee's promise to repay salary.**

Where public utilities commission was only willing to pay $3,837 for engineer's services, for which he claimed $8,886, the detriment suffered by the engineer in accepting $5,049 less than the sum claimed *held* sufficient consideration, under Civ. Code, § 1605, for an employee's promise to repay salary amounting to $1,500 if the employer would accept the commission's offer.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by C. S. Houghton against H. A. Kluegel upon agreement for return of compensation. From a judgment for plaintiff, defendant appeals. Affirmed.

J. R. Moulthrop, of San Francisco, for appellant.

Courtney L. Moore, of San Francisco, for respondent.

PER CURIAM. This appeal is from a judgment in the plaintiff's favor in an action to recover the sum of $1,500 upon a written contract alleged to have been made

between the defendant and one Shirley Houghton, by the terms of which the defendant agreed to pay to the latter said sum. The plaintiff sues upon such assigned contract. The defendant denies the existence of any such contract or obligation. He also pleads that any such contract or agreement, if shown to exist, was wholly without consideration moving to said defendant. He further pleads the bar of the statute of limitations against the plaintiff's alleged cause of action. The case was tried upon an agreed statement of facts supplemented by some oral testimony of minor importance. The following, briefly summarized, are the undisputed facts of the case.

During the year 1916 Shirley Houghton, who was apparently a consulting engineer in construction work, with his office in San Francisco, Cal., had been engaged in the preparation of a certain report for the use of the public utilities commission of the city of Denver. The defendant, Kluegel, was also an engineer and was at the time an employee of said Shirley Houghton and his representative in Denver, under a salary, in connection with the preparation of said report and in the adjustment of the compensation to be allowed and provided for in the budget of said commission. Difficulties having arisen before the commission as to the amount of such compensation, Kluegel, on the 29th of December, 1916, sent from Denver to Shirley Houghton in San Francisco the following telegram:

"1916 Dec. 29 Denver Colo

"Shirley Houghton Hooker & Lent Bldg., San Francisco, Calif. Refer Nyes night letter. Last conference today. Presented statement for 8886 dollars from Sept. first. Deductions made 5049 include Wilhelm, your last two trips, Nyes two bills and practically everything since Oct fifth, making net allowed and for which they will issue warrant 3837 plus fee. Everything done under Nyes direction. Urge you accept this recommendation. Do not believe your presence would alter situation. Will refund my salary in above amounting to 1500. Speer will not include warrant in budget, but will take up matter after Jan. first in the line our talk Marsh. I could attend same after returning New York or Nye. Answer so if you agree present basis I can get warrant this week. Mailing copy report tomorrow.

"H. A. Kluegel."

The foregoing telegram had been preceded by certain other telegrams between the parties during the few days prior to December 29th from which it appeared that a good deal of doubt existed as to the allowance by the commission of the full amount of Shirley Houghton's claims for compensation for the labor and expense incurred by him in the preparation of said report, with the prospect of much delay and protracted litigation. As a result of these conditions and upon the receipt of the above-quoted telegram, Shirley Houghton, on December 29, 1916, sent to Kluegel at Denver the following reply to his aforesaid telegram:

"San Francisco, Dec. 29, 1916.

"H. A. Klugel, Century Building, Denver, Colo. Your wire. Make best settlement possible with Commission.

"Shirley Houghton."

Upon the receipt of this telegram Kluegel went before the public utilities commission of Denver and continued his negotiations for a settlement of Houghton's claim, but was unable to procure other or better terms than those embraced in his aforesaid telegram, and he finally made a settlement upon said terms. Thereupon, and on January 3, 1917, he sent a telegram to Shirley Houghton, stating:

"Settlement made approximately as per my last wire and warrant received duly registered."

Later he declined to repay Shirley Houghton the sum of $1,500 referred to in his telegram, whereupon the present action was instituted by the plaintiff as said Houghton's assignee. The trial court rendered judgment in the plaintiff's favor upon findings to the effect that the foregoing telegrams between the defendant and plaintiff's assignor constituted a written contract by which the defendant bound himself to the repayment to Shirley Houghton or his assignee of the sum of $1,500 theretofore received by him as salary for his services as an engineer, which services had apparently been rendered in whole or in a large part in connection with the preparation of the report to the public utilities commission of the city of Denver. The court also found that said action was not barred by the statute of limitations, and its finding in that regard is not assailed upon this appeal.

[1] The sole question presented upon this appeal is as to whether the evidence in the case, taken as a whole, sustains the foregoing finding on the part of the trial court. Looking to the terms of the telegram sent by the defendant Kluegel to Shirley Houghton on December 29, 1916, it would appear that the total claim of said Houghton for his labor and expenditures in the preparation of the report, which with the defendant Kluegel's co-operation he had prepared and presented to said public utilities commission, was the sum of $8,886, from which the said commission proposed to make deductions amounting to $5,049, leaving the sum of $3,837 for which the commission was willing to issue its warrant. The defendant, Kluegel, was apparently anxious to make a settlement on this basis if he could not by further negotiation procure better terms. But this basis of settlement would apparently cause a loss to his employer approximately two-thirds of his claim. The defendant, Kluegel, for reasons which we will discuss hereafter, was willing

to share some portion of this loss with his employer, and hence made the offer to do so by returning to his employer the sum of $1,500, theretofore received by him as salary during the prosecution of the work of preparing said report. As we view this telegram of Kluegel's it amounted to an offer to do just that thing as an inducement to said Houghton to accept, at considerable loss to himself, the terms of settlement proposed by the public utilities commission. As to the consideration for such an offer, viewed from the standpoint of Shirley Houghton, it would seem to be ample, since it would, if complied with, reduce his loss by an amount of about one-third of its total sum, in the event of his acceptance of the offered compromise of his claim. Viewed from the standpoint of the defendant, the record is not so clear as to his motives in making said offer, or as to the benefit to be derived by him from his employer's acceptance of the same. His own explanation of his expected benefit to be ultimately derived from his present sacrifice is plausible, and would, in our opinion, supply a sufficient legal consideration for his offer. He states that at the time of making it he expected to remain in the employ of Shirley Houghton in the doing of other construction work, and he states, in substance, that he believed that his said offer to share with his employer the loss venture would induce a continuance of the relationship between them. It was only when he was disappointed in this expectation that he concluded that his offer was not binding upon him. We are of the opinion that a consideration by the defendant's definite offer was fully shown, and that its acceptance on the part of the plaintiff's assigner constituted a binding contract between the parties which the plaintiff herein was entitled to enforce in the present action.

The judgment is affirmed.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition to have the above entitled cause heard and determined by this court after judgment in the District Court of Appeal is denied.

[2] We do not however approve what is said in the opinion of that court as to the consideration for defendant's promise. The detriment suffered by plaintiff in accepting $5,049 less than the sum he claimed to be due him was sufficient consideration for defendant's promise to repay him $1,500. (Civil Code, Sec. 1605.)

WILBUR, C. J.; LENNON, J.; SEAWELL, J.; KERRIGAN, J.; and Myers, J. concur.

59 Cal. App. 662

## BURNS v. JACKSON. (Civ. 2523.)

(District Court of Appeal, Third District, California. Nov. 16, 1922. Hearing Denied by Supreme Court Jan. 15, 1923.)

**1. Appeal and error ⊜1001(1)—Evidence held to support finding that driver of car causing injury was in defendant's employment.**

Where, in an action against J. and D. for death through the operation of an automobile, the driver had on two previous trials testified as to the facts of his employment and expressed his opinion that he was in the employ of J., which evidence was sufficient as a matter of law to demand submission to the jury of the question of the liability of J., the driver's alleged special employer, evidence on a third trial, wherein it was sought to show that J. was the employer liable, detailing the same facts but showing the driver's opinion to be that he was employed by D., the general employer, was sufficient on appeal after verdict in favor of plaintiff to compel the decision that a verdict against J. was legally supported, regardless of the technical rule of the law of the case.

**2. Master and servant ⊜301(4)—Test of employer's liability for acts of employee stated.**

Where the question is as to whether the general or special employer is responsible for injuries caused by an employee, the test is not which of them paid the wages of the employee, but whether the act was done in the business of which the person was in control as a proprietor so that he could at any time stop or continue it, and could determine the way in which it should be done, not merely in reference to the result to be reached, but in reference to the method of reaching the result.

**3. Death ⊜99(3)—$5,250 held not excessive for death of 16 year old boy.**

$5,250 *held* not excessive for the death of a 16 year old boy who had just completed his first year in high school, and was strong, healthy, industrious, and obedient, and a great help to his parents, both of whom were cripples; the father's life expectancy being 15.39 years.

**4. Death ⊜97—Damages matter of discretion of jury.**

In determining damages for death, no hard and fast guide can be employed in all cases, but the jury may exercise an intelligent discretion in view of the particular facts of the case, keeping in mind the well-established principles of law as to actual compensation for the loss sustained.

**5. Witnesses ⊜379(8)—Cross-examination of witness as to inconsistent statements made on former trials held not error.**

In an action for death caused by the operation of an automobile owned by the driver's general employer, but used temporarily in the services of defendant, where, on two previous trials wherein liability was sought to be imposed upon the general employer, the driver had testified as to the facts of his employment, it was not error on the third trial, wherein lia-

bility was sought to be imposed upon the special employer, to permit the driver on redirect examination by plaintiff to be examined as to his evidence on the former trials claimed to be inconsistent, in view of Code Civ. Proc. § 2049, permitting a party producing a witness to show that the witness has made at other times inconsistent statements, provided the attention of the witness is called to such statements as required by section 2052.

6. Trial ⊜207—When instructions as to inconsistency of testimony at previous trial improper stated.

Where a witness testifies that his testimony on former trials of the case was true and was just what he meant to testify at the subsequent trial, an instruction that the jury could consider the testimony only in explanation of inconsistencies, and not as substantial testimony in the case, is improper.

7. Master and servant ⊜301(4)—Special employer may be liable for acts of servant.

One who is the general servant or employee of another may be lent or hired by the master for some special service so as to become as to that special service the servant of such other party, and where a general servant or employee is so hired to another, and as regards the particular service is subject wholly to the direction and control of the other, the latter and not the general employer is the master and is liable for injuries caused by the negligent and wrongful act of the servant while engaged in the duties appertaining to such service.

8. Trial ⊜260(8)—Requested instructions covered by instructions given properly refused.

In a death action brought against several defendants, it was not error to refuse instructions as to each of the defendants that, if the death was solely caused by the negligence of a certain defendant, verdict must be in favor of the particular defendant named in the instruction, where the requests were covered by another instruction to find in favor of defendant if the death was caused solely by the negligence of any other person than such defendant.

9. Appeal and error ⊜1039(2)—Inconsistent allegation in amended complaint held not ground for reversal.

In an action for wrongful death caused by the operation of an automobile, on the theory that the driver was in the employ of defendant, a special employer, an allegation in the complaint that the driver was employed by another defendant as general employer *held* not to require a reversal; such allegation through oversight not having been amended when the remainder of the complaint was amended to conform to a theory attempting to place liability on the special instead of the general employer.

10. Appeal and error ⊜193(3)—Sufficiency of complaint held not subject to attack for first time on appeal.

Where a case has been tried three times without objection to the sufficiency of the complaint, the contention cannot be made for the first time on appeal that the complaint is insufficient, particularly where, at most, it can be said that a particular allegation thereof is open to the charge of duplicity.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by W. F. Burns against George H. Jackson for damages for the death of a minor child. Judgment for plaintiff, and defendant appeals. Affirmed.

W. H. Carlin, of Marysville, and A. H. Hewitt, of Yuba City, for appellant.

V. L. Hatfield, Martin I. Welsh, and W. H. Hatfield, all of Sacramento, for respondent.

BURNETT, J. The action was for damages for the death of a minor son, and plaintiff was awarded by a jury the sum of $5,250, and judgment was thereupon entered in his favor for that amount. The son was killed in a collision between a Southern Pacific motor passenger car and an auto truck owned by one Jackson Diggs, one of the original defendants herein, operated by one F. G. Prinderville, also a former defendant, who, it is claimed by respondent, was in the special service and under the control of appellant Jackson through his superintendent, W. G. McRoberts, at the time of the collision.

The cause has been before this court on two former occasions. In Burns v. Southern Pacific Co. et al., 43 Cal. App. 667, 185 Pac. 875, the facts are quite fully stated, and therein it was said:

"The fact that Diggs was the owner of the truck, and that the defendant Prinderville was in his general employ as a chauffeur, appears to be the only cause for having joined him in this action, but, as the testimony shows without contradiction that at the time of the collision referred to both truck and chauffeur were under the control and management of the defendant Jackson, the correctness of the ruling of the court as to the defendant Diggs requires no further mention."

Furthermore, it was said:

"Without setting forth the evidence in detail, it is only necessary to say there was sufficient evidence to take the case to the jury as to the defendant Prinderville being an employee of the defendant Jackson, and also as to the negligence of the defendant Prinderville in his operation and management of the auto truck at the time of the collision."

This court therefore ordered the judgment of nonsuit in favor of the defendants Diggs and McRoberts rendered in the trial court to be affirmed and the judgment of nonsuit in favor of defendant Jackson to be reversed, and the cause remanded for a new trial as to him. It may be added that upon the first trial a verdict was rendered in favor of plaintiff against Prinderville and for defendant company for its costs, and there was no appeal as to either of these defendants.

The case went back for a new trial as to

Jackson, and again a judgment of nonsuit was rendered in his favor. An appeal was taken and the judgment reversed, as reported in Burns v. Jackson (Cal. App.) 200 Pac. 80. Therein it was held that substantially the same evidence as to the liability of defendant Jackson appeared at the second as at the first trial, and therefore the principle of the "law of the case" was applicable. In the opinion is set out the testimony of the two witnesses, Prinderville and McRoberts, at both trials, which it is not necessary to repeat. This appeal is by the defendant Jackson from the judgment rendered against him after the third trial, and the main contention of appellant is that the verdict is entirely unsupported, since the evidence shows without conflict that Prinderville was in the employ and under the direction and control of Diggs, and hence Jackson was in no wise responsible for the negligence of the driver of said auto truck at the time of the collision. Preliminarily, it may be stated that the conclusion as to the liability of Jackson at all the trials rested wholly upon the testimony of Prinderville and McRoberts, that a petition for a rehearing was denied by the Supreme Court after said decisions were rendered by this court and appellant's counsel, who represented Diggs in the opposition to the petition of the plaintiff in the Supreme Court for a hearing after said first decision of this court holding that the nonsuit as to him was properly granted, contended that there was no evidence that Prinderville was under the control and direction of Diggs, and therefore the latter could not be held responsible for the former's negligence. In other words, while representing Diggs alone, they earnestly sought to make it appear that Jackson was the responsible employer, but herein, while representing Jackson alone, they are equally insistent that the liability belongs to Diggs. It is due counsel, though, to say that they claim the evidence at the last trial to be different from the first, in that the testimony of Prinderville was not the same. To support this position attention is called to the fact that at the last trial he testified that he had full control of the truck, that he had full power to stop and to start it when he pleased, that nobody had any control over him in doing that work, that he was then the employee of Jackson Diggs, and that neither Dr. Jackson nor Mr. McRoberts directed him in any particular as to how he should run the truck, whereas at the first and second trials he testified that he was working for Dr. Jackson, subject entirely to his orders, to go with his truck and drive it wherever he was directed and without anything being said by Diggs at all. Hence it is concluded that the principle of "the law of the case" is inapplicable, since it presupposes that the facts are substantially the same and has no application where the facts alleged and found are materially different from those considered on a former appeal. Esrey v. Southern Pac. Co., 103 Cal. 541, 37 Pac. 500; Moore v. Trott, 162 Cal. 268, 122 Pac. 462; Kramm v. Stockton Electric R. Co., 10 Cal. App. 271, 101 Pac. 914.

But it is to be observed that Prinderville admitted that at the first trial he testified that he was working for Dr. George H. Jackson that day, and subject entirely to his orders, to go with the truck and drive it wherever he directed him without anything being said by Jackson Diggs at all. In explanation of the apparent discrepancy he made the following reply to the questions asked by counsel for appellant as follows:

"Q. Well now, Mr. Prinderville, in this testimony here, as I understand, on the 27th day of June, 1917, while you were in the employ of Jackson Diggs on that day, you were working for Dr. Jackson. You mean by that you were hauling Dr. Jackson's fruit? A. Yes, sir. Q. As you said to-day? A. Yes, sir. Q. (Reading) 'And subject to his orders entirely?' That is, that you were hauling fruit he told you to haul? A. Yes, sir; hauling fruit he told me to haul and when he told me to to haul it. Q. (Reading) 'And to go with your truck and drive it wherever he directed you to?' A. Yes, sir. Q. That is true, wasn't it? A. Yes, sir. Q. (Reading) 'And without anything being said by Jackson Diggs at all?' A. Yes, sir. Q. That is true, and that is what you say to-day? A. Yes, sir. Q. You still say, do you, that so far as the management of the truck was concerned, you controlled that absolutely yourself, drove it as you pleased, stopped it when you pleased, controlled absolutely without anything being said by Dr. Jackson or any of his employees? A. Yes, sir."

[1] We can see no substantial difference in the facts to which the witness testified at the various trials, the only difference being in the inference or opinion of the witness as to who was his employer. His opinion at the first two trials was that he was in the employ of Dr. Jackson, while at the last trial, for some reason or other, his judgment was that Mr. Diggs was his employer and that he was responsible to him. This consideration was, however, for the determination of the jury and not to be influenced by the opinion of the witness. Upon what ground he based his conclusion is not disclosed, but when it comes to the recital of the facts from which the jury was to conclude whether in this particular employment he was subject to the direction and control of Dr. Jackson or Mr. Diggs, in justice to the witness, it must be said that his testimony throughout is consistent. These facts, in brief, are that for a month or six weeks he had been in the general employ of Mr. Diggs as chauffeur; that during all this time he had been living at the Jackson place; that Mr. Diggs was operating a ranch across the road, and on the morning in question Mr. Diggs sent him over to Dr. Jackson's without giving him any directions as to what he should do; that he hauled

fruit that day from Dr. Jackson's ranch to Oswald; that after dinner, Mr. McRoberts, the foreman for Dr. Jackson, told him to take a load of fruit to Oswald, to go out in the orchard and get the fruit; that Mr. McRoberts and young Burns rode with him and assisted him in unloading the fruit; that, after unloading the fruit, he went to a place named Kecks and got a load of empty boxes; that he had nothing to do with the loading, but that it was attended to by Mr. Burns and McRoberts; that he went to Kecks by direction of Mr. McRoberts; that he was hauling Dr. Jackson's fruit "he told me to haul and where he told me to haul it and to go with my truck and drive it wherever he directed me to and without anything being said by Jackson Diggs at all." The foregoing appear as the material facts in all these trials from which the inference was to be drawn as to who had the direction and control of Prinderville, and, if they were sufficient as a matter of law in the first and second trials to demand the submission to the jury of the question of the liability of Jackson, they are sufficient upon this appeal after verdict in favor of plaintiff, regardless of the technical rule of "the law of the case" to compel a decision that the verdict is legally supported. In this connection it is to be remembered that neither Jackson nor Diggs testified in the case. They were in a position to shed more light upon the disputed point than any one else, and their silence under the circumstances must have been deemed by the jury as a circumstance of some significance. They undoubtedly had some agreement as to the services of Prinderville as it is unreasonable to suppose the contrary. While neither, of course, was required to testify, they at least had direct and personal knowledge of the relation of the parties, and their failure to speak could hardly fail to weigh against the appellant. It is true, also, that the jury were at liberty to accept a portion of Prinderville's testimony if it carried conviction to their minds, and reject any other portion that they may have disbelieved. Indeed, they must have observed his inclination to favor Jackson in the last trial as he manifestly desired to help Diggs in the other trials. This apparent bias could not be laid out of view in properly appraising his testimony. As to Prinderville's statement that no one directed him when to stop and when to start the machine, etc., it can have no bearing upon the question before us. There is no pretense that he was an independent contractor, but it appears beyond peradventure that he was an employee of either Diggs or Jackson, and it would be absurd to suppose that the employer would give him such minute directions as to the operation of the truck. Such matters would naturally be left to the judgment of the driver, who was better qualified and in a better position than the employer to exercise such judgment.

As to the principle of law involved in the question of the relation of the parties there is no controversy, the only difficulty being in its application to the facts. The books are replete with illustrative cases, but it is sufficient to refer to a few from the recent decisions of our Supreme Court.

In Stewart v. California Imp. Co., 131 Cal. 125, 63 Pac. 177, 724, 52 L. R. A. 205, the injury was caused by escaping steam from an engine operated by one Conger, who was employed by the California Improvement Company to roll and level certain streets in the city of Oakland. The main contention of appellant therein was that the injury to the plaintiff was not caused by its negligence but that of the city of Oakland, since it was being used under the direction of the city superintendent of streets. The Supreme Court, however, said that the trial court had found that the defendant company had selected the engineer, and his services were to be paid by said company, and said company had the right to remove him, and that the relation of master and servant existed between them and not between the city and Conger. The Supreme Court held that the evidence supported these findings and quoted with approval from the leading case of Boswell v. Laird, 8 Cal. 469, 68 Am. Dec. 345, the following statement of the rule in such cases:

"The relation between parties to which responsibility attaches to one, for the acts or negligence of the other, must be that of superior and subordinate, or, as it is generally expressed, of master and servant, in which the latter is subject to the control of the former. The responsibility is placed where the power exists."

[2] Therein the services were paid for by the party whom the court held to be liable, while in the case at bar the evidence shows that Diggs, and not Jackson, paid Prinderville, but such circumstance is not controlling, the test being whether "the act is done in the business of which the person is in control as a proprietor, so that he can at any time stop or continue it and determine the way in which it shall be done not merely in reference to the result to be reached, but in reference to the method of reaching the result." 18 R. C. L. § 244; Burns v. Jackson, supra.

In Pruitt v. Industrial Accident Commission (Cal. Sup.) 209 Pac. 31, it was held that the owner of a truck was not liable for the death of the driver caused by injuries received by said driver while hauling materials for a contracting firm, "where such firm hired the truck from the owner including the services of the driver, and controlled and directed the driver in the operation and movement of the truck, and said owner never exerted any measure of control over the

truck or driver while in the service of said firm"; the court being of the opinion that the hirer of the truck was the responsible party.

In Billig v. Southern Pacific Co. (Cal. Sup.) 209 Pac. 241, is found the last expression of the Supreme Court on the subject. Therein the governing principle is stated as follows:

"The application of the doctrine of respondeat superior in any given case depends upon the power of control which the superior possesses, and which for the protection of third persons he is required to exercise, over the conduct and activities of his subordinates," and "consequently the doctrine has application only in cases where the power of control exists, and such power does not exist in a situation where the special employer has no voice in the selection or retention of the negligent subordinate."

It was held therein that the trial court was justified in holding that the special employer had no such power of control, but the general employer did have and that the latter was therefore liable. In the opinion denying a rehearing (209 Pac. 245) the Supreme Court shows that there is no conflict between that case and Pruitt v. Industrial Accident Commission, supra, there being a difference in the evidence, and the court being of the opinion that there was no evidence, either direct or otherwise, "from which it might be inferred that Harris [the general employer] at the time and place of the collision, and with respect to the manner and method of operating and controlling the auto truck while in transit, had relinquished to another person his right of control over the driver of the truck." Herein, as we have seen, there is no direct evidence of the extent of the authority of the special employer, but it is a fair inference from all the circumstances in the case that it depended upon Dr. Jackson's volition whether Mr. Prinderville should be retained in that particular work, and that the special employer had control over the employee while engaged in that work.

[3, 4] The contention that the verdict is excessive, in our judgment, possesses no merit. The rule is, of course, that the verdict will not be disturbed upon this ground unless it is "so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury." Hale v. San Bernardino, etc., Co., 156 Cal. 713, 106 Pac. 83. The boy was 16 years of age, had just completed his first year in the Marysville High School, and the evidence shows he was a strong, healthy, industrious, and obedient lad, and a great help and comfort to his parents, who were both cripples. The father's expectancy of life was 15.39 years, and applying the principles that must govern in such instances, as enunciated in the cases cited by appellant, we cannot say that the verdict should be condemned. Peluso v. City Taxi Co., 41 Cal. App. 297, 182 Pac. 808; Bond v. United Railroads, 159 Cal. 270, 113 Pac. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50. It is, of course, true, as stated by appellant, that no "hard and fast guide" can be applied to all cases, but that the jury is permitted to exercise an intelligent discretion in view of the peculiar facts of the case, keeping in mind the well-established principles of law as to actual compensation for the loss sustained.

[5] It is claimed by appellant that the court committed error in overruling the objection to questions asked of Prinderville on the redirect examination by respondent as to said Prinderville's testimony at the first trial of the cause. Upon cross-examination, it seems, he declared that he was the servant of Jackson Diggs and was not in the employ of Dr. Jackson and that the latter had no control over him. The questions as to his testimony at the former trial we may combine into one as follows:

"As I understand, in that day, the 27th day of June, 1917, while you were in the employ of Jackson Diggs on that day, you were working for George H. Jackson, and subject to his orders entirely, to go with your truck and drive it wherever he directed you and without anything being said by Jackson Diggs at all?"

[6] He admitted that his answer was, "Yes," and in reply to further questions by appellant he stated what we have hereinbefore set out. Appellant admits that the questions as to the former trial would have been proper on the ground of surprise if the witness had testified on the direct as he had on the cross examination; but we can see no difference in principle, since he was a witness for plaintiff and the particular statement could be no less surprising because elicited by appellant rather than by respondent. Section 2049 of the Code of Civil Procedure permits a party producing a witness to show that the witness "has made at other times statements inconsistent with his present testimony," provided the attention of the witness is called to such statements as provided in section 2052 of said Code. The reason for the rule is clearly stated in the opinion of this court in Zipperlen v. Southern Pacific Co., 7 Cal. App. 206, 93 Pac. 1049, to the effect that "a party producing a witness virtually stands as an indorser of the character of such witness, and by the act of calling him to testify in his behalf in effect declares to the court and jury that the testimony of said witness will strengthen and support his contention," and it would be unjust to allow the witness to place the party "in a false light before the court or jury." Moreover, said questions propounded to the witness on cross-examination involved his opinion of the relation he sustained to the other parties, and to that extent he was really made the witness of appellant, and it was proper to permit the respondent under such circumstances to call his attention to an adverse opinion that he had formerly expressed. In

this connection appellant claims that he requested the court to limit this testimony to the consideration of the credibility of the witness and that it should not be regarded as proof of the fact, but our attention is not directed to any portion of the record showing such request. All that we have found concerning it is the following statement made by counsel for appellant during the argument as to the admissibility of said testimony at the first trial:

"Now, I repeat, had they asked the witness a question and then obtained an answer which surprised them, under the law as laid down in the Code and sustained by the authorities, they would have had the right to ask him if he made another answer at another time; and then we would have been entitled from your honor to an instruction to the jury that they were permitted to do that only for the purpose of putting them right before the court and jury, but it must not be considered as testimony in the case."

But if such instruction had been requested, it would have been properly refused, since the witness said his former testimony was true and just what he meant at this trial.

[7] Appellant complains of this instruction:

"You are instructed that it is the law that one who is the general servant or employee of another may be loaned or hired by the master for some special service, so as to become as to that special service the servant of such third party; and where a general servant or employee is so loaned or hired to another, and as regards the particular service, for which he is so loaned or hired, is subject wholly to the direction and control of the other, the latter, and not the general employer, is the master, so far as the particular or special service is concerned, and is liable for injuries caused by the negligent and wrongful act of the servant, while engaged in the duties pertaining to such service."

The instruction embodies a sound principle of law, and, as a rational inference in harmony with the hypothetical situation therein presented could be drawn from the evidence in the case, we perceive no valid objection to the action of the court in giving it.

[8] Appellant proposed a specific instruction as to each of the defendants other than himself similar to the following:

"I instruct you that if you find from the evidence in this case that the death of Emmons Franklin Burns was caused solely by the negligence of the defendant F. G. Prinderville, then your verdict must be in favor of defendant."

It is apparent that no prejudice resulted from the refusal of the court to give them, since they were entirely covered by this direction to the jury:

"If you find from the evidence in this case that the death of Emmons Franklin Burns was caused solely by the negligence of any person or persons, or corporation, other than George H. Jackson, or his servants, agents, or employees, then your verdict should be in favor of defendant Jackson."

The only other point made by appellant is that since concededly the only ground, upon which plaintiff could recover from defendant Jackson, depends upon the theory that Prinderville was in the employ of Jackson, he is precluded from such recovery by the allegation in paragraph 6 of his complaint, "and defendant F. G. Prinderville was then employed by the defendant Diggs as his agent and servant to drive said motor truck while the same was being used in the transportation of said fruit." Appellant says:

"That allegation, of course, was a proper one when plaintiff was seeking to fix liability on the defendant Diggs, but manifestly out of place when seeking to charge the defendant Jackson."

It appears that in paragraph 5 the complaint originally alleged that "said George H. Jackson was engaged in transporting said fruit * * * by means of a certain auto truck owned and operated by defendant Jackson M. Diggs." In the original answer it was denied "that the said auto truck was, on said date, operated by the defendant, Jackson M. Diggs," but at the last trial appellant by leave of court amended his answer so as to strike out that denial. Thereupon plaintiff amended said paragraph so as to have it read:

"That some of said fruits were then ready for shipment and sale, and on said 27th day of June, 1917, said George H. Jackson, was engaged in transporting said fruit from said farm to various places, including a station called Oswald on the lines of the Southern Pacific Company in said county of Sutter, as aforesaid by means of a certain auto truck owned by defendant Jackson M. Diggs, along and upon a certain highway of said county of Sutter extending from the ranch of said Jackson to a station called Oswald, on the railway line of the defendant Southern Pacific Company."

[9] Said paragraph 6, through oversight no doubt, was not amended as it should have been to make it consistent with said amended paragraph 5. However, the defect is not sufficient to justify a reversal of the judgment. The theory of plaintiff in the beginning was that defendants Diggs and Jackson were jointly liable for the negligence of Prinderville, and this joint liability he attempted to set forth in said sixth paragraph by the allegation:

"That defendant Jackson is the grandfather of defendant Jackson M. Diggs, and they work together and exchange utilities with each other, and were so co-operating at said date in the use of said auto truck."

It may be admitted that the pleader was not fortunate in the use of terms, but there was no demurrer, and the case was tried three times without objection upon the the-

ory that defendant Jackson was charged with responsibility for the operation of said truck; and for the first time in this court the point is made that the complaint is insufficient in that respect. The truth is, however, that the complaint is simply uncertain, since paragraph 5 as amended alleged, as we have seen, that defendant Jackson "was engaged in transporting said fruit by means of a certain auto truck owned by defendant Jackson M. Diggs."

[10] In connection with the other allegations this could only mean that he was transporting the fruit through the operation of said truck, thus rendering the complaint open to the charge of duplicity in view of paragraph 6; but no objection was made, and it is apparent that appellant should not be heard now for the first time to urge the point.

We think the judgment should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

---

59 Cal. App. 727

## ANDERSON v. ANDERSON. (Civ. 3659.)

(District Court of Appeal, First District, Division 2, California. Nov. 24, 1922. Hearing Denied by Supreme Court Jan. 22, 1923.)

**1. Divorce ⟸11—Policy of law stated.**

It is the policy of the law to conserve the stability of the marriage relation, and to grant no divorce except on clear proof, adequately corroborated, of facts specified by the Code as ground for divorce.

**2. Divorce ⟸179—No complaint of evidence admitted without objection.**

That testimony was given without objection by defendant in divorce is sufficient response to her contention that its admission was prejudicial to her.

**3. Divorce ⟸184(10)—Court on appeal bound by findings supported by evidence.**

The appellate court is bound by the findings supported by the evidence in a divorce action, and an argument on the weight of the evidence is improper.

**4. Divorce ⟸130—Findings of cruelty supported.**

Findings of fact sufficient for divorce for cruelty *held* sustained by the evidence.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Andrew H. Anderson against Lenna Mae Anderson for divorce. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 206 Pac. 463.

J. J. Dunne, of San Francisco, for appellant.

James M. Thomas, of San Francisco, for respondent.

LANGDON, P. J. This appeal is taken by the defendant from a judgment against her by which plaintiff was granted an interlocutory decree of divorce.

[1] Appellant devotes much space in her brief to the cases expressing the general attitude of courts with reference to divorce actions. There is no dispute about what this attitude is, and it is beyond controversy that the policy of the law, as expressed by appellant, is to conserve the stability of the marriage relation and to grant no divorce except upon clear proof, adequately corroborated, of facts specified by the Code as grounds for divorce. However, we find no violation of these principles in the present record. The complaint charged the defendant with having an uncontrollable temper, with constant quarreling, almost continually from the date of the marriage (December 6, 1916), to June 21, 1918. He also charged that she had falsely accused him of improper relations with a "German woman"; that she had stated to divers persons that she was going to "put plaintiff out of business"; that defendant had interfered with plaintiff's business by calling at his office and insisting upon reading all his business letters; that she had accused him of being "so crooked in his business dealings that he never got through with a transaction without having a lawsuit over it"; that on June 21, 1918, in the town of Novato, Cal., the defendant met plaintiff outside of the freight sheds of the Northwestern Pacific Railroad; that plaintiff had called there for his satchel and had found that defendant had previously secured possession of it. He remonstrated with the station agent for having delivered the satchel to defendant, and thereupon defendant turned upon him with vile language, striking him in the face with clenched fists and striking his eye several times, so that it became bruised and swollen; that defendant thereupon stated to several persons standing about:

"That man left me to go with a German woman. I will have him driven out of town by the people of Novato."

That defendant followed plaintiff as he left said station and picked up a stone and threatened to strike plaintiff with it, and in order to avoid being struck plaintiff was obliged to seek shelter in the depot; that defendant has stated to divers persons that she is going to put plaintiff out of business; that she not only personally annoyed, harassed, and assaulted the plaintiff, but caused her mother and sister to assist her in annoying, harassing, and assaulting him. Plaintiff

then specifies an instance in which defendant's mother and sister called at his office and assaulted him, breaking his eyeglasses and accusing him of being intimate with a "Hun" woman; that plaintiff has endured great mental suffering and physical pain as a result of such conduct on the defendant's part and has been incapacitated thereby from attending to his business duties.

[2] Let us concede at the outset that the last incident, although admitted in its essential features by the mother and sister, was not proven to have been instigated by the defendant. The mother and sister testified that the defendant did not know of their contemplated visit to plaintiff's office and plaintiff produced no proof to contradict this. Therefore we shall dismiss this incident from our consideration and direct our inquiry to whether or not the remainder of the evidence warrants the granting of the interlocutory decree of divorce. However, before passing to a consideration of the remainder of the evidence, it might be well to point out, in response to appellant's contention that the admission of the evidence of the assault by the mother and sister of the defendant was prejudicial to the defendant, that the record discloses that the facts were testified to in the first instance by the mother of defendant without objection on the part of the defendant.

Plaintiff testified to repeated quarrels and accusations by the defendant, and particularly to the accusation that plaintiff was having improper relations with his stenographer, whom defendant characterized as the "German woman" or the "Hun." There is no direct corroboration of all of plaintiff's testimony on these matters, but there is corroboration of a considerable part of the same in the testimony of plaintiff's mother to the effect that the defendant came to her house and stated that plaintiff had been there with "that German woman." Plaintiff testified also that he heard this conversation as he was about to enter his mother's house. Another witness, Mrs. Clark, testified that defendant had told her that plaintiff had had improper relations with his stenographer. The stenographer and the plaintiff both took the stand and denied any improper relations whatsoever, and the court has found that defendant's accusations with reference to this matter were untrue. But plaintiff and his said stenographer also testified to an incident in which defendant had assaulted the stenographer in his office. All of these matters corroborate plaintiff's testimony of repeated quarrels between the parties and of accusations made by the defendant, as does also the testimony of the witness Beck, who worked in the office of plaintiff. He told of a visit of defendant to plaintiff's office at a time when plaintiff was away. She insisted upon getting into the safe, and Mr. Beck prevented her from doing so. At that time "she spoke about the 'Hun' woman, as she called her; she said: 'He is with this Hun woman.'"

Plaintiff also testified that defendant would come to his office and read the letters on his desk and would take papers and copies of letters away from his desk and would go into his files against his protest. Mrs. Brown, the mother of plaintiff, testified that defendant had brought to her home a letter which she stated was taken from the plaintiff's file. She read this letter to the witness and stated she was going to put it back again.

The witness Alpi testified that defendant had stated to him that her husband's business dealings were so "crooked" that they seldom "put a deal through" without a lawsuit. She said his business was "crooked."

Plaintiff testified to the assault by the defendant at Novato, Cal. He was corroborated by the testimony of the witness Stone, who was working at the freight depot when the scene took place. He stated that the plaintiff had asked for his suit case and had protested when told that it had been given to his wife; that defendant followed close behind him, saying, "You left me for a German woman." She called plaintiff "a dirty dog" in a loud voice and struck him in the face with her hand; that, as plaintiff walked away, defendant followed him and stopped as though to pick up something. The station agent, Seaton, also witnessed this assault and testified to substantially the same facts with relation to it, as did also the witness Peterson, the assistant station agent.

The witness Bond, a newspaper publisher at Novato, testified to a conversation between defendant and himself in which defendant admitted striking plaintiff and stated that plaintiff wanted a divorce, but that she would not let him have it and was going "to make it warm for him" and wanted to run him out of town. Another witness testified that defendant told him she had "beaten Mr. Anderson up" at the depot. Plaintiff's mother testified that on the evening after the assault she saw plaintiff, and his eye was swollen and blackened. Another witness also saw him at the same time and testified to his injuries. Defendant herself admitted the assault, seeking to justify it by stating that the plaintiff had used offensive language to her; but the trial court has found the facts to be in accordance with the plaintiff's testimony. In the light of all the testimony in the record upon this incident, we feel the finding of the court was a proper one.

[3] A great part of the appellant's briefs is devoted to arguments upon the evidence; but after the foregoing statement of the testimony, which supports the findings of the court, it will appear that we are bound by

the findings of the trial court, and that an argument upon the weight of the evidence is improperly addressed to this court.

Appellant complains that the evidence does not show that plaintiff lost any business by reason of the acts of defendant. We do not think that such a showing was necessary. Plaintiff testified that during the time he was subjected to these annoyances he lost 30 pounds in weight and was in the worst physical and financial condition he had ever been in in his life. It does not take much proof to carry the conviction that such a course of conduct as that herein narrated would cause mental and physical suffering to the victim regardless of the acuteness of his sensibilities.

[4] We are of the opinion that the evidence sustains the findings, which are sufficient upon which to base the judgment. Appellant makes the most of minor matters with reference to rulings of the trial court upon evidence, but we can find no error in the record which would warrant a reversal of the judgment.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

---

59 Cal. App. 706

## PEOPLE v. GRAFF. (Cr. 878.)

(District Court of Appeal, Second District, Division 2, California. Nov. 20, 1922. Hearing Denied by Supreme Court Jan. 18, 1923.)

**Husband and wife ⊂=54—Wife "a person" within acts defining and punishing embezzlement and forgery against husband's property.**

Notwithstanding Pol. Code, § 4468, which provides that the common law, so far as it is not repugnant to or inconsistent with the United States Constitution or the Constitution or laws of this state, is the rule of decision in all courts of this state, and in view of Code Civ. Proc. § 1881, providing that neither husband nor wife can be a witness against the other without consent, except for a crime committed by one against the other, Pen. Code, §§ 26, 1322, providing that all persons are capable of committing crimes, except, inter alia, married women (except for felonies) acting under coercion of their husbands, and that neither is a competent witness against the other in a criminal action, except in case of a crime committed by one against the person or property of the other, "any person," "every person," and "a person" as used in Pen. Code, §§ 470, 503, 506, 507, defining embezzlement and forgery to include, in substance, both husbands and wives, hence a motion to quash an indictment against a wife for embezzlement and forgery concerning the property of her husband was improperly granted.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Person.]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Harriet A. Canfield Graff was informed against for embezzlement and forgery. From an order granting her motion to quash the information, the People appeal. Order reversed.

U. S. Webb, Atty. Gen., and Arthur Keetch and John W. Maltman, Deputy Attys. Gen., and Thomas Lee Woolwine, Dist. Atty., and William G. Randall, Deputy Dist. Atty., all of Los Angeles, for the People.

Kemp, Mitchell & Silberberg, of Los Angeles, for respondent.

WORKS, J. Defendant was informed against in two counts for the commission of the crime of embezzlement and in four counts for the commission of the crime of forgery. Under all of these counts the commission of the alleged offenses was stated to have been against the property and rights of defendant's husband, defendant having been a married woman at the time of the alleged wrongful acts. Defendant moved the trial court to set aside and quash the information, and the motion was granted; defendant never having entered her plea to any of the six counts. The people appeal from the order granting the motion to set aside and quash.

The point offered in support of the motion made in the trial court, and the sole point now offered by respondent in support of the order of that court is that a wife cannot commit the crimes of embezzlement and forgery if her alleged criminal acts concern the property of her husband. This contention is based upon the well-known rule of the common law, founded upon the unity of the two parties to the marriage relation, to the effect that a wife cannot commit a crime against the property of her husband; respondent insisting that the rule mentioned yet obtains in California.

Section 4468 of the Political Code provides, with our italics, that—

"The common law of England, *so far as it is not repugnant to or inconsistent with* the Constitution of the United States, or *the Constitution or laws of this state*, is the rule of decision in all of the courts of this state."

The solution of the question before us depends upon the italicized portion of this section. Respondent contends that the insistence that her alleged wrongful acts do not constitute the crimes of embezzlement and forgery is not repugnant to nor inconsistent with the Constitution and laws of the state, in the absence of constitutional provision or legislative enactment expressly extending the two crimes to married women who offend against the property of their husbands, and there is no such provision or

enactment. On the other hand, the position taken by appellant is that the general state of the law as to married women is such that there is thereby furnished a repugnancy to the idea of the application of the common-law rule above mentioned to the charges made in the information filed against respondent. It is between these two contentions that we must make a choice in disposing of the appeal.

We first take account of the penal laws which bear upon the question. Where italics are used throughout this opinion it will be understood that they are ours. Section 470 of the Penal Code provides:

"*Every person* who, with intent to defraud," commits certain acts, or who, "with intent to prejudice, damage, or defraud *any person*," commits certain other acts, "is guilty of forgery."

Section 503 of that Code reads:

"Embezzlement is the fraudulent appropriation of property by *a person* to whom it has been intrusted."

Section 506 of the same Code is to the partial effect that—

"*Every trustee*, * * * *agent*, * * * *or person*, otherwise intrusted with or having in his control property for the use of *any other person*, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust * * * is guilty of embezzlement. * * *"

Section 507 of that enactment in part provides:

"*Every person* intrusted with any property as bailee * * * who fraudulently converts the same or the proceeds thereof to his own use * * * is guilty of embezzlement."

These quotations, while fragmentary, will serve sufficiently as a basis for our discussion. It will be observed that each of the sections is all-inclusive as to persons, in *form* at least. The continued use of the expressions "every person," "any person," and "a person" justifies the statement upon principles of pure logic and without the possibility of cavil. That, however, does not settle the matter, for some courts in other jurisdictions have found no great difficulty in deciding in the face of the very general terms of penal statutes that a wife may not be guilty of the larceny of her husband's property; this upon the common-law rule as to the unity of husband and wife; it being declared in those jurisdictions, in effect if not by positive statement, that as to such offenses a wife is not a person. This being so, we may look to other enactments of the Legislature which cast light upon the question.

It is provided by section 26 of the Penal Code that—

"*All persons* are capable of committing crimes except those belonging to the following classes: * * * Seven. Married women (except * * * felonies) acting under the threats, command, or coercion of their husbands. * * *"

Because of the exception upon exception in which this statement is involved and for the sake of clarity, the people in their brief paraphrase it thus:

"Married women are persons capable of committing all crimes, except misdemeanors committed by them when acting under the threats, command, or coercion of their husbands,"

a rendition of the terms of the enactment which to us seems eminently just. Certainly, if the Legislature had not intended the words "every person," "any person," and "a person," as used in sections 470, 503, 506, and 507, to operate as contended for by the people in the present instance, we might reasonably expect that body to have so expressed itself in the seventh subdivision of section 26. Under such conditions we should naturally expect a reading of the subdivision somewhat after the following manner:

"Seven. Married women (except for felonies) acting under the threats, command, or coercion of their husbands; or (as to both felonies and misdemeanors) committing acts against the property of their husbands."

Certain companion sections of the Penal Code and the Code of Civil Procedure are very persuasive of, if they do not in fact control, the view that the Legislature never intended an exception to the general terms of sections 470, 503, 506, and 507 of the Penal Code in the case of a married woman offending against the property of her husband. Section 1322 of the Penal Code is to the effect, in part, that—

"Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except * * * in case of criminal actions or proceedings for a crime *committed by one against the person or property of the other*. * * *"

The following is a portion of section 1881, Code of Civil Procedure:

"There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, * * * a husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceedings *for a crime committed by one against the other*. * * *"

Respondent asserts that these two sections embody rules affecting procedure alone, and that therefore they cannot be regarded as substantive declarations that either husband or wife may commit crimes against the prop-

erty of the other. The statement is true, but the sections nevertheless have both a direct and a decided bearing upon the question here presented. The rules of evidence prescribed by the Legislature in them amount to a contemporaneous construction of the substantive law enacted by that body and dealing with questions kindred to that covered by those rules of evidence. It is well settled that such a construction is most persuasive with the courts. 25 R. C. L., tit. "Statutes," pars. 273, 275. The language employed by the Legislature in the two sections is particularly persuasive in the present instance, for if the lawmaking body has not intended by its substantive enactments to render husbands and wives criminally responsible for wrongful acts committed by either against the property of the other, then parts of the two sections do nothing but incumber the statute book. It must be said that the body has performed, not only a futile, but a foolish act, in providing that husbands and wives may testify against each other in cases in which either is under prosecution for the commission of a crime "against the person or property of the other," or "against the other," if such crimes cannot be committed. It must be true, then, that in announcing this rule of evidence the Legislature has in effect declared that it has elsewhere provided that each of the spouses may commit such crimes; that is, if we may find elsewhere language employed by the lawmaking body which with reason may be interpreted as declaring that each may commit them. We have already remarked that such a declaration is made, in *form*, in sections 470, 503, 506, and 507 of the Penal Code. We may now, with the aid of section 1322 of that Code and section 1881 of the Code of Civil Procedure, not forgetting to pay due regard to the terms of section 26 of the Penal Code, safely conclude that we have made substantial progress toward the view that the Legislature has made the declaration, not alone in form, but in substance as well.

The question whether a wife may offend against the property of her husband through a commission of the crimes of embezzlement and forgery has never been passed upon, apparently, in any jurisdiction. Courts of last resort in several of the states have had before them, however, the question whether one spouse may commit larceny of the effects of the other, or may commit other crimes, notably arson, against the property of the other, with the result that the authorities upon the question are divided. In those cases in which it has been determined that the crimes mentioned may not be committed by one spouse against the other the courts have descanted upon the sanctity of the marriage relation as the foundation upon which a stable condition of society can alone exist. The view is taken that the peace of the home will be destroyed if husbands and wives may be charged with the commission of crimes against the property of each other, and it is said that it were better to permit the escape from punishment of a husband or wife who robs a spouse than to encourage the dissension which would enter a family if a criminal charge could be pressed against the thief. It is said in effect that the commission of such a theft would have a slight tendency to produce a warfare internecine to the family, while the pressure of a criminal charge because of the immoral act would tend to cause a disruption of the marital relation. We cannot adopt such a line of reasoning. We cannot believe that such events can be so smothered in the family circle that no ripple, or that but a slight ripple, will disturb the serenity of the home. A spouse will not lightly forgive a robbery committed against him by his marital partner, and a home in which one of the partners will steal the property of the other cannot be regarded as one resting on a particularly solid foundation.

In passing upon the question involved in this appeal we cannot but contemplate the effect upon society if our decision should be favorable to respondent. Such a termination of the cause would advertise to the world the fact that wives may rob their husbands with impunity, that they may commit against their husbands inherently immoral acts which if committed by them against others, or if committed by others against their husbands, would bring down condign punishment upon the offender under the laws denouncing the serious crimes of embezzlement and forgery. Such a conclusion on our part could not but encourage and multiply the commission of such acts, thus bringing into some households at least the very strife and dissension which it is the purpose of some of the decided cases to prevent, through arguments unconvincing, unsound, and illogical.

Another circumstance may be looked to as indicating the inapplicability of the cases with which we have already indicated our positive disagreement. In jurisdictions in which it has been determined that either spouse cannot commit larcey of or arson against the property of the other it is also held that neither can maintain a tort action to recover damages for the wrongful act of the other against the person. In fact, the authorities on these two questions generally go hand in hand; there being some exceptions because of the language of particular statutes. The rule is different everywhere as to the right of either spouse to maintain a civil action to recover separate property of that spouse which has been appropriated by the other, or to recover its value. Either a husband or a wife may

maintain such an action against the other as freely as he or she might maintain a similar action against a third person. Peters v. Peters, 156 Cal. 32, 103 Pac. 219, 23 L. R. A. (N. S.) 699. In such a case a spouse may drag the family skeleton from its closet and exhibit it to the public view, thus precipitating the domestic warfare which the cases that we decline to follow would have us believe might never otherwise arise. We repeat, however, that the authorities are uniform upon the proposition that such actions may be maintained. In fact, such a rule is necessary to the maintenance of the separate property rights of husband and wife. Upon this consideration alone we might almost venture to base a decision favorable to appellant, for it surely would be strange if the husband of respondent could maintain an action against her for the recovery of any money which she may have appropriated to her use after he had intrusted her with its possession, and the people at the same time be precluded from the maintenance of a criminal action against her upon the score of embezzlement.

On the whole, we conclude upon reason and from the face of the various sections of the Codes to which we have referred that when the Legislature used the expressions "any person," "every person," and "a person," in sections 470, 503, 506, and 507 of the Penal Code, it meant to include in substance, and not merely in form, both wives and husbands. Our views, however, find substantial support in decided cases, a few of which we shall take the space to cite. Garrett v. State, 109 Ind. 527, 10 N. E. 570; Beasley v. State, 138 Ind. 552, 38 N. E. 35, 46 Am. St. Rep. 418; Hunt v. State, 72 Ark. 241, 79 S. W. 769, 65 L. R. A. 71, 105 Am. St. Rep. 34, 2 Ann. Cas. 33; Brown v. Brown, 88 Conn. 42, 89 Atl. 889, 52 L. R. A. (N. S.) 185, Ann. Cas. 1915D, 70; State v. Shaw, 79 Kan. 396, 100 Pac. 78, 21 L. R. A. (N. S.) 27, 131 Am. St. Rep. 298; Fiedler v. Fiedler, 42 Okl. 124, 140 Pac. 1022, 52 L. R. A. (N. S.) 189. Some of these cases proceed partly and some wholly upon the different position in which Legislatures have placed wives in relation to property rights, as contrasted with the servile status occupied by them at common law. Because of the construction which we have placed upon our criminal statutes we have not found it necessary to discuss this phase of the question involved in the present appeal. It is sufficient for us to say that the California Legislature has granted to women at least as full a measure of right in the acquisition, holding and disposition of property and with reference to the making of contracts generally, as well as in matters of civic or political concern, as have the Legislatures of the generality of the states. It is doubtless because of this emancipation of woman from the disabilities under which she so long labored that the Legislature has cast our criminal law in the form in which we have found it to be.

Respondent has called to our attention the cases of Sesler v. Montgomery, 78 Cal. 486, 21 Pac. 185, 3 L. R. A. 653, 12 Am. St. Rep. 76; People v. Miller, 82 Cal. 107, 22 Pac. 934; Henley v. Wilson, 137 Cal. 273, 70 Pac. 21, 58 L. R. A. 941, 92 Am. St. Rep. 160; and Peters v. Peters, 156 Cal. 32, 103 Pac. 219, 23 L. R. A. (N. S.) 699; but we find nothing in the opinion in any of them which precludes the conclusion at which we have arrived.

Order reversed.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

59 Cal. App. 724

## MARTIN v. EMERSON. (Civ. 2551.)

(District Court of Appeal, Third District, California. Nov. 22, 1922.)

**Partnership ⊂⊃69—Consideration to be paid for half interest in lot sold and conveyed to partner by copartner and wife, after transfer to her, held not assets.**

Where a partner conveyed in good faith to his wife his undivided half interest in a partnership lot, she took subject to the rights of creditors and to payment of any balance due his copartner pursuant to Civ. Code, § 2405, but when he and his wife thereafter sold and conveyed such interest to his copartner, the lot was removed from the partnership assets and thereafter his copartner was owner of the lot in his individual right subject to claims of creditors, and it follows that the consideration agreed to be paid therefor, and for which his wife sued his copartner, did not constitute partnership assets, and his copartner, either as an individual or as a survivor, has no lien on, or claim to, such consideration for any balance due him.

Appeal from Superior Court, Lassen County; J. O. Moncur, Judge.

Action by Elizabeth M. Martin against C. E. Emerson. Judgment for defendant, and plaintiff appeals. Reversed.

Pardee & Pardee, of Susanville, for appellant.

G. C. Julian, of Susanville, for respondent.

FINCH, P. J. The plaintiff appeals from a judgment denying her any relief and awarding the defendant his costs of suit. The transcript on appeal was filed March 1, 1921, and appellant's opening brief was filed May 18, 1921. Respondent has filed no brief and no appearance was made for him at the

time set for oral argument, November 10, 1922.

The complaint alleges that the plaintiff, being the owner as her separate property of an undivided half of a certain town lot, sold the same to defendant for $1,250; that at the same time the defendant executed a written agreement with plaintiff and her husband, E. A. Martin, who died prior to the time suit was brought, by the terms of which defendant promised to pay plaintiff and her husband the purchase price agreed upon; that her husband "joined in said agreement merely as a matter of form, and at the suggestion of defendant," but that her husband had no title to or interest in the lot.

The answer denies that plaintiff had any interest in the lot, or that the same was her separate property; admits the execution of the agreement to pay the $1,250; alleges that Martin "was the actual owner of said land and that he held the same in trust for a partnership between himself and said defendant, and that, so far as said plaintiff was concerned, said property was community property of said plaintiff and said E. A. Martin." As a separate defense, the answer alleges that from the year 1901 to August 5, 1915, the defendant and Martin were engaged in the saloon business as copartners; that February 24, 1904, they purchased the property in suit with partnership funds and for partnership purposes; that thereafter Martin executed a deed purporting to convey an undivided half interest in the property to plaintiff, but that there was no valuable consideration for the transfer; that the plaintiff knew, at the time of said conveyance, that such property belonged to the partnership and that she thereafter held the property in trust for the partnership; that at all times said property was used as partnership property and all receipts therefrom claimed and treated as partnership funds, and all taxes paid by the partnership, and that plaintiff never claimed any of said receipts; that at the time of the execution of the deed from Martin to his wife, the partnership was largely indebted and its business carried on through the credit of defendant, all to the knowledge of plaintiff; that defendant never had actual knowledge of the conveyance from Martin to plaintiff; that the business of the partnership ceased August 5, 1915, and thereafter there were no funds or assets belonging to the partnership, and that no accounting has ever been had between the partners; that Martin was "largely indebted to defendant on account of moneys drawn by him from said partnership in excess of the moneys drawn by said defendant"; that at all times since August 5, 1915, the books of account of the partnership have been in possession of Martin and plaintiff; that the acts, omissions, and conduct of plaintiff misled defendant, and "if it had not been for said acts, omissions, and conduct of said plaintiff said defendant would have compelled an accounting of said partnership business, and would have been able to have protected himself and to have secured said property or the value thereof to said partnership as a part of the assets thereof"; and that by reason of the foregoing facts the plaintiff is estopped from claiming said property. In a separate defense it is alleged that Martin acted in bad faith in transferring the property to his wife and concealed from defendant the fact of such conveyance. Other defenses are alleged, and found by the court to be true, in support of which no evidence was produced. The findings follow the denials and allegations of the answer.

The evidence shows that the defendant and Martin were engaged in the saloon business as alleged in the answer; that they purchased the town lot in controversy with partnership funds, both Martin and Emerson being named as grantees in the deed of conveyance. Thereafter Martin, in consideration, as expressed in the deed, of love and affection and for her better support and maintenance, conveyed a half interest in the lot to plaintiff, the deed being delivered at the time it was recorded, June 11, 1907. February 20, 1914, a deed was executed by "Elizabeth M. Martin and E. A. Martin, her husband," to defendant conveying to him an undivided half interest in the lot. At the same time the parties to the deed executed the contract sued on, which reads as follows:

"This memorandum of agreement, made this 20th day of February, 1914, between C. E Emerson, first party, and A. E. Martin and Elizabeth M. Martin, second parties,

"Witnesseth: That whereas said parties heretofore entered into an agreement whereby the said second parties agreed to sell to said first party an undivided one-half interest in and to lot No. 8, of block No. 10 of the town of Susanville, and said first party agreed to pay therefor the sum of $1,250 in cash, provided said first party does not incorporate his property of which the above is a part, and further providing that in case such property is turned to a corporation, then the said second parties are to get for said property above described such price as they are able to obtain from the said corporation.

"Now, it is understood and agreed, that the said second parties have this day made and executed a deed conveying said property to said first party in accordance with the terms of such agreement, and the said first party hereby agrees to pay therefor the said sum of $1,250, in case no incorporation is made, it being understood that, if the property of said first party is handled by a corporation, then the price to be agreed upon with said corporation, for any amount more than $1,250, but in any event said second parties to receive the said sum of $1,250.

C. E. Emerson.
"Elizabeth M. Martin.
"E. A. Martin."

No corporation has been formed to take over the property. There is no evidence of bad faith on the part of Martin, in so far as defendant's rights are concerned, in conveying the property to his wife. The conveyance did not become effective until delivered to her and it was recorded at the time of delivery. She took the property, of course, subject to the rights of creditors and the right of defendant to have it applied to the payment of any general balance due him. Civ. Code, § 2405. Such right remained in defendant until plaintiff and Martin sold and conveyed their interest in the lot to him. The effect of such sale, however, was to remove the property from the partnership assets and thereafter, the defendant was the owner of the same in his individual right, subject to the claims of creditors. In Jauman v. McCusick, 166 Cal. 517, 523, 137 Pac. 254, 256, it is said:

"Each partner had the right to transfer his interest in the agreement or in any other partnership property, subject, of course, to the rights of creditors of the firm. * * * When two of the partners thus assigned the contract to the third, the interest of all the partners became merged and vested in such assignee. Retaining his own interest and taking under the assignment the interests of his copartners, he became the owner of every right of the three partners in the contract. The legal effect of such transfer was precisely the same as that of an assignment purporting to transfer the claim in the partnership name."

Since the effect of the transfer to defendant was to vest in him the entire ownership of the property in his individual right, it follows that the consideration agreed to be paid did not constitute a partnership asset, and the defendant, either as an individual or as the surviving member of the partnership, has no lien upon, or claim to, such consideration. It may be further stated that, after the partnership discontinued business, it effected a composition with its creditors, and the evidence does not show that as between the partners there is anything due from one to the other. There is no evidence to sustain defendant's plea of estoppel.

In the contract on which the suit was brought, defendant promised to pay plaintiff and E. A. Martin the sum therein specified. The complaint is based upon the theory that the plaintiff is entitled to the full amount due, and that Martin's name appears in the contract as a mere matter of form. Defendant did not by demurrer to the complaint or by objection to evidence offered at the trial contest plaintiff's right to sue alone on the contract, without joining the representative of her deceased husband's estate as a party to the action, but based his defense upon the theory that the plaintiff never acquired any interest in the town lot in question, and the case seems to have been tried on that theory. For the reasons stated, the evidence does not support the findings and conclusions of the court. If anything in support of the judgment has been overlooked, it is due to respondent's failure to point it out or to render any assistance to the court in the consideration of the appeal.

The judgment is reversed.

We concur: HART, J.; BURNETT, J.

---

59 Cal. App. 781

## ZAUTZ et al. v. SEBREAN et ux.
(Civ. 3991.)

(District Court of Appeal, First District, Division 1, California. Nov. 27, 1922.)

**Landlord and tenant ⇐109(8)—Surrender and acceptance held not rescission of agreement when not consented to by lessors acting within rights in good faith.**

In an action for money paid under the terms of a lease and for the value of goods sold and delivered, where the lessees, negotiating with the owner of the premises, purchased through them automobile accessories and leased the building, and lessees without cause renounced and surrendered up their lease and failed to comply with any of its terms, the act of the lessors in re-entering the premises under an expressed provision of the lease, and accepting the keys and taking possession, did not constitute a rescission on their part, but rather an assertion by them of a right under the lease, and one which the lessees themselves acknowledged when they requested that defendants take possession.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Charles Zautz and another against F. W. Sebrean and wife. From a judgment for plaintiffs, defendants appeal. Reversed.

Victor A. Dunn, of Oakland, and Lewis A. Hilborn, of San Francisco (D. Cameron, of Los Angeles, of counsel), for appellants.

Jesse Robinson, of Oakland (Clarence De Lancey, of San Francisco, of counsel), for respondents.

TYLER, P. J. This action is one in assumpsit, and was brought to recover money paid under the terms of a lease, and also for the value of certain goods sold and delivered. Plaintiffs obtained judgment in the sum of $2,083, and defendants appeal.

The facts may be briefly summarized as follows:

Defendants were the owners of certain real property situated in San Leandro, county of Alameda. The premises were improved with a brick building known as the

Cherry City Garage. On October 15, 1920, and prior thereto, one Leslie Galbraith was in possession thereof under a lease covering a period of some five years. He was in arrears in rent, and wished to dispose of his lease and business. Plaintiffs, being informed of this fact, communicated with the defendants and expressed their desire to purchase the business and lease the premises. They did not care to deal directly with Galbraith as they were of the opinion that defendants could acquire the business upon better terms than they. Accordingly they agreed that defendant F. W. Sebrean should conduct the negotiations and purchase the garage for them. This arrangement was carried out. Sebrean acquired the lease for the sum of $1,750. He also, and at the same time, and for the benefit of plaintiffs, purchased from Galbraith automobile accessories to the amount of $633.32. In addition to being in arrears in rent Galbraith was indebted to various people in different sums, and the entire amount of the purchase price he received from the sale of his lease and business was distributed among his creditors.

Upon acquiring the property in the manner thus indicated defendants as lessors and plaintiffs as lessees entered into a contract of lease of the same for a term of five years at a monthly rental of $350 per month, payable monthly in advance. Under its terms the parties agreed that the lessees would be credited with the sum of $1,750 they had paid Galbraith for his lease, said sum to be applied on the last five months of the term. One month after entering into this contract, and when in default in payment of the second month's rent, one of the plaintiffs, Charles Zautz, served defendants with a notice of rescission of the lease and sale, claiming that he and his associate had been defrauded. At the same time he delivered the keys of the leased premises to them with the suggestion that they take possession of the premises in accordance with the provisions of the lease entitling them so to do in the event of nonpayment of rent on the part of plaintiffs, one of the covenants of the lease between the parties providing that, if any rent should be due and unpaid, or default should be made in any of the provisions thereof, the lessors would have the right to re-enter the premises and remove all persons therefrom. Demand was also made at this time upon defendants for a restitution to plaintiffs of the sum of $2,383, the amount paid by them for the lease and automobile accessories.

Defendants accepted the keys, but refused to make reimbursement of the sum demanded. The following day defendants took possession of the abandoned premises as requested, made an inventory of the property belonging to plaintiffs, and notified them to remove the same. Thereafter defendants proceeded to conduct the same business as was carried on by plaintiffs. A small quantity of gasoline remained in the tank which defendants were unable to store. They had the tank refilled without removing this gasoline, but offered to return an equal quantity in kind to plaintiffs. Prior to the notification given plaintiffs to remove their accessories, defendants had been tendered a bill of sale for the same, together with a demand for the sum of $633.32, the amount paid by plaintiffs for such accessories. Compliance with this demand was also refused. This action was thereupon brought by plaintiffs.

It was contended below, and is here, that the facts above narrated constituted a rescission of the agreement between the parties. The trial court so concluded, and judgment went in plaintiffs' favor for the sum of $2,083, the full amount prayed for, less one month's rent which the court found to be due defendants under the lease, and defendants appeal. It is appellants' claim that entry by them under the circumstances related did not constitute an abandonment of their rights under the terms of the lease, and did not, so far as they were concerned, amount to a rescission of their agreement. We see no escape from this contention. The acts amounted to no more than a surrender on the part of plaintiffs of the leased premises, and a determination by them to terminate the lease. This surrender and abandonment was without any fault on the part of defendants. True, fraud was claimed by plaintiffs when they demanded restitution of the money they had paid Galbraith, but at the trial all question of fraud was expressly abandoned, and they relied solely for a recovery upon the acts of defendants in accepting the keys and conducting the business, which acts, they claim, constitute a rescission of the contract. We fail to see in what possible manner such acts can be so construed. Under the circumstances defendants had the right to enter the premises, care for them, and terminate the lease. They might have elected to accept possession for the purpose of reletting the same for the benefit of plaintiffs, but they were not bound to do so. Baker v. Eilers, 26 Cal. App. 371, 146 Pac. 1056. The only presumption, if any, that could possibly arise from the acceptance of the premises upon plaintiffs' surrender would be an agreement to absolve them from the further payment of rent under the lease. But defendants are not here seeking to recover any rent, but, on the contrary, have elected to accept a surrender. They at all times positively refused to rescind their agreement or to make any reimbursement of any character to plaintiffs. They do stand ready, however, as is their duty, to deliver

up the automobile accessories. So far as the lease is concerned, as above pointed out, defendants were expressly given the right of re-entry when any rent became due and unpaid. Their mere act, therefore, of accepting the keys and taking possession did not constitute a rescission on their part, but rather an assertion by them of a right given under the lease, and one which the lessees themselves acknowledged when they requested that defendants take possession. Glock v. Howard, 123 Cal. 1, 16, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Phillips v. Stark (Cal. Sup.) 199 Pac. 509, 511; 13 Corpus Juris, 600; Jones on Landlord and Tenant, § 548. The evidence conclusively shows that appellants were in no manner ever in default, but, on the contrary, it does show that they were at all times ready and willing to perform their contract. Respondents, on the other hand, without cause renounced and surrendered up their lease, and failed to comply with any of its terms. Such an arbitrary renunciation on their part can in no manner affect the rights of defendants, who at all times insisted upon a compliance with the terms of the contract. The acts of plaintiffs amounted to no more than an offer of rescission, never consummated or consented to by defendants.

The conclusion we have reached renders it unnecessary to discuss the liability of defendants for the sums paid by plaintiffs to Galbraith or any question of agency or the respective rights of the parties flowing therefrom.

For the reasons given, the judgment is reversed.

I concur: KERRIGAN, J.

---

(59 Cal. App. 729)

**BERRY v. ALDERSON et al., Board of Medical Examiners. (Civ. 4262.)**

(District Court of Appeal, First District, Division 1, California. Nov. 23, 1922. Hearing Denied by Supreme Court Jan. 22, 1923.)

**1. Physicians and surgeons ⟸11(3)—Evidence held sufficient to sustain revocation of physician's license.**

Evidence in a proceeding to revoke a physician's license to practice medicine *held* sufficient to sustain a revocation under the Medical Practice Act, authorizing the board of medical examiners to revoke a license of a physician or surgeon for unprofessional conduct.

**2. Physicians and surgeons ⟸10—Statute relating to professional conduct of physicians and surgeons requires doctor to practice in own name.**

By the Medical Practice Act, the Legislature intended that a person to whom the privilege of practicing medicine and representing himself to the world as qualified and worthy of the confidence of the sick should, when offering his services by advertisement or announcement, do so under his own name; the statute not being vague and indefinite, but aiming at conduct less reprehensible than fraudulent misrepresentations.

**3. Constitutional law ⟸318—Revocation of physician's license by board of medical examiners based upon charges filed by board's special agent held not denial of due process of law.**

Where the charges against petitioner physician to revoke his license were filed before the state medical board by a special agent of the board, charged with the duty of discovering violations of the Medical Practice Act, and the agent appeared as the witness against petitioner, there was no denial of due process of law, on the theory that the board of medical examiners was at once prosecutor and judge; the board having no direct interest in the revocation of the license nor bias against petitioner, and the special agent having filed the charges in discharge of his official duty.

Appeal from Superior Court, City and County of San Francisco; George H. Cabannis, Judge.

Proceedings by Harry E. Alderson and others, as members of the Board of Medical Examiners of the State of California, to revoke the license of John Lafayette Berry to practice medicine. From a judgment of the Superior Court in certiorari proceedings, affirming the action of the State Board of Medical Examiners, petitioner appeals. Affirmed.

Edwin V. McKenzie, of San Francisco, for petitioner.

Harry A. Encell, of San Francisco, and Frank M. Smith, of Los Angeles, for respondents.

KERRIGAN, J. This is an appeal by the petitioner from a judgment of the superior court in a proceeding in certiorari by which the action of the board of medical examiners of the state of California in revoking the license of the petitioner to practice medicine was affirmed. The appeal is presented upon a bill of exceptions which contains the papers constituting the record of the proceeding before said board, including a transcript of the testimony taken therein, and which, in obedience to the writ of certiorari issued by the trial court, were produced in that court.

The record shows that a complaint was filed before the board of medical examiners by one Frank M. Smith, special agent of said board, charging the petitioner, John Lafayette Berry, with having been guilty of unprofessional conduct under the eighth section of section 14 of the Medical Practice

Act (St. 1913, p. 722, as amended), in that the said Berry, being the holder of a certificate issued by said board licensing him to practice medicine and surgery, did "use in connection with his practice of medicine and surgery a name other than his own in a certain sign and advertisement of his practice in the words and figures following, to wit, K. B. Bloodless Surgeons."

[1] Said section of the Medical Practice Act authorizes the board of medical examiners to revoke the license of a physician or surgeon for unprofessional conduct as defined in the act, and one of the specifications of unprofessional conduct as therein defined is "the use by the holder of any certificate, in any sign or advertisement in connection with his said practice, or in any advertisement or announcement of his practice, of any fictitious name, or any name other than his own."

The contention of the respondents in support of the judgment is that the petitioner, in an advertisement or announcement of his practice, used the letters and words "K. B. Bloodless Surgeons," and that said expression is a name; that it not being the name of the petitioner he was therefore guilty of the particular unprofessional conduct charged in the complaint.

The material evidence disclosed by the transcript of the testimony taken before the respondents is uncontradicted, and shows that one Kratzer in conjunction with one Bennett, organized in the state of California a corporation for the vending of medicine and medical remedies; said corporation being known as "K. B. Remedies Incorporated" and "K. B. Medicine Company." It was under the management and control of Kratzer and conducted its business in various parts of the state. To foster and increase the demand for its product, it employed or worked in conjunction with physicians, or persons styling themselves such, and in one instance conducted a sanatorium at Hayward, where at different times Drs. Brandon, Manley, Crum, and Powell treated the patients. Upon the exterior of this sanatorium was a large sign, "K. B. Bloodless Surgeons." This sign, or one quite similar, was also used in an office conducted by the corporation, through Kratzer, in Livermore. This had been going on for some years before the petitioner met Kratzer, and the business connection of the two men dates from only a few weeks prior to the events which gave rise to the present proceeding. One of the methods adopted by Kratzer in pushing the sale of the corporation's so-called remedies was to give open-air entertainments to which the public were invited without payment. The character of these entertainments may be gleaned from the following advertisement:

"Free Open-Air Show. July 14, 7:30 p. m. and every evening except Sunday, corner N. and Yolo streets. * * * Vaudeville, Music, Singing, Comedy, Lectures, Sketches and Funny acts. Free demonstrations in Bloodless and painless surgery. * * *"

At the conclusion of the entertainment, the performers would circulate among the audience and offer for sale the K. B. remedies. Such an entertainment was arranged to be given at Newman by Kratzer and the petitioner, the expenses thereof to be jointly defrayed. Accordingly, upon an open space in said town they caused to be erected a platform, and engaged performers for the entertainment. Upon the platform was placed a large sign, the dimensions being about 4 by 12 feet, upon which the device "K. B. Bloodless Surgeons" appeared in red letters upon a yellow ground. One of such entertainments was given by Kratzer and the petitioner on or about the 1st of August, 1919, part of which was a lecture by the petitioner upon some medical subject. In addition to the vending of these remedies to the members of the audience, the performers also distributed cards, upon which was printed the following:

"This card entitles the holder to one free consultation and examination by the physicians and surgeons of the K.-B. Medicine Co. Not good after ———. Corner P and Merced streets."

The location indicated was the place of residence of Kratzer and the petitioner, the latter occupying one of the rooms as an office or consulting room. Upon this building was also exhibited the sign "K. B. Bloodless Surgeons," but upon the window and door of the petitioner's consulting room appeared only his name, J. L. Berry. The profit, if any, to be derived by Berry from this enterprise, was to come from fees received for medical treatment given by him to persons coming to his office, although, as stated upon the card distributed, the first consultation was gratuitous.

It is apparent from this recital of the evidence that the petitioner did use in connection with his practice in an advertisement thereof the designation or name "K. B. Bloodless Surgeons," a name other than his own, thus bringing himself within the provisions of the Medical Practice Act relating to unprofessional conduct.

[2] The first contention of the appellant in support of his appeal is that the use by a physician of a name other than his own referred to in the statute must be of such a nature and under such circumstances as to amount to a fraud upon the public, i. e. that it must amount to a representation that said physician is in fact another person; in other words, that there must be a fraudulent concealment of identity; and that, if not so construed, then this provision of law is too vague and indefinite to be given any effect.

We think this construction is entirely too narrow, and that the provision is aimed at conduct much less reprehensible than fraudulent misrepresentation. Our view is that the Legislature intended that a person to whom the privilege had been granted of practicing medicine and representing himself to the world as qualified and worthy of the confidence of the sick should, when offering his services by advertisement or announcement, do so under his own name. This simple requirement, so easily complied with, was not aimed particularly at the person who was willing to incur the odium of actual fraud, but was designed to offer a much wider protection to the public by assuring to it a reasonable certainty of knowing in every case precisely with whom it was dealing, the importance of the relation of physician and patient, and the very serious consequences which might follow improper, unskillful, or negligent treatment, rendering such openness and candor particularly desirable. That the provision of the law in question is neither vague nor indefinite is obvious. Every person with intelligence enough to have been granted a license to practice medicine must be presumed to know his own name. When such a person is informed in so many words that in any announcement or advertisement of his practice he may not use a name other than his own, i. e. if he uses any name at all it must be his own name, there can be no doubt that he understands precisely what is required. It would, indeed, be difficult to put it in plainer language.

[3] The next contention of the appellant is that the provision of the federal Constitution that no man shall be deprived of life, liberty, or property without due process of law, was violated in the case at bar, in this, that the board of medical examiners before whom the appellant was cited to appear, and which as the result of the hearing revoked his license to practice medicine, was at once prosecutor and judge; that the hearing was therefore a mere formality, and the result a foregone conclusion.

The basis for this assertion is the fact that the charge against the appellant was filed before the board by one Frank M. Smith in his capacity of special agent appointed by the board, charged with the duty of discovering violations of said Medical Practice Act, and that in the trial of appellant said Smith appeared as a witness against him. The appellant cites the case of North Bloomfield G. M. Co. v. Keyser, 58 Cal. 315, quoting from it the following language:

"It is an ancient maxim, and one founded in the most obvious principles of natural right, that no man ought to be a judge in his own cause. * * * A sound public policy, which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observance."

But it is also said in the same case:

"Undoubtedly the prohibition does not extend to cases where the interest is simply in some question or questions of law involved in the controversy, or when it is indirect and remote."

If, for the sake of the argument, and contrary to many eminent authorities which might be cited, we assume that the right here in question is one protected by the provision of the Constitution referred to, we cannot agree with the appellant that that provision was violated in the present case merely because the proceeding for the revocation of the appellant's license was initiated by an agent of the board. No direct or immediate interest on the part of the board can be predicated upon such fact, nor can any fair inference be drawn from it that the board in its hearing of the charges was biased against the accused thereby. The Medical Practice Act itself provides for the appointment of such agent; and it was in discharge of his duties as such that he filed the charges. Under these circumstances, this contention made on behalf of the appellant seems to have little weight.

This disposes of the points made on the appeal.

Judgment affirmed.

We concur: TYLER, P. J.; ST. SURE, Justice pro tem.

---

59 Cal. App. 690

## CIOLI v. KENOURGIOS et al. (Civ. 2461.)

(District Court of Appeal, Third District, California. Nov. 18, 1922.)

1. **Fraudulent conveyances ⇐15 — Sending purchase money paid beyond jurisdiction held badge of fraud.**

Where a property owner against whom a suit for personal injuries was pending sold all his property to his partners, and sent the money paid to a foreign country, the very fact of sending the money out of the jurisdiction was a badge of fraud.

2. **Fraudulent conveyances ⇐15—Disposal of grantor's entire property with grantees' knowledge held badge of fraud.**

Where plaintiff, having a cause of action for personal injuries, sued to set aside a conveyance by the person causing the injuries to his brothers as in fraud of creditors, that the grantor had disposed of his entire property, and that the grantees knew it, constituted a badge of fraud.

3. **Fraudulent conveyances ⇐15—Conveyance of defendant's entire property during pendency of suit held badge of fraud.**

Where plaintiff having a cause of action for personal injuries sued to set aside a convey-

ance by the person causing the injury to his brothers as in fraud of creditors, that such conveyance was made during the pendency of the suit for personal injuries constituted a badge of fraud.

4. Fraudulent conveyances ⊂=15—That grantees were grantor's brothers held not a badge of fraud.

Where plaintiff, having a cause of action for personal injuries, sued to set aside a conveyance by defendant in the personal injury suit, whereby all defendant's property was conveyed to his brothers during the pendency of the personal injury suit, the fact that the grantees were related to the grantor did not constitute a badge of fraud.

5. Evidence ⊂=591—Plaintiff, calling alleged conspirators as witnesses, not obliged to approve their testimony.

In a suit to set aside a conveyance by one of the defendants to his brothers, the other defendants, as in fraud of plaintiff, who had recovered a judgment against one of them, that plaintiff called defendants to the witness stand did not compel an approval by him of their testimony, and he could use any part thereof and reject the rest in view of Code Civ. Proc. § 2055, as added by St. 1917, p. 58, authorizing examination of adverse parties.

6. Fraudulent conveyances ⊂=215—One having cause of action for personal injuries held protected as against fraudulent conveyance by person causing injury.

A plaintiff who has brought suit against one of several brothers to recover for personal injuries inflicted by defendant, if not a creditor, as soon as the injury was inflicted, *held* fully protected under Civ. Code, § 3439, defining fraudulent conveyances, so that defendant could not, after the injury had been inflicted, convey his property to his brothers, and thereby defeat plaintiff's recovery.

7. Fraudulent conveyances ⊂=66—Payment of adequate purchase price held not to relieve transaction from taint of fraud.

Where a defendant, who had become liable to plaintiff for personal injuries inflicted in an automobile accident, conveyed all his property to the other defendants, who were his brothers and partners, that an adequate consideration was paid for the property, did not relieve the transaction from the taint of fraud; the consideration received being immediately sent out of the country.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Claude Cioli against Samuel Kenourgios and others, to set aside conveyances. Judgment for plaintiff, and defendants appeal. Affirmed.

J. M. Inman and Neil R. McAllister, both of Sacramento, for appellants.

Charles B. Harris, of Sacramento, for respondent.

ANDERSON, Justice pro tem. This is an action brought by the plaintiff to set aside certain conveyances alleged to have been made by John Kenourgios to said Samuel Kenourgios and Frank Kenourgios for the purpose of defeating plaintiff's claim, and for defeating creditors generally. Judgment was rendered for the plaintiff, canceling and annulling the deed and bill of sale in controversy.

The main contention of appellants is made on the ground of insufficiency of the evidence to sustain the alleged grounds of fraud. A brief statement of the evidence will be necessary for the purpose of an examination of this contention.

It appears from the evidence that the three brothers, natives of Greece, came to Sacramento and formed a partnership to engage in the grocery and bakery business in that city. John (grantor and vendor herein) and Samuel came first, in 1915, and Frank joined them later. While associated in said business as such partners, on the 4th day of July, 1920, an automobile collision occurred, in which the said Claude Cioli, plaintiff herein, was injured; the automobile, a borrowed one, was being driven by John; the other brothers not being present. On September 21, 1920, the attorney for Cioli wrote to the three brothers, addressing the letter in the firm name of the defendants, the receipt of which letter was acknowledged, and one of the defendants—Frank, grantee herein—went to the office of the attorney for plaintiff in regard to the collision.

On the 6th day of July, 1920, all three defendants entered into a written agreement to purchase the real property in controversy, though payments had previously been made by them on the intended purchase. Thereafter, on the 16th day of November, 1920, a deed was made of said property to Frank and Samuel; John's name being omitted from the deed. The next day the deed was recorded at the request of M. I. Welch, the then attorney for the defendants; but before this deed was executed and delivered notice of institution of suit and summons were served on the defendants on the 29th day of September, 1920.

Thereafter each defendant was in frequent consultation with Mr. Welch, attorney for defendants. Among other things, the attorney was told that the collision occurred while John was out on a "joy ride"; that the automobile which he drove was a borrowed one; that the other two brothers were not in the machine; that they did not see the accident, and knew nothing about it. Each defendant filed a separate answer, the one by John admitting that he was driving and in control, but denying negligence or liability. The answers of Samuel and Frank, respectively, denied everything on information and belief. The case was finally set for trial on January 25, 1921. About one week before the date set for trial Mr. Welch, the attorney

for defendants, advised John to settle the case by paying the plaintiff $1,500. In response to this, all three defendants offered to pay a total sum of $1,000. The plaintiff, through his attorney, Mr. Harris, offered to settle the case against all three defendants for the total sum of $1,500. The defendants refused to act upon the advice of Mr. Welch, whereupon Mr. Welch refused to further represent either of them in the case. They then immediately employed Mr. McAllister, who proceeded at once to obtain a continuance of the case. The continuance was procured against the protest of the plaintiff. The case was then reset for trial on February 15, 1921, at which time judgment for $2,500 against John alone was given by the court, sitting without a jury; Frank and Samuel were held not liable.

Between the date of the withdrawal of Mr. Welch and the final trial of the case, being within a few weeks' time, the following matters occurred: Mr. McAllister, the substituted attorney, proceeded at once to draw papers for the dissolution of the partnership between John, on the one hand, and Samuel and Frank on the other; Samuel and Frank buying John's interest and retaining the business. Mr. McAllister also prepared a bill of sale for John to sign, conveying to Samuel and Frank his entire interest in everything appertaining to the grocery and bakery business; this bill of sale was duly executed. In fact, when all of the papers were finally executed, and before the trial finally took place, John was completely divested of all of his earthly possessions. The money which it is claimed was paid to John for his property was immediately sent to Europe, part to a brother as a gift and the remainder to the father for payment of alleged debts of the father. It happened that by the time judgment was filed in the case of Cioli v. John Kenourgios, John was "execution proof," as the sheriff's return showed.

The notice of intention to sell, filed in the recorder's office, fixed the time for sale at 10 a. m., February 5, 1921, and place at Mr. McAllister's office. At the time and place above stated Mr. McAllister was not there, nor were any of the defendants there to receive notice of the claim of Mr. Cioli, the plaintiff, although the claim was duly presented. It appears from the record that the money had been paid to John, and that he had sent it to Europe before the above date set for the payment.

It appears from an examination of the whole case that the plaintiff when he brought his action, was ignorant of the fact that he did not have the slightest ground for a cause of action against the defendants Samuel and Frank Kenourgios, but, as often happens in such cases, the plaintiff can only learn this at time of trial. Plaintiff must have known at the time the collision occurred that one of the brothers was driving, though he may not have known his first name, or he may have thought the one who was driving was doing so as the agent of the others; but whatever the reason which prompted the pleader at the time of bringing the action to name all three brothers defendants is now immaterial, for, although the plaintiff may have been under a misapprehension, it is certain that the defendants were not. This was clearly shown as soon as their answers were filed, from the advice given them by their attorney, Mr. Welch, advising only John to pay, and by the testimony of the defendants that the collision occurred while John was on a "joy ride." The defendants knew at the time they answered that the plaintiff was in error. They knew that it was John who was on the "joy ride," and not Frank or Samuel. They stated that Mr. Welch had been their attorney "for a long time." They told both Mr. Welch and Mr. McAllister "all about the facts" of the case, and Mr. McAllister stated that Mr. Welch told him "about the facts" of the case. It is true they would not admit that the attorneys told them that Samuel and Frank could not be held liable, but every action of the attorneys appearing in the record, every step taken by the defendants, coupled with the evidence revealed by both attorneys and clients, leads irresistibly to the conclusion that the attorneys did advise them that no judgment could be obtained against Frank and Samuel. Every step taken by the defendants and their attorneys was consistent with such advice. Wherever the halting and evasive answers of the defendants failed to make complete connection the link is supplied by some positive act which speaks for them as clearly and certainly as words could declare it, and shows clearly what was in their minds.

These men had been associated very intimately for years as brothers and partners. Frank said "he had helped John and Sam out of trouble before." There is not a particle of evidence in the case that their relations were not of the most amicable nature, except from their own statement, and this not until after the accident with Cioli. The only evidence in the case, as stated, to support the claim that they wanted to get rid of John because they quarreled comes from their own lips; and, notwithstanding their repeated assertions on the witness stand that they could not get along with John, he has been their constant associate in the business, working with them at the very time of the trial; no change having taken place by reason of the sale and dissolution of the partnership, so far as any one could see. All the circumstances appearing in the case refute their assertion that they were not willing or satisfied to retain John as a partner.

We find nothing in the evidence which would tend to convince the trial judge of the frankness and sincerity of any of the defend-

ants, and we can easily imagine what their appearance must have been on the witness stand from many of the questions and answers and remarks made during the course of the trial. In one portion of the testimony Frank was trying to make it appear that he did not understand that by putting all of the property out of John's hands would defeat recovery on Cioli's claim. The court was finally compelled to say, "Yes; you do; you understand English." All of the defendants, after considerable effort, finally admitted that they knew that if John had no property Cioli's judgment would remain unsatisfied, and John admitted he had nothing after he sent the money to Greece as gifts and to pay the pretended indebtedness of his father, and at the time he testified he stated that he was collecting his wages from his brothers every day, as fast as they became due. The whole scheme reveals a determined purpose to prevent recovery by Cioli for his injuries caused by John's reckless driving.

[1] We can see nothing in the brothers going through the form of paying the $3,000 to John for the property. The very fact that it was sent to a father and a brother—beyond the process of the courts of this country, to persons hopelessly beyond the jurisdiction of our courts—is a badge of fraud. And the testimony of Samuel and Frank, trying to declare their ignorance of what John did with the money until long after it was sent, could not be believed by any one. Frank pretended that he did not correspond with his relatives in Greece, that John did the writing, and he was not interested in the letters when they were received by John. He said:

"Never received no letters from the old country; I received the letters and put them all aside; I never read one. * * * I never wrote no letter, and never read no letter."

Further on in his testimony, in relation to these letters, he said:

"Sometimes I read a letter and sometimes I didn't care to."

The record is full of such evasive and contradictory testimony on many important matters.

Samuel pretended he did not know until July or August of 1921 that John sent the money away, and that he learned this from a letter written to John from the old country about that time. He finally admitted evasively that the receipts for the money sent were shown him several months before while on the witness stand, to wit, during the month of April.

We do not deem it necessary to review the evidence further.

[2] The grantor disposed of his entire property, and the grantees knew it. This was a badge of fraud. Bump on Fraudulent Conveyances, p. 33, § 47, citing many authorities.

[3] The expectation and pendency of suit created a badge of fraud. Bump on Fraudulent Conveyances, p. 36, § 50, citing numerous authorities.

[4] On the question of relationship, in matters of fraud, we quote from Bump on Fraudulent Conveyances, at page 56, section 67, as follows:

"Relationship is not a badge of fraud. Fraud, however, is generally accompanied with a secret trust, and hence the debtor must usually select a person in whom he can repose a secret confidence. The sentiments of affection commonly generate this confidence, and often prompt relatives to provide for each other at the expense of just creditors. Consequently relatives are the persons with whom a secret trust is likely to exist. The same principle applies to all persons with whom the debtor has confidential relations. Any relation which gives rise to confidence, though not a badge of fraud, strengthens the presumption that may arise from other circumstances, and serves to elucidate, explain, or give color to the transaction. This doctrine applies to the relationship of father, * * * brother," etc. "Wherever this confidential relation is shown to exist, the parties are held to a fuller and stricter proof of the consideration, and of the fairness of the transaction."

[5] The fact that plaintiff called the alleged conspirators to the witness stand did not compel approval by him of their testimony. He could use their appearance on the stand, their words, their acts—in fact anything they could furnish in his favor, and reject the rest. The salutary provision of section 2055 of the Code of Civil Procedure, as added by St. 1917, p. 58, was designed to prevent as far as possible parties to an action from perpetrating fraud and dishonesty. It strips them of former barriers used for shielding falsehood.

As soon as the automobile collision occurred, Cioli had a claim against John Kenourgios, and as soon as his brothers, Frank and Samuel, had notice of the claim, they were no longer innocent third parties without notice.

[6] The greater weight of authority placed Cioli in the category of creditor as soon as the collision occurred, but if there is doubt in our own state that this is the proper designation of Cioli's status, certainly, no matter what his status may be termed, his rights are fully protected under section 3439 of our Civil Code, and he cannot be deprived of his rights by a fraudulent conveyance.

[7] Appellants strenuously urge that the fact that an adequate consideration was paid removes the taint of fraud from the transaction. This fact in some cases would be a controlling factor, but we are unable to attach any importance to this fact in this case. In the light of the circumstances of this case, it appears but hollow form merely. The explanation as to where the ready money came from and why John was not bought out long

before was not satisfactory, and the payment and sending away of the money seems, to say the least, to have been a little overdone, for "when a part is overacted the delusion is broken and the fiction appears." Bump on Fraudulent Conveyances, p. 54, § 64.

In Hunters v. Waite, 3 Grat. (Va.) 32; 14 Am. St. Rep. 747 (note), Baldwin, J., states:

"It is not the consideration, but the intent with which a conveyance is made, that makes it good or bad as against creditors. However valuable the consideration, if the conveyance be designed to delay, hinder, or defeat creditors, it is void."

For further consideration of the subject, see Fluegel v. Henschel, 7 N. D. 276, 74 N. W. 996, 66 Am. St. Rep. 642, and note; State v. Mason, 112 Mo. 374, 20 S. W. 629, 34 Am. St. Rep. 390, and note.

We will not undertake to even touch upon the vast number of authorities bearing upon the question of the proof of fraud, and believe it will suffice to merely quote the following from the work of Mr. Justice Cooley on the subject of Torts, at page 907, volume 2 (3d Ed.):

"Fraud is never presumed, and the party alleging and relying upon it must prove it. This, however, is one of those rules of law which is to be applied with caution and circumspection. 'So far as it goes, it is based on a principle which has no more application to frauds than any other subject of judicial inquiry. It amounts but to this, that a contract, honest and lawful on its face, must be treated as such until it is shown to be otherwise by evidence of some kind, either positive or circumstantial.' Fraud is therefore as properly made out by marshaling the circumstances surrounding the transaction, and deducting therefrom the fraudulent purpose, when it manifestly appears, as by presenting the more positive and direct testimony of actual purpose to deceive; and, indeed, *circumstantial proof in most cases can alone bring the fraud to light, for fraud is peculiarly a wrong of secrecy and circumvention, and is to be traced not in the open proclamation of the wrongdoer's purpose, but by the indications of covered tracks and studious concealments.* And while it is often said that to justify the imputation of fraud, the facts must be such as are not explicable on any other hypothesis, yet this can mean no more than this, that the court or jury should be cautious in deducing the fraudulent purpose; *for whatever satisfies the mind and conscience that fraud has been practiced is sufficient.*" (Italics ours.)

We do not deem it necessary to discuss the objections made in defendants' closing brief in relation to the pleadings and findings. No one was or could have been misled by them. It appears the case was fairly tried and a just judgment rendered therein, which should not be disturbed. The judgment is therefore affirmed.

We concur: FINCH, P. J.; BURNETT, J.

59 Cal. App. 758

## H. LIEBES & CO. v. UNITED STATES CASUALTY CO. (Civ. 4363.)

(District Court of Appeal, First District, Division 2, California. Nov. 24, 1922. Hearing Denied by Supreme Court Jan. 22, 1923.)

**Insurance ⊂=495(2)—Store window held "show window" within burglary policy limiting liability.**

Under facts shown, *held*, that a store window was a "show window" within condition of burglary policy limiting liability in case of merchandise being taken from such a window by persons breaking the glass from the outside.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by H. Liebes & Co. against the United States Casualty Company. From judgment for less than claimed, plaintiff appeals. Affirmed.

Leon E. Morris, of San Francisco (Edward M. Jaffa, of Berkeley, of counsel), for appellant.

Chickering & Gregory, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the plaintiffs from a judgment against the defendant for $200 in an action to recover upon a policy of burglary insurance issued by defendant to the plaintiff. Appellant contends that the judgment in its favor should have been for $1,885, the agreed value of the property which was stolen. It is conceded, however, that, if the condition marked "t" in the policy applies to the facts in the instant case, the judgment must be affirmed. That condition reads as follows:

"The company shall not be liable for any loss of or damage to * * * (t) merchandise contained in a show window in the premises for an amount in excess of $200.00 occasioned by any person or persons who, from the outside of the premises, breaks the glass in any such show window."

We are asked to determine whether or not the goods stolen were contained within a show window, as the words are used in condition "t" of the policy. It is the contention of appellant that there was no show window in the store, but that this store was of the type known as "glass front." The case was submitted to the trial court upon a stipulation as to facts. The trial court, having reached the conclusion that the goods which had been stolen were contained in a "show window," gave judgment in favor of appellant and against respondent in the sum of $200. From the agreed statement of facts and the exhibits attached thereto we think the court could have reached no other conclusion, for from these it appears that a plat-

form of polished oak, 3 feet wide and 13 inches high, extended across the front of the store immediately behind the plate glass. On the surface of this platform, or on racks placed thereon, the goods which were stolen had been placed for the purpose of display to persons passing along the sidewalk or within the store. The goods were removed from the platform by a person or persons from the outside of the premises, who broke the plate glass separating the platform from the street. While, with the exception of a doorway, the plate glass extended across the front of the building in two sections, and there were no walls or curtains behind the platform to interfere with the view of the entire interior of the store from a position outside of the plate glass front, nevertheless the fact remains that the goods stolen were placed upon the platform behind the plate glass to catch the eye of the traveling public, and the use of the platform behind the plate glass indicates clearly that it was in fact, and was intended to be, a "show window." It is quite immaterial that it was used in part for other purposes such as housing meters and mechanical devices or as a seat for customers within the store.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

---

59 Cal. App. 647

## SMITH v. SAN JOAQUIN LIGHT & POWER CORPORATION. (Civ. 4287.)

(District Court of Appeal, First District, Division 2, California. Nov. 16, 1922. Hearing Denied by Supreme Court Jan. 15, 1923.)

1. **Electricity ⟸19(3)—Doctrine of res ipsa loquitur held applicable in action for injuries to boy grasping live wire hanging from pole.**

The doctrine of res ipsa loquitur *held* applicable in an action for injuries to a seven year old boy grasping a live wire hanging from an electric light pole to within a foot or two of the ground near the side of a public highway on which he was walking.

2. **Electricity ⟸16(7)—Broken electric power wire held not caused by act of God.**

That an electric power wire was broken by leaves of a large palm being blown against it *held* no defense to an action for injuries to one grasping it as it hung near the ground as constituting an act of God; it being defendant's duty to properly protect its wire from such danger.

3. **Master and servant ⟸322—Independent contractor's neglect to protect electric wire chargeable to employer.**

Where an electric company's power line was being replaced with new poles for wires, and leaves of a palm tree endangering an unprotected live wire were blown against the wire and broke it, the company was liable for injury to a boy who touched the broken wire, though the work was done by an independent contractor.

4. **Appeal and error ⟸1004(1)—Appellate court has power over excessive damages only when excess appears as matter of law, or suggests passion, prejudice, or corruption.**

The appellate court has power over excessive damages only when the excess appears as a matter of law, or is such as to suggest, at first blush, passion, prejudice, or corruption on the part of the jury.

5. **Damages ⟸132(12)—$20,000 for burns, necessitating amputation of seven year old boy's arm below elbow, held not excessive.**

$20,000 for injuries to a seven year old boy, whose right arm was so badly burned as to necessitate amputation a little below the elbow, *held* not excessive.

Appeal from Superior Court, Fresno County; M. F. McCormick, Judge.

Action by Noah Harvey Smith, a minor, by Charles Smith, his guardian ad litem, against the San Joaquin Light & Power Corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Carl E. Lindsay and Lindsay & Conley, all of Fresno, for appellant.

Burns & Watkins, of Fresno, for respondent.

STURTEVANT, J. The plaintiff, through his guardian ad litem, commenced an action against the defendant to recover damages for personal injuries. Judgment was entered in favor of the plaintiff, and the defendant appealed under section 953a of the Code of Civil Procedure.

The defendant owned and operated as a part of its general system an electric power line consisting of wires strung on poles in the usual manner along the north side of the public highway known as North avenue in the county of Fresno, running west from the public highway known as Elm avenue, to and beyond the intersection of said North avenue with the public highway running north and south, known as Fruit avenue, which power line was used for the purpose of transmitting and distributing electricity for light and power purposes to various consumers. In the morning of November 10, 1920, the plaintiff, a child of seven years, whose parents lived on the south side of North avenue, was sent to a neighbor's house on the north side of said avenue for some milk. After procuring the milk, and while on his way home, walking on the north side of the avenue, which is a county highway, he observed a wire hanging from the top of a pole and reaching to within a foot or two of the ground. This wire, at the time, was charged with electricity. The lad took

hold of the wire, with the result that he was very severely injured. As stated in the complaint, his right arm was so badly burned that it became necessary to amputate the same, and the same was amputated at a point below and near the elbow. The jury's verdict was for the sum of $20,000. The defendant thereafter served and filed a notice of intention to move for a new trial, but the record does not disclose the fact that the motion was ever made, or, if made, on what grounds. Neither does the record disclose any motion or other attack in the trial court on the amount of the verdict.

[1] In instructing the jury the trial court, at the request of the plaintiff, stated to the jury that in such a case the doctrine of res ipsa loquitur applies. The appellant makes no attack on the language used by the court, and does not claim that the instruction was improperly worded. The objection in this behalf made by the appellant is that the case as made by the pleadings is not a proper case to apply that doctrine. In this contention we think that the California rule is otherwise. Diller v. Northern Cal. Power Co., 162 Cal. 531, 123 Pac. 359, Ann. Cas. 1913D, 908.

As to this same instruction the appellant claims that its real meaning is that the mere fact that an accident happened authorized the jury to infer negligence. However, a most cursory reading of the instruction shows it was broader than as contended, and that it contained all of the elements necessary to bring into play the doctrine of res ipsa loquitur. O'Connor v. Mennie, 169 Cal. 217, 224, 146 Pac. 674.

[2] The defendant pleaded in its answer, and thereafter offered to prove, facts showing or tending to show that the wire which the plaintiff touched was properly in place the night before, that a wind arose, and the leaves of a large palm were blown over against the wire and broke it, and that such facts constituted an act of God. If the facts stated constituted an act of God the defendant should have been permitted to show the same as a defense. However, the respondent contends that the alleged facts do not show an act of God within the proper meaning of that rule. Fay v. Pacific Improvement Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198. In this behalf he contends that, if the palm tree stood in such a position as to endanger the defendant's wire, the defendant should have properly protected its wire therefrom, and in failing to do so the omission was an act of neglect on the part of the defendant, and not an act of God. This contention is supported by the authorities. Chidester v. Consol. Ditch Co., 59 Cal. 197.

[3] The defendant claims that the trial court erred in refusing it permission to prove that at the time of the accident an independent contractor held a contract and was proceeding to replace the old line of poles with a new line of poles, and to string the wires thereon. In this behalf the appellant contends that the independent contractor might be liable to the plaintiff, but the existence of its contract would operate to relieve the defendant of liability if the accident occurred by reason of the act of such independent contractor or his employees. The rule contended for by the appellant is that the instant case is governed by the general rule stated in Boswell v. Laird, 8 Cal. 469, 487, 68 Am. Dec. 345, but the respondent claims that the case is governed by the exception to the general rule. In this contention we think the respondent is correct. Spence v. Schultz, 103 Cal. 208, 37 Pac. 220; Frassi v. McDonald, 122 Cal. 400, 55 Pac. 139, 772; Louthan v. Hewes, 138 Cal. 116, 70 Pac. 1065; Stockton Automobile Co. v. Confer, 154 Cal. 402, 97 Pac. 881; Luce v. Holloway, 156 Cal. 162, 103 Pac. 886.

[4, 5] The appellant claims that the verdict was excessive. The power of this court over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest, at first blush, passion, prejudice, or corruption on the part of the jury. We have carefully examined the evidence, and under the facts of this case we are unable to say that it is a proper case for this court to declare the verdict excessive.

We find no error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

---

59 Cal. App. 651

## GIOVANNONI v. BARTMANN. (Civ. 2489.)

(District Court of Appeal, Third District, California. Nov. 16, 1922. Hearing Denied by Supreme Court Jan. 15, 1923.)

**1. Banks and banking ⇐40—Transaction held to constitute sale of corporate stock.**

Where stockholder of bank indorsed certificate of stock in blank and left it with president to be delivered in event of its sale, and shortly thereafter met the person desiring to purchase it, and they came to an agreement for the sale of the stock, and the purchaser gave his check for the purchase price, and the seller delivered an order on the president for the certificate of stock, there was a completed sale, under Civ. Code, § 1140.

**2. Banks and banking ⇐40 — Finding that seller of corporate stock was without knowledge of insolvency sustained by evidence.**

In an action by purchaser of bank stock against seller to recover the purchase price, evidence *held* to justify a finding that defendant

seller, although a director of the bank, was without knowledge of the insolvency of the bank at the time of the sale, and that he did not make any misrepresentation, though the published reports of the financial condition of the bank contained gross misrepresentations.

**3. Banks and banking ⟸40—Misrepresentation must have been relied on in sale of stock.**

In order to recover price paid for bank stock purchased from a director as stockholder, it is not sufficient for plaintiff to show misrepresentations in financial report of bank, but he must prove that he placed his reliance upon them in making the purchase, although he need not show that they were the sole inducement.

**4. Banks and banking ⟸40—Finding that purchaser of stock was not induced to purchase by false financial report sustained.**

In an action to recover purchase price of bank stock, evidence *held* to sustain a finding that plaintiff did not rely upon misrepresentations in a financial report, assuming that the seller of the stock, as director in the corporation, was technically guilty of misrepresentations.

**5. Banks and banking ⟸40—Valueless stock sufficient consideration for price.**

One purchasing valueless shares of stock could not contend that there was a total want of consideration, and that he was entitled to a rescission on ground of mutual mistake, since the consideration for the payment of the purchase price was the stock, and not the value thereof.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by P. J. Giovannoni against George H. Bartmann. Judgment for defendant, and plaintiff appeals. Affirmed.

A. M. Drew, of Fresno, and Whitehurst & Logan, of Newman, for appellant.

John W. Maloy, of Madera, Lee D. Windrem, of Richmond, and Fee & Ring, of Madera, for respondent.

FINCH, P. J. The complaint sets up a cause of action for money had and received on the 13th day of January, 1920, in the sum of $1,650. The answer denies the allegations of the complaint, and by way of cross-complaint the defendant alleges that on said day the defendant, being the owner of 10 shares of the capital stock of the First National Bank of Newman, Cal., sold the same to plaintiff for the sum of $1,650, which the plaintiff then paid; that within 60 days after such sale the bank was declared insolvent and taken over by the Comptroller of Currency and a receiver placed in charge thereof; that March 2, 1920, the Comptroller levied an assessment of $100 a share on the capital stock of the bank, and the receiver notified defendant to pay such assessment on the 10 shares sold to plaintiff; that thereupon on the defendant notified plaintiff to pay the same, but that he refused; that the defendant then paid the assessment pursuant to a stipulation that such payment should not prejudice any right the defendant might have for the recovery of the amount thereof from plaintiff; that the sale of the stock was made without knowledge, information, or belief on the part of the defendant that the bank was to be closed or declared insolvent or that it was "otherwise than solvent, and conducted as an honest and successful business enterprise." The prayer of the cross-complaint is for recovery of the $1,000 paid on the assessment. The answer to the cross-complaint, in addition to the denials of many allegations thereof, avers that, at the time of the alleged sale of the stock, the defendant was, and for a long time prior thereto had been, a director of the bank, and as such had knowledge of its affairs; that on the day of the alleged sale the defendant, "at and in the First National Bank of Newman, * * * wrongfully, unlawfully, and fraudulently, and with intent to induce this plaintiff to purchase 10 shares of the capital stock, * * * represented and stated to this plaintiff * * * that the said stock was of the value of" $188 a share, and that the bank was about to declare a dividend of $38 a share, that the defendant warranted the stock to be of the value of $188 a share; that the plaintiff relied on said statements and believed them to be true and, so relying and believing, paid the defendant $1,650 for such stock; that the bank was insolvent and the stock thereof worthless at the time of the alleged sale, to the knowledge of defendant. In the answer to the cross-complaint the plaintiff prays for a rescission of the contract of sale and for recovery of the $1,650 paid thereon to defendant. The court found in favor of defendant on all the issues which are material on this appeal, and gave defendant judgment for the sum of $1,000, with interest.

The First National Bank of Newman was incorporated with a capital of 1,000 shares of the par value of $100 each and carried a reserve of $25,000. Wm. J. Burris and Frank P. Gomez were president and cashier, respectively, and had been such for a number of years. The defendant served as one of the directors from January 14, 1919, to January 13, 1920, and attended all meetings of the board from the time of his election to and including September 3, 1919. Having changed his residence and place of business from Newman to Madera in August, he attended no board meetings after September 3d. The Comptroller of Currency took over the affairs of the bank January 23, 1920, and levied an assessment of $100 a share on the capital stock, as alleged in the cross-complaint, which the defendant paid on the 10

shares involved in this suit. The receiver succeeded in collecting about 80 per cent. of the total assessment. After applying the amount so collected, the remaining liabilities far exceeded the value of the total assets. At the time the bank was closed it carried on its books, as assets, bills receivable in the sum of $1,075,961.54 and other assets to the amount of $150,067.44. The receiver classified the bills receivable as follows: Good, $204,264.06; doubtful, $361,110.01; and worthless, $510,587.47—and the other assets: Good, $56,628.54; doubtful, $93,438.90. Prior to the time his deposition was taken, November 4, 1921, the receiver had collected $64,803.36 on promissory notes which he had classified as worthless and $201,393.40 on those classified as doubtful. Among the assets classified as worthless were promissory notes forged by the president and cashier aggregating the sum of $223,000. The receiver testified that these forgeries had continued through a period of 8 or 10 years. All except a few of the persons whose names were forged to these notes resided in the vicinity of Newman. In some instances fictitious names were signed to the spurious notes. A large number of the forged notes were signed by mark, different clerks in the bank signing as witnesses at the request of the president, apparently without seeing the persons whose names appeared thereon as makers. About $250,000 was loaned to bean growers and others without security, and their notes renewed from time to time. On these notes the receiver was able to collect but about 5 per cent. of their face value. These loans were made prior to defendant's term of office and seem to have been made on the prospect of a continuance of war prices. During the subsequent depression in the bean market the growers were unable to pay, and their notes were renewed from time to time; the board of directors approving the renewals made during defendant's term. The receiver testified that very few loans were made during defendant's term. Whether such as were made were good or not does not appear. The minutes of July 8, 1919, contain the following:

"All loans 6860 to 6911, inclusive, examined and approved. All loans, property of this bank, also examined and approved."

The defendant testified:

"These notes were all made prior to my time, and the men who were on the board of directors had been living in the vicinity of Newman, some of them anywhere from 15 to 30 years, and they knew the conditions, and they had made these loans and approved them, and when they came up for renewals there was not any reason for me doubting their motion to renew them and O. K. the notes. I just followed in behind them and signed the book. * * * I never investigated them any more than what the men said who were on the board of directors."

The receiver found on file in the bank a letter from the Comptroller calling attention to the low reserve and past-due paper and instructing the directors to increase their reserve and get rid of their past-due paper. The record does not show when this letter was received. Early in December, 1919, the chief bank examiner and Mr. Day of the Federal Reserve Bank called the members of the board, including defendant, into conference and instructed them not to loan any more money until they could reduce the bank's indebtedness to the Federal Reserve Bank, then amounting to about $190,000, according to defendant's testimony. At that time the members of the board gave their personal note to the Reserve Bank for the sum of $50,000 as further security. The bank examiner had regularly investigated the affairs of the bank without discovering its insolvency or the numerous forgeries of the president and cashier. The defendant testified that at the December conference a proposition to increase the capital stock was discussed, and, relative to the price at which the new stock should be sold, the bank examiner said:

"I myself would possibly pay in the neighborhood of $135 a share for it now."

This testimony was not contradicted.

January 13, 1920, a meeting of the stockholders was held for the purpose of electing a new board of directors and increasing the capital stock. Both the plaintiff and the defendant attended this meeting; the former being the owner of one share of the stock. At this meeting the president stated that the bank was in a flourishing condition, and that the capital stock was of the value of $188 a share. It was proposed to sell the new issue of stock at $150 a share and to declare a dividend of $38 a share in favor of the old stockholders, thus placing the old and the new stockholders on an equality. There were not enough stockholders represented at the meeting to increase the stock, but a number of persons subscribed for new stock, in the event it should finally be issued. The plaintiff so subscribed for 10 shares.

The testimony of the parties is sharply conflicting as to what occurred relative to the sale of defendant's stock to plaintiff. In view of the findings in favor of defendant, the question is whether the findings are supported by the evidence, and hence only the defendant's testimony need be noticed. The defendant testified that plaintiff was desirous of purchasing sufficient stock to qualify for the office of director; that at the stockholders' meeting he sought to purchase the stock of another director, who replied that he did not care to sell; that the plaintiff then said to defendant, "Well, Dr. Bartmann, you are moving away and leaving town; * * * you'd better sell me your stock," and that defendant replied, "I don't believe I care to

sell it;" that immediately after the meeting the plaintiff again sought to buy the stock, and defendant replied that he had given the president of the bank "the refusal of it" if defendant should decide to sell; that the plaintiff said he would take it if the president did not buy it; that the defendant interviewed the president and learned that he did not desire to purchase the stock; that defendant then indorsed the certificate of stock in blank and left it with the president to be delivered in the event of its sale, thinking he would not see the plaintiff again; that shortly thereafter he again met the plaintiff, and they came to an agreement for the sale of the stock at $165 a share; that the plaintiff gave his check for the purchase price, and the defendant delivered his order on the president for the certificate of stock. The defendant further testified that he did not make the representations alleged in the answer to the cross-complaint. The defendant deposited in the bank the $1,650 received for his stock. His check for $1,000 was paid January 22, 1920, leaving a balance in his account of $689.87 at the time the bank was closed. July 12, 1919, the defendant attested as correct a report to the Comptroller of the financial condition of the bank at the close of business on June 30th, in which the doubtful and worthless notes were listed as resources. The defendant testified that he attested the report on the assurance of the cashier, who had verified it, that it was correct. The report was published in a local newspaper. The defendant had attested other reports prior to that time during his term.

[1] That the transaction between the parties constituted a sale and passed title to plaintiff seems clear. The parties agreed upon a present transfer, and the thing to be transferred was identified. Civ. Code, § 1140; Young v. New Pedrara Onyx Co. (Cal. App.) 192 Pac. 55; Johnston v. Laflin, 103 U. S. 800, 26 L. Ed. 532.

[2] The court was justified in finding from the foregoing facts that the defendant was without knowledge of the insolvency of the bank at the time of the sale, and that he did not make the misrepresentations alleged by plaintiff. It is apparent that both parties thought the stock was valuable. It is not probable that the defendant would have left so large a sum on deposit in the bank if he had doubts as to its solvency. It is not surprising that the defendant should have been deceived into the belief that the bank was sound when the experienced bank examiner was equally deceived. Whether or not the defendant was negligent in the discharge of his duties as director, there is sufficient evidence to support the finding that he acted in good faith in the sale of his stock to plaintiff.

The published reports of the financial condition of the bank, attested by defendant, contained gross misrepresentations though the defendant believed the report to be correct. It was the report itself, and not the signature of the cashier, which the defendant attested. The attestation was a positive statement that the condition of the bank was as represented in the report. U. S. Rev. Stat. § 5211; 6 Fed. Stat. Ann. (2d Ed.) p. 790 (U. S. Comp. St. § 9774); Gerner v. Mosher, 58 Neb. 135, 78 N. W. 384, 46 L. R. A. 244.

"The making and publishing of the reports are not merely for the information of the Comptroller, but are to guide the public, and he who buys stock in a bank in reliance upon the reports has a right of action under section 5239, Rev. Stats. [Comp. Stat. 1916, § 9831], against any officer or director who, knowing its falsity, authorizes such report." Chesbrough v. Woodworth, 244 U. S. 72, 37 Sup. Ct. 579, 61 L. Ed. 1000; Macdonald v. de Fremery, 168 Cal. 189, 142 Pac. 73.

"While the statute furnishes the exclusive rule for determining whether its provisions have been violated or not, this does not prevent the application of the common-law rule for measuring violations of common-law duties." Bowerman v. Hamner, 250 U. S. 504, 39 Sup. Ct. 549, 63 L. Ed. 1113.

This is not an action to recover damages for deceit or misrepresentation, but for rescission of the contract and for money had and received through defendant's misrepresentations. Where stock is purchased from a corporation through misrepresentation, "the purchase of shares may be set aside, and the purchaser relieved from his liability as a contributory, without any knowledge of the untruth on the part of those who issued the document. Recovery from the directors personally requires knowledge of the untruth on their part, or else that the statement should be made under such circumstances that knowledge will be imputed to them." Pomeroy's Equity Jurisprudence (4th Ed.) § 881. Appellant contends that, where a director sells his own stock through misrepresentation, however innocently made, he is liable in an action for the purchase price received.

"An action at law for fraud in making false representations and a suit in equity for the rescission of a contract on the ground of misrepresentations are founded on distinct theories. The former is based on an intentional deceit, which of course includes a knowledge of the falsity of what is affirmed. But the latter is aimed at the undoing of a bargain which circumstances would render it inequitable to enforce and the restoration of the parties to the status quo, and this may be consistent even with entire innocence and ignorance on the part of the person making the misrepresentations, or with his belief in their truth." Black on Rescission and Cancellation, § 102.

In Alvarez v. Brannan, 7 Cal. 503, 507, 68 Am. Dec. 274, it is said:

"A party will always be held to make good his statement in the form in which he makes it. If he states a thing as true in general terms without qualification, then he is presumed to do so upon his own knowledge, or at his own peril, and must make good his assertion."

In Groppengiesser v. Lake, 103 Cal. 37, 42, 36 Pac. 1036, 1037, an action for the rescission of a contract because of fraudulent representations, the court said:

"It does not matter that defendant did not know that what he stated was untrue, or that he believed it to be true."

[3, 4] Whether or not appellant's contention be correct, it is not sufficient for the plaintiff to show that the financial report contained false statements, but he must prove that he placed his reliance upon them in making the purchase, although he need not show that they were the sole inducement. Macdonald v. de Fremery, supra. The plaintiff testified that he made the purchase on the information obtained from the published reports, the statements of the president at the stockholders' meeting, and the representations made by the defendant at the time of the transaction. On cross-examination he testified as follows:

"Q. I want to ask you if you have an independent recollection now of having read the financial report of the First National Bank of Newman, in the West Side Index, a newspaper, published on the 22d day of July, 1919? A. I am reading it and I have read all the issues of the Index and I take an interest to look at the way the bank was progressing; I read them all; now, if you ask me if I read a certain number, I read them all, because I was used to reading them. Q. You have no independent recollection of having read this particular number at that time? A. I have read them all. * * * As I say, I am reading the whole papers very carefully and every issue almost, and, if I miss an issue, I will go into the office and get it. Q. Now, the only recollection that you have as to having read these various reports published in these various issues of this paper which has been introduced here in evidence is that you do read the paper, and that is all the recollection you have? A. I do read them all very carefully; yes. Q. That is the only reason that you have for believing that you read this particular one, is that correct? A. Well, that is just the way I am expressing myself. * * * Q. Let me ask you what was the report of the total resources * * * as published * * * July 21, 1919? A. It was over a million. Q. Will you discard that paper; now, what was the total liabilities at that time? A. I was just reading, taking the figures of the Newman Bank and the First National Bank, to see how they were getting up. Q. If this total published here shows $993,751.20 instead of away over a million, as you assumed it to be, why you were not so much influenced by this statement as you thought you were? A. Ain't it over a million? I don't remember; I read one below, one million; ain't this over a million, $1,161,000, that is what I was going by. Q. That is loans and discounts. A. That is all Greek to me. Q. Then you just went by what you saw here at the top? A. Up here, the way I seen it was; that is the way we took it, the Newman Bank was so much that they had in, etc., and the First National Bank, we was considering the First National Bank; it was much better than the Newman Bank. Q. Now, that also applied to the other issues in this paper, your testimony applies to all the other issues in this paper which have been introduced here in evidence? A. They have."

In connection with this testimony, the court may have logically considered the fact that the only misrepresentations averred by the plaintiff were those alleged to have been made at the very time of the transaction. Since the plaintiff did not allege that he was influenced in making the purchase by the published reports, it is fair to infer that he did not have such reports in mind when he filed his answer to the cross-complaint, and from this inference, considered in connection with the uncertainty of his testimony relative to his knowledge of the contents of the reports, it was not unreasonable to conclude that he did not have them in mind at the time of the purchase. While it cannot be said that the evidence is insufficient to support a finding that the published reports were among the inducements which caused the plaintiff to buy the stock, neither can it be said to be such as to compel a finding to that effect.

[5] Appellant urges that, since the stock was of no intrinsic value (whether or not it had a market value not appearing from the record), there was a total want of consideration for the contract, and that, even if both parties were mistaken as to its value, appellant was entitled to a rescission on the ground of mutual mistake. This contention finds support in the case of Neale v. Wright, 130 Ky. 146, 112 S. W. 1115. The case cited, however, seems to be in conflict with the decisions of this state and with the great weight of authority in other states. The consideration for the payment of the purchase price was 10 shares of bank stock, not the value thereof. There was no mistake as to what each party was to receive. In Sutro v. Rhodes, 92 Cal. 117, 28 Pac. 98, the plaintiff sought to recover money paid for worthless bonds; both parties believing them to be valuable at the time they were transferred. The court said:

"In the case at bar, as in Otis v. McCullum, 92 U. S. 447, the appellants 'got exactly what they intended to buy, and did buy'—that is, certain written instruments."

To the same effect is the decision in Harvey v. Dale, 96 Cal. 160, 31 Pac. 14:

"Where a party obtained what he contracted for, he cannot avoid his contract on the ground that what he received is less valuable than he supposed or that it has no value at all, unless he shows fraud or mistake as to the subject-

matter of the contract." Black on Rescission and Cancellation, § 166.

In Peck Colorado Co. v. Stratton (C. C.) 95 Fed. 741, where the defendant sought to avoid payment of the purchase price of stock which was worthless, the court said:

"The stock was the definite thing that he purchased, and he received the consideration selected by him. As distinguished from the consideration, the defendant seeks to set up the motive of the contract, and then to show that his expectation of deriving valuable benefits from this purchase * * * has not been realized; but such motive is not to be confounded with the consideration of the contract."

"The rule of caveat emptor applies as well to the sale of stocks as of chattels. The vendor can only be made liable for misrepresentation or fraud. Here, although the stock was worthless, there is not sufficient proof of any representation of its value, or any act that would amount to fraud either at law or in equity." Renton v. Maryott, 21 N. J. Eq. 123.

See, also, Hunting v. Downer, 151 Mass. 275, 23 N. E. 832; Long v. Symonds, 216 Mass. 595, 104 N. E. 476; Jones v. Garlington, 44 S. C. 533, 22 S. E. 741; Rothmiller v. Stein, 143 N. Y. 581, 38 N. E. 718, 26 L. R. A. 148.

It is not contended that, if the transfer of the stock is binding upon plaintiff, he is not liable to the defendant for the assessment paid by the latter. The payment was not voluntary, but under compulsion. 6 Fed. Stat. Ann. (2d Ed.) p. 723 (U. S. Comp. St. § 9689). See People's Home Savings v. Stadtmuller, 150 Cal. 106, 109, 88 Pac. 280.

The judgment is affirmed.

We concur: ANDERSON, Judge pro tem.; BURNETT, J.

---

59 Cal. App. 687

## CEINAR v. HAWES et al. (Civ. 4299.)

(District Court of Appeal, First District, Division 2. California. Nov. 18, 1922.)

**1. Fraudulent conveyances ⟸263(5)—Complaint, although not directly alleging facts showing conveyance of all of grantor's property, held sufficient.**

In action to set aside a fraudulent transfer of property, a complaint, not directly alleging the facts, but containing such allegations that the inference was strong, that the conveyance transferred all of grantor's properties, and that she had not since been the owner of any, *held* sufficient.

**2. Fraudulent conveyances ⟸297—Evidence held sufficient to support judgment setting aside transfer as fraudulent.**

In an action to set aside a fraudulent transfer of property, the judgment roll in a former case and grantor's oral testimony before a referee that she transferred the property for no other consideration than support of her brother and love and affection for grantee, that the property was all she possessed, and that she had acquired none since, *held* sufficient, in the absence of evidence that grantee furnished any support or parted with anything since the deed was made, to support a judgment for plaintiff.

**3. Fraudulent conveyances ⟸80—Transfer of all of one's property in consideration of support of one whom grantor is not bound to support is void.**

A transfer of all of one's property in consideration of the future support of one whom grantor is not obligated to support, as well as a transfer in consideration of the future support of grantor, is void.

**4. Fraudulent conveyances ⟸168—Grantee's lack of knowledge of grantor's indebtedness immaterial.**

That one to whom property was conveyed in consideration of the future support of grantor's brother did not know of grantor's indebtedness is immaterial in an action to set aside the transfer as fraudulent.

**5. Witnesses ⟸275(5)—Questions asked plaintiffs as to defendant's testimony before referee concerning matters as to which she was not asked held improper as not cross-examination.**

In an action to set aside a fraudulent transfer of property by one defendant to the other, an objection to a question, asked plaintiff on cross-examination, as to whether he remembered that grantor, as to whose testimony before a court referee he had testified on direct examination, testified that she had transferred the property many years before, but had never recorded anything, was properly sustained as not cross-examination, where she was not asked when the deed was made or whether it was recorded, but was asked questions regarding her assets before and after it was made.

**6. Appeal and error ⟸1048(6)—Question on cross-examination of plaintiff as to defendant's transfer of property without recordation held not prejudicial to defendant.**

In an action to set aside a fraudulent transfer of property from one defendant to another, sustaining an objection to a question asked plaintiff on cross-examination as to whether he remembered that grantor, as to whose testimony before a referee he testified on direct examination, testified that she transferred the property many years before, but never had anything recorded, was not prejudicial to defendant, as an affirmative answer would have strengthened plaintiff's case, by tending to show that the transfer was a secret, while defendants would neither have been assisted nor injured by a negative answer.

**7. Judgment ⟸256(2)—Finding of no consideration except love and affection and future support of grantor's brother held sufficient to support judgment setting aside conveyance.**

In an action to set aside a fraudulent transfer of property, the court's finding that

there was no consideration therefor except love and affection for grantee and the future support of grantor's brother was sufficient to support a judgment for plaintiff, whether treated as a finding of no consideration or that the consideration was the support of a member of grantor's family; the case being ruled by Civ. Code, § 3442, in either event.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by William Tracey Ceinar against Mary E. Hawes and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Edward J. Lynch, of San Francisco, for appellants.

Reisner & Honey, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendants to obtain a judgment declaring a certain transfer of real and personal property fraudulent and to obtain a decree setting the same aside. Judgment was entered in favor of the plaintiff, and the defendants have appealed.

[1] Attacking the complaint filed by the plaintiff, the defendants contend that the same does not state a cause of action. In this behalf the appellants state their objections under 12 different heads, but do not argue any of them. Thereupon the appellants cite Albertoli v. Branham, 80 Cal. 631, 22 Pac. 404, 13 Am. St. Rep. 200. Although the complaint in the instant case does not directly allege the facts, nevertheless it contains such allegations that the inference is strong that when the conveyance was made by the grantor said conveyance transferred all of her properties, both real and personal, and that since the date of said conveyance she has not been the owner of any other properties.

The record before us does not show when the action was commenced, and the only information we have on that subject is a statement of fact set forth in the appellants' brief. The fact that an execution was issued in the first case is clearly set forth, and there is an attempt to plead that the execution has been returned wholly unsatisfied. The latter allegation is in the form that we think falls within the rule concerning facts defectively pleaded, but it does not fall within the rules of a total failure to plead such facts.

[2, 3] The appellants claim that the evidence was insufficient to support the decision. The point is without merit. Windhaus v. Bootz et al., 3 Cal. Unrep. 351, 25 Pac. 404. The judgment roll in the first case proved many of the plaintiff's allegations, and oral testimony was introduced to the effect that before the court referee the grantor testified that she transferred the property described in the complaint for the support of her brother and for the love and affection which she bore the grantee and for no other consideration; and that she further testified that the property conveyed constituted everything she possessed, and that she owned nothing and had nothing since. There was no evidence that the grantee furnished any of the support for which the deed was made, or that she has ever parted with anything since the deed was made. If the transfer had been made in consideration of the future support of the grantor, it is settled law in California that the transfer would be void. Baxter v. Baxter, 19 Cal. App. 238, 125 Pac. 359. In other jurisdictions the rule is the same when, as here, the support to be furnished is to be furnished to some person whom the grantor is under no legal obligation to support. No reason is presented why a different rule should be declared in this state. Brown et al. v. Moore et al., 52 S. W. 944, 21 Ky. Law Rep. 664.

[4] The trial court found that the grantee did not know of the existence of the indebtedness of the grantor. That fact, in this case, was immaterial. Clowe v. Seavey, 208 N. Y. 496, 499, 102 N. E. 521, 47 L. R. A. (N. S.) 284.

[5, 6] The plaintiff took the stand as a witness in his own behalf, and testified as to certain testimony given by the defendant Hawes when she was being examined before a court referee. She was not asked when the deed was made nor whether the deed was recorded, but was asked questions regarding her assets both before and after the deed was made. Counsel for appellants then propounded this question:

"Do you remember also Mrs. Hawes testifying as follows: 'I transferred that property to Mrs. Burke many years ago, but never had anything recorded; transferred to Mrs. Burke years ago by a notary public in the Hibernia Bank.'"

The respondent objected to the question as not being cross-examination and immaterial. The trial court sustained the objection. We think the ruling was correct. The question was not cross-examination, but the appellants should have made the witness their own if they wanted further passages of the former testimony recited. Moreover, if the question had been answered in the affirmative, the answer would have strengthened the case of the respondent, as tending to show that the transfer was a secret. If the question had been answered in the negative, then the appellants would not have been assisted, nor would they have been injured.

[7] On the issue of consideration the trial court found:

"That there was no consideration for said conveyances of said real and personal property, save and except love and affection of defendant

Mary E. Hawes, for said Elizabeth E. Burke, and the future support of the father of said Elizabeth E. Burke."

Whether said finding be treated as a finding that there was no consideration, or as a finding that the consideration was the support of a member of the family of the grantor, we need not determine. In either event the case is ruled by the provisions of section 3442 of the Civil Code.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

---

59 Cal. App. 699

## LEBALLISTER et al. v. MORRIS et al. (Civ. 2524.)

(District Court of Appeal, Third District, California. Nov. 18, 1922.)

1. **Vendor and purchaser ⟸95(2)—Default in payment of installment under land contract not ground for forfeiture where prompt payment impliedly waived.**

Where an installment under a contract for the sale of realty in which time was made of the essence was payable at a bank on August 8th, and on August 9th and 10th plaintiffs made demand for payment forthwith, and defendant made payment August 10th, which payment the cashier of the bank accepted before he was told by plaintiff not to do so, prompt payment on August 8th was impliedly waived and a forfeiture on such ground would not be sustained.

2. **Vendor and purchaser ⟸101—Where prompt payment of installments under land contract has been waived, right of forfeiture for future delays can only be restored by special notice.**

Where by the acceptance of partial payments for the sale of realty after they became due, there has been a waiver of performance in accordance with the terms of the contract, the right of forfeiture for a future delay in payment is temporarily suspended and can only be restored by giving a definite and special notice to that effect.

3. **Appeal and error ⟸197(7)—Objection to pleadings cannot be made for first time on appeal.**

In a suit to declare a forfeiture of an installment land contract for failure to make prompt payments, an objection that defendants did not plead a waiver of promptness of payment cannot be made for the first time on appeal.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by James G. Leballister and another against John Morris and another, to cancel an agreement for the sale of real estate. Judgment for defendants, and plaintiffs appeal. Affirmed.

George E. Gardner, of Oroville, for appellants.

W. H. Carlin, of Marysville, for respondents.

BURNETT, J. The appeal is from a judgment in favor of defendants and the record is presented by the alternative method. Appellants have filed herein only what is denominated "Appellants' Opening Brief." Therein they have not set out the pleadings or the evidence in the case, but have contented themselves with the discussion of the legal question whether a vendee by failure to make payments at the time specified in a written contract for the sale of real property, wherein time is made of the essence thereof, does not subject himself to the penalty of forfeiture. The consideration, though, as thus presented is of no assistance in the absence of an exposition of the particular facts of the case. However, what has been omitted by appellant has been supplied by respondents, and as the statement by the latter is not denied by the former, we may virtually adopt it as a proper portrayal of the real situation. On August 8, 1919, a written agreement of the sale and purchase of a tract of land near Gridley, in Butte county, for the sum of $20,000 was executed by the parties herein. Four thousand dollars were paid by respondents at that time, and it was agreed that the balance should be paid in 32 consecutive installments of $500 each on February 8 and August 8 of every succeeding year until paid, with interest upon deferred payments at 6 per cent. per annum. The payments were to be made at the Gridley branch of the Rideout Bank at Gridley, and the bank was to receive the moneys, give receipts therefor and hold the deed, which had been placed in escrow. On February 8, 1920, respondents made the first payment of the balance amounting to $980. They made the next payment on August 9 of $965. The next payment, which became due February 8, 1921, respondents paid in two installments, $550 on February 8, and $416 on August 1, 1921. These payments were received by the bank and accepted by appellants. The next installment became due and payable on August 8, 1921. On the next day, appellants demanded payment of this money from respondents, who then had only $200, which they offered to pay; this appellants refused to accept on account, and threatened to terminate the contract. On the following day, as soon as the Bank of Gridley was open for business, respondents went to the bank and paid to the cashier for appellants the sum of $935.35, the total amount then due. This money was received by the cashier who had charge of this account, and a deposit tag was made out in the name of appellants and as respondent, John Morris, was turning away from the counter a telephone message came from appellants' attorney to the cashier not to receive the money, but it had already been

paid in, and said respondent left it there. Thereafter, upon the same day, appellants served upon respondents a written notice of cancellation of the instrument, but respondents refused to surrender possession of the premises, and the action was brought for an annulment of said agreement, for the restitution of said premises, and for damages in the sum of $2,000 for breach of contract. The trial court found against plaintiffs on all the material issues, and particularly as to said belated payment that

"Time is of the essence of said written agreement and the sum of $500 and interest under said agreement became due and payable by and from defendants to plaintiffs at the Rideout Bank in the city of Gridley, county of Butte, state of California, on the 8th day of August, 1921, under the terms of said written agreement, said money was not paid on said 8th day of August, and on the 9th day of August, plaintiffs demanded of defendants that they forthwith make said payment at said bank, and again on the 10th day of August, 1921, plaintiffs again demanded of defendants at the hour of about 8 o'clock a. m. of said day that they, defendants, forthwith pay said money; and thereafter, at the hour of 9:30 a. m. of said day, defendants went to said city of Gridley, and then and there paid into said bank for said plaintiffs at said bank the sum of $935.35, being the full amount of the payment which became due and payable under said written agreement on the 8th day of August, 1921, with interest as specified in said agreement up to and including the 10th day of August, 1921; that said money was received by the assistant cashier of said bank, and a deposit tag made out in the usual way for the purpose of depositing said money to the credit of plaintiffs upon the books of said bank. Plaintiffs did, on said 10th day of August, 1921, but not until the hour of about 4 o'clock p. m. of said day, and long after said money had been paid into said bank as aforesaid, make, sign, and serve upon defendants a written notice purporting to cancel, annul and terminate said written agreement."

In this connection the trial court further found:

"From and after the execution of said contract or agreement on the 8th day of August, 1919, defendant duly and regularly made payments of principal and interest to plaintiffs at the Gridley Branch of the Rideout Bank in the city of Gridley, county of Butte, state of California, as therein required as follows, to wit:

| | |
|---|---|
| On February 9, 1920 | $980 00 |
| On August 9, 1920 | 965 00 |
| On February 8, 1921 | 550 00 |
| On August 1, 1921 | 416 00 |

—said last two payments making a total of $966, which constitutes and was the total amount which should have been paid on February 8, 1921. However they were paid in two installments as aforesaid, and by plaintiffs with full knowledge of the respective times of payment, namely, February 8, 1921, $550, and August 1, 1921, the balance in the sum, of $416, accepted and received from defendants and credited and applied upon said written agreement as full payment of the principal and interest which became due and payable under said agreement on the 8th day of February, 1921; the next payment, coming due and payable under said contract on the 8th day of August, 1921, was paid by defendants to plaintiffs at said bank in the manner and at the time hereinbefore in these findings found and specified."

[1] We must assume that these findings are supported by the evidence, and it follows that there was no forfeiture by defendants upon either of two theories. In the first place, there was an implied waiver as to the prompt payment of the installment due on August 8 by the receipt for plaintiffs on August 10th of said amount by the cashier, and also by the demand of plaintiffs, made on August 9th and August 10th, that defendants forthwith pay the money. After such demand and an immediate compliance with it plaintiffs could not stultify themselves by insisting that there already had been a forfeiture by reason of the failure to pay on the 8th of August.

[2] It is also apparent from the foregoing findings that the case falls within the principle enunciated by the authorities that where, by the acceptance of partial payments after they became due, there has been a waiver of strict performance in accordance with the terms of the contract, the right of forfeiture for a future delay in payment is temporarily suspended, and can only be restored by giving a definite and special notice of an intention to that effect. Boone v. Templeman, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126; Myers v. Williams, 173 Cal. 301, 159 Pac. 982; Pearson v. Brown, 27 Cal. App. 125, 148 Pac. 956.

[3] There is no merit in the point that defendants did not plead a waiver. Respondents in their brief have set out a portion of the answer, which clearly meets this objection. Besides, as far as we are advised, no such objection was made at the trial, and appellants should not be heard to make it now for the first time.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

59 Cal. App. 760

## LEAL et ux. v. MARTIN. (Civ. 4376.)

(District Court of Appeal, First District, Division 2, California. Nov. 24, 1922.)

**1. Highways ⟸184(2)—Plaintiff held bound to prove that defendant's automobile was not operated in a careful or prudent manner when it struck plaintiff's son.**

Where in an action for the death of plaintiff's son, caused by being struck by defendant's automobile on a highway, plaintiff relied on Motor Vehicle Act, § 22, subd. (a), requiring operator of motor vehicle to operate it in a careful and prudent manner, and at such speed as not to endanger another, it was necessary for plaintiff to prove that the automobile was not operated in a prudent manner, or that it was operated at an unreasonable speed.

**2. Appeal and error ⟸1010(1)—Court's findings supported by evidence will not be disturbed on appeal.**

Where there is evidence to support the findings of the trial court, they will not be disturbed on appeal.

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Action by Manuel Leal and wife against Frank Martin. From a judgment in defendant's favor, plaintiffs appeal. Affirmed.

M. J. Rutherford, of Oakland, for appellants.

Frank M. Carr and Stanley R. Sterne, both of Oakland, for respondent.

NOURSE, J. Plaintiffs appeal from a judgment in favor of defendant in an action for damages for the death of plaintiffs' son, caused by having been struck by an automobile driven by defendant on the public highway. The appeal is taken under the provisions of section 953a of the Code of Civil Procedure.

The grounds of appeal, as stated by appellants in their brief, are that the respondent was guilty of negligence because at the time of the accident he was operating his automobile in the vicinity of a schoolhouse at such a rate of speed that he could not stop the same in less than 30 feet; that he failed to give a warning of his approaching machine, though the street was banked with trees and poles; that he was driving the machine without watching the road over which he was passing. All the grounds urged by appellants are mere matters of fact which the trial court was called to determine, and all of which were found adversely to appellants.

[1, 2] It is not argued that respondent was guilty of negligence per se, or that he violated any statute relating to the manner of operation of the automobile upon the public highway other than the provisions of section 22, subdivision (a), of the Motor Vehicle Act (Stats. 1919, p. 220), which requires that one operating a motor vehicle on the public highways shall do so in a careful and prudent manner and at such a rate of speed as shall not endanger the life or limb of another. When reliance is placed on this provision of the statute, it is necessary to prove that the vehicle was not operated in a careful or prudent manner, or that it was operated at an unreasonable rate of speed. The trial court found that the respondent was operating his car in a careful and prudent manner, and that the accident was not the result of any carelessness or negligence on his part, but that it resulted from the fact that the little boy suddenly and without warning jumped from behind a tree and ran directly in front of the automobile. There is evidence to support all the findings of the trial court. Such being the case, the judgment should not be disturbed.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

---

59 Cal. App. 743

## HALL et al. v. MITCHELL. (Civ. 2527.)

(District Court of Appeal, Third District, California. Nov. 23, 1922.)

**1. Trial ⟸395(6)—Finding that "all material allegations" are true is insufficient.**

A finding that "all material allegations of the complaint are true" is insufficient and must be disregarded on appeal.

**2. Sales ⟸130(3½)—Finding that defendant "made untrue statements" held insufficient to enable court to determine whether reliance thereon was warranted.**

A finding in an action to rescind a contract to purchase nursery stock for fraud that defendant "made untrue statements to plaintiffs regarding the number of dormant buds that would grow" is insufficient, in that it does not disclose the representation made so that the court could determine whether it was of a character to justify reliance thereon by plaintiffs.

**3. Sales ⟸130(3½)—Findings that representations were knowingly false and intended to deceive necessary to warrant annulment of contract.**

That false representations were known to be false when made and were made with intent to deceive, should appear in the finding to warrant an annulment of a contract for fraud.

**4. Sales ⟸130(3½)—Specific finding of damage necessary to warrant award.**

A specific finding that plaintiffs were damaged by misrepresentations made is necessary to warrant damages, and a finding that "plaintiffs are entitled to damages" is insufficient.

**5. Sales ⟸38(9) — Misrepresentations not harmful not grounds for action to rescind contract.**

A misrepresentation that does not result in injury to the innocent party cannot be the predicate of an action to rescind a contract of sale on the ground of fraud.

**6. Appeal and error ⟸704(2), 907(2)—Failure to bring up evidence on special defense precludes review.**

Failure of the lower court to find regarding a special defense set up by appellant is not reviewable, where the evidence is not brought up and it must be assumed that the showing made would not warrant a finding in favor of appellant.

**7. Sales ⟸130(2)—No particular phraseology necessary in allegation of intent to deceive.**

Though the intent to deceive is a material element of fraud, complaint in an action to annul a contract for misrepresentation need not allege it in any particular phraseology, though, in accordance with Civ. Code, § 1572, the complaint should contain an allegation that misrepresentations were intended to induce plaintiff to enter into the contract.

**8. Sales ⟸38(3)—Whether representations are expressions of opinion depends on facts.**

Whether a representation relied upon to constitute fraud in a sale, is in fact but an expression of an opinion, must be adjudged upon its own surrounding facts, taking into consideration the nature of the representation and the language used, for an expression of opinion may constitute actionable fraud, if coupled with an actual misrepresentation or concealment, or if it relates to a subject of which the parties have not equal knowledge or means of ascertaining the truth.

**9. Appeal and error ⟸1031(2)—Defects in pleading assumed to be without prejudice.**

In considering on appeal the sufficiency of appellee's complaint, it will be assumed that evidence of a complete cause of action was received without objection, and that defects in the complaint were without prejudice.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

An action by H. V. M. Hall and another against R. N. Mitchell. From a judgment for plaintiffs, defendant appeals. Reversed.

Hawkins & Hawkins, of Modesto, for appellant.

F. W. Reeder, of Oakdale, for respondents.

BURNETT, J. The action was brought to rescind, on the ground of fraud, a written contract for the sale of certain nursery stock, and the appeal is by the defendant from the judgment upon the judgment roll. Said written contract provided:

"Agreement, made and dated at Waterford, Cal., November 2, 1920, between Robert Mitchell of Ceres, Cal., hereinafter described as the seller, and H. V. M. Hall, of Waterford, Cal., hereinafter described as the purchaser. Witness, that the seller agrees to sell and convey, and the purchaser agrees to purchase, all that block of nursery stock grown and now standing on the northerly portion of the property owned and farmed by J. T. McComic at Waterford, Cal. The price is ten thousand dollars ($10,000.00) payable as follows: Three thousand five hundred dollars ($3,500.00) on the signing of this contract, the receipt of which is hereby acknowledged. Fifteen hundred dollars ($1,500.00) on or before March 1, 1921. Five thousand dollars ($5,000.00) on or before March 1st, 1922, with interest on this deferred payment at six per cent. from the date of this agreement until March 1, 1922, payable at that time. The seller agrees to remove strings now on part of the within described stock, and to furnish to the purchaser a correct and true list of all varieties and their exact location. The seller hereby guarantees that title to the stock described within is free from liens, or other debts or incumbrances. The stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties."

After an allegation of the execution of said contract, the complaint proceeds:

"That a few days before the entering into of said contract the exact dates being to plaintiffs unknown, defendant made to plaintiffs the following false, fraudulent and untrue statements: That defendant stated to plaintiffs that he had placed 52,000 dormant buds in the trees comprising the nursery stock mentioned in before mentioned contracts, and that plaintiffs could depend upon 60 to 70 per cent. of said dormant buds growing and producing trees. That plaintiffs, relying upon the representations of defendant as to the amount of dormant buds which would grow and produce trees, as represented by defendant, agreed to and did enter into a contract with defendant in writing as hereinbefore set forth and agreed to pay said defendant the sum of $10,000 therefor. That plaintiffs had no way of knowing whether or not the representations were true and were compelled to rely and did rely upon the representations made by defendant as to the amount of buds that would grow and produce trees. That plaintiffs are not nurserymen by profession, but that defendant is a man who has been engaged in the nursery business for a number of years and is fully conversant with said business, which plaintiffs knew at the time of entering into said contract, and because of this knowledge plaintiffs gave a greater degree of reliance upon the statements made by defendant than they would otherwise have done. That the statement made by defendant to plaintiffs that they could depend upon 60 or 70 per cent. of the dormant buds of said nursery stock growing and producing trees was false, fraudulent, and untrue, which defendant well knew, but plaintiffs did not know and had no way of determining at the time of the entering into of said contract. That defendant well knew, as an experienced nurseryman that at the time of entering into said contract and at the time of making the said statement to plaintiffs that 60 or 70 per cent. of the dor-

mant buds would not grow because of the nature of the budding and which the defendant had done in said nursery, which was wholly within the knowledge of defendant. That in truth and in fact there were only 30 per cent. of the dormant buds placed in said nursery by defendant that grew and produced trees. That by reason of the false, fraudulent, and untrue statement of defendant to plaintiffs that 60 or 70 per cent. of said dormant buds would grow and produce trees, plaintiffs were damaged in the following amounts and did pay to defendant on the 2d day of November, 1920, the sum of $3,500."

Then follows an enumeration of the other losses claimed to have been sustained, the allegation of a written demand for rescission and restoration, and that "plaintiffs have carried out the terms and conditions of said contract in every particular."

The answer put in issue every material allegation of the complaint and set up an affirmative defense of ratification of the contract, and laches in the failure of plaintiffs to rescind the contract promptly after ascertaining what proportion of said buds would grow. It was also averred "that if a due proportion of the said nursery stock failed to grow, it was because the plaintiffs failed to properly care for the same in an approved manner of horticulture, and for their failure to so care for the said nursery stock, a large percentage of the same failed to grow."

The court found:

"That all the material allegations of plaintiffs' complaint are true. That the material allegations as to the denial of fraud and misrepresentation in defendant's answer are untrue. That plaintiffs H. V. M. Hall and Caroline Rice Dyer are inexperienced in the nursery business. That defendant, R. N. Mitchell, is an experienced nurseryman. That defendant R. N. Mitchell, made false, fraudulent and untrue statements to plaintiffs regarding the number of dormant buds that would grow at the time and before the sale of said nursery to plaintiffs. That plaintiffs H. V. M. Hall and Caroline Rice Dyer, relied upon the statements made by defendant, R. N. Mitchell, and so relying purchased said nursery from defendant. That because of the delay of notice of rescission of contract served by plaintiffs H. V. M. Hall and Caroline Rice Dyer on defendant, R. N. Mitchell, said contract of purchase cannot be rescinded by plaintiffs against the defendant. That plaintiffs H. V. M. Hall, and Caroline Rice Dyer are entitled to damages from defendant, R. N. Mitchell, because of the misrepresentations and fraud of defendant in the sale of said nursery to plaintiffs by defendant."

Among the conclusions of law is also this finding of fact:

"That H. V. M. Hall and Caroline Rice Dyer, plaintiffs, have already paid to the defendant, R. N. Mitchell, all that nursery stock mentioned in said contract of purchase is reasonably worth."

[1] It is apparent that the findings as to "all the material allegations," etc., must be entirely disregarded. Stampfli v. Stampfli (Cal. App.) 199 Pac. 829; Krug v. F. A. Lux Brewing Co., 129 Cal. 322, 61 Pac. 1125; Holt Mfg. Co. v. Collins, 154 Cal. 265, 97 Pac. 516.

[2] We must look to the other findings to ascertain whether there is sufficient basis for the support of the judgment, and we are satisfied that they fall short of meeting the requirement of the law. The court does not find what false statement or statements were made by defendant to plaintiffs. It is not sufficient to declare that he made "untrue statements to plaintiffs regarding the number of dormant buds that would grow," etc. Such a vague and indefinite finding as to the supposed misrepresentations cannot be deemed of any value. If it had been qualified by the phrase "as alleged in the complaint" or some equivalent expression, the situation would be different. But the vital consideration of what representation was made is left entirely to surmise and conjecture. It should have been exhibited with at least reasonable certainty so that the court could determine whether it was of a character to justify the conduct of plaintiffs in relying upon the statement.

[3] Again, there is no finding that any statement made by defendant was known by him to be untrue or that it was made with intent to deceive or to induce plaintiffs to rely upon it. These are vital elements in a case of actual fraud, and manifestly they should appear in the findings in order to warrant a conclusion that the contract should be annulled by reason of misrepresentation. 20 Cyc. 13; 26 Corpus Juris, 1062.

[4, 5] There should have been also a specific finding that plaintiffs were damaged or injured by the misrepresentation of defendant. That "plaintiffs are entitled to damages from defendant" is not a sufficient finding of fact in that regard. Of course, any misrepresentation that does not result in injury to the innocent party cannot be the predicate for an action such as this.

[6] There was no finding as to the special defense set up in the answer that any loss suffered by plaintiffs was the result of negligence on their part in the care of the nursery, but of this no complaint can be made, since the evidence is not brought up. We must assume that the showing made would not warrant, in that respect, a finding in favor of appellant.

[7] In view of the necessity for a reconsideration of the case by the trial court, it becomes advisable to notice appellant's criticisms of the complaint. One is that it is not alleged that any misrepresentation was made with intent to deceive. Authorities are cited to the effect that such an allegation is material. Of course, there can be no actual fraud without such evil intent. But, manifestly, in setting forth this necessary ele-

ment, the pleader is not required to adopt any particular phraseology, although the simple and direct averment that the representation was made with such intent would relieve the situation of any uncertainty in that respect.

It is also claimed that there is a failure to allege that the misrepresentation was made with the intent to induce plaintiffs to enter into the contract. It would have been a simple matter to set this forth so as to avoid just criticism. It is to be observed that section 1572 of the Civil Code, in defining actual fraud, provides that it "consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract," etc. In this particular case no more important element could be suggested, and it is unfortunate that plaintiffs were not more careful to reveal it more clearly.

[8] Appellant seems to attach most importance to the claim that the so-called misrepresentation consists simply in the expression of an opinion and not the statement of a fact, and therefore it could not constitute actionable fraud. He insists that "a vendor has the right to free expression of opinion as to what will or will not happen in the future in relation to the sale of the property under consideration, and such statements will never constitute a ground for actionable fraud." The familiar principle is stated in 12 R. C. L. 245, as follows:

"Generally, therefore, fraud cannot be predicated upon the mere expression of an opinion which is understood to be only such or cannot reasonably be understood to be anything else, nor upon representations in regard to matters of estimate or judgment. The person to whom such statements are made has no right to rely upon them, and does so at his peril, nor can it be supposed that they influenced his judgment."

However, as stated by the same and other authorities, there are exceptions to these general rules "growing out of the need of preventing the successful perpetration of fraud," but we need not specify them. Moreover, it is true that—

"There is no certain rule by the application of which it can be determined when false representations constitute matters of opinion or matters of fact, but each case must in a large measure be adjudged upon its own facts, taking into consideration the nature of the representation and the meaning of the language used as applied to the subject-matter and as interpreted by the surrounding circumstances." 12 R. C. L. 247.

Illustrations of the application of the principle, as thus stated, are given in the text; indeed, the books contain many of them, but in this connection we notice specifically only the California cases cited by appellant, holding that a mere opinion was involved. In Rendell v. Scott, 70 Cal. 514, 11 Pac. 779, it was said:

"It was certainly a matter of opinion when the plaintiff stated that the land was the best ranch in Ione Valley, and was very rich and productive, and would produce 50 bushels of wheat to the acre, that a portion was good alfalfa land, and that another portion was rich in mineral deposits."

It was held that, since there was nothing in the pleadings to exclude "the idea of personal inspection by the purchaser," he must be presumed to have exercised his own judgment.

In Nounnan v. Sutter County Land Co., 81 Cal. 1, 22 Pac. 515, 6 L. R. A. 219, it was held that the representations made by the defendant to the plaintiffs "as to the nature of the soil to be excavated, and the number of cubic yards in the levee which they contracted to construct, were mere expressions of opinion with reference to matters equally within the power of both of the parties to ascertain and determine," and it was held further that the contract itself showed that the plaintiffs did not rely upon these representations.

In Holton v. Noble, 83 Cal. 7, 23 Pac. 58, it appears that plaintiff represented that the land sown in alfalfa would produce at least 8 tons of hay to the acre, that he also represented that the 40 acres of grapevines on the land would produce at least from a ton to two tons of raisins per acre. The Supreme Court said:

"The alleged representations of the plaintiff as to the amount that the alfalfa and grape vines would produce were clearly matter of opinion, and cannot be regarded as fraudulent."

Lee v. McClelland, 120 Cal. 147, 52 Pac. 300, is to the same effect. Therein defendant testified:

"He [referring to the plaintiff] said it was fine orange land, and I could put out oranges and go east in the summer and come back and I would get a crop of oranges; and on the strength of that statement I purchased the land."

Said the Supreme Court:

"It is quite obvious that such statements made by a seller of land, even admittedly to induce a purchase, cannot be made the predicate of false or fraudulent representations such as will avoid a contract of sale. They are the exaggerated, and it may be the reckless, declarations of an eager trader, holding out the golden promise of profit to induce a sale, but after all they are but the expressions of the vendor's opinion, actual or pretended, upon which the purchaser will rely at his peril."

It may be added that the most recent decision upon the subject by an appellate court of this state is presented by French v. Free-

man, 39 Cal. App. Dec. 405,[1] wherein it was held that the representations that certain land was suitable for raising pears and that it was the finest sediment soil "were merely expressions of opinion" which could not be regarded as fraudulent.

Herein, the representation was that "60 or 70 per cent. of the dormant buds would grow." This—so appellant claims—could be nothing more than the opinion of the seller; that, manifestly, he could not know that such would be the result in the future, nor could any one of ordinary understanding believe it was more than the expression of an opinion. It is not at all unlike—so it is said—the representation in the Rendell Case, supra, that the land would produce 50 bushels of wheat per acre, or in the Holton Case that the land sown in alfalfa would produce 8 tons to the acre. Standing alone, it may be admitted that this would be a mere opinion upon which plaintiffs would rely at their peril. It must be stated, though, that there is a defective attempt herein to couple with this opinion the concealment of a material fact, which necessarily would affect the development and productivity of the buds. This is suggested in the allegation that defendant "well knew, as an experienced nurseryman, * * * that 60 to 70 per cent. of the dormant buds would not grow because of the nature of the budding and which the defendant had done in said nursery which was wholly within the knowledge of defendant." If the budding was imperfectly done and this fact was intentionally concealed from plaintiffs, who were unskilled in that business, and who did not possess an equal opportunity of ascertaining the real condition, and with this knowledge defendant had no reason to believe that the buds would grow as he represented, then it could hardly be disputed that such representation, if made with the intent to deceive and induce plaintiffs to enter into the contract and upon which representation plaintiffs relied, could be nullified in a court of equity. Under such circumstances the representation would be equivalent to the statement of a fact for which the party making it would be held to accountability. The expression of an opinion may amount to fraud where it is accompanied by active misrepresentation or concealment (Gray v. Richmond Bicycle Co., 167 N. Y. 348, 60 N. E. 663, 82 Am. St. Rep. 720), or where it relates to a subject as to which the parties have not equal knowledge or means of ascertaining the truth (Davis v. Lee, 52 Wash. 330, 100 Pac. 752, 132 Am. St. Rep. 973).

Where the statement of the opinion is necessarily based upon a fact, or carries such inference that it must be regarded as the statement of a fact and is known to be false and made with intent to deceive, it may be actionable. Olston v. Oregon Water Power, etc., Co., 52 Or. 343, 96 Pac. 1095, 97 Pac. 538, 20 L. R. A. (N. S.) 915.

In Wendell v. Ozark Orchard Co. (Mo. App.) 200 S. W. 747, it was held that representations as to the productiveness of a peach orchard and the enhanced value of the land because of it being fruit land should be regarded as representative of existing conditions and fraudulent because made by one having superior knowledge based upon past experience of himself and others, and sufficient to support allegations of fraud.

In Stonemets v. Head, 248 Mo. 243, 154 S. W. 108, it is said:

> "Courts generally recognize that where parties do not stand on an equal footing of opportunity and knowledge a positive assertion of a matter, which, stated in another form, might be a mere opinion, may, when false and fraudulent, be actionable if the statement was a material inducement to the trade or sale. So a statement of an opinion under like circumstances, when in fact the party has no such opinion or has a contrary opinion, may become a statement of a material fact, to wit, the fact that an opinion exists."

The subject is clearly set forth in 2 Pom. Eq. Juris. (3d. Ed.), § 878, to which we also refer for an instructive discussion of the question.

[9] We think we discern in the complaint an attempt—though imperfectly stated—to set forth a situation within the contemplation of such recognizable fraud. The complaint is defective in the respects indicated, but, considering the whole pleading, we think it cannot be said that there is such entire omission of any material element of fraud as to require the action to be dismissed. We must assume that the evidence of a complete cause of action was received without objection and thus said defects were without prejudice. However, if it should be amended the various elements to which we have referred should be set forth more explicitly.

We think the judgment should be reversed and the parties permitted to amend their pleadings, if so advised. It is so ordered.

We concur: FINCH, P. J.; HART, J.

[1] Rehearing granted by Supreme Court, 217 Pac. 515.

# CALIFORNIA REPORTER

212 PACIFIC REPORTER

# CALIFORNIA REPORTER

## 212 PACIFIC REPORTER

190 Cal. 308

### LOCKHART v. J. H. McDOUGALL CO. (L. A. 7193.)

(Supreme Court of California. Jan. 6, 1923.)

**1. Mortgages ⟸38(1)—Evidence held to support finding deed with contract to convey constituted mortgage.**

Evidence that plaintiff had contracted to purchase a tract of land, that defendant agreed to furnish the money necessary to enable her to complete the purchase, taking the deed therefor in its own name and giving plaintiff a contract for the purchase of the property on payment of the amount advanced, which was less than the value of the land, *held* sufficient to sustain a finding that the deed and contract constituted a mortgage.

**2. Interest ⟸50—Mortgages ⟸608—Absolute refusal held to waive objection offer to pay was conditioned on conveyance of too much land, and indebtedness ceased to draw interest.**

The objection that the offer of a mortgagor, under a deed and contract to convey which were intended as a mortgage, to pay the balance due was conditioned on a conveyance by the mortgagee of land to which the mortgagor was not entitled, was waived, under Civ. Code, § 1501, where the mortgagor did not object on that ground, and did refuse to consider that mortgagor owed any debt, or had any interest in the land, so that a tender of the amount due was useless, and the indebtedness ceased to bear interest on that date, under Civ. Code, § 1504.

**3. Interest ⟸45—Bonus for extension of time for payment held to draw interest.**

Where the parties to a mortgage transaction in the form of a deed and contract to convey expressly stipulated that two sums separately agreed to be paid by the debtors for the extension of time for the payment of the principal were bonuses for the granting of such extensions, such amounts are not to be treated as interest payments, and must bear interest from the date they became due, under Civ. Code, § 1917, notwithstanding the agreement of the parties that they should not bear interest before they became due.

**4. Mortgages ⟸602—Presence of wells on mortgagee's lands held not to affect apportionment of rent.**

Where a corporation held title to a tract of land, a portion of which it had agreed to convey in a transaction which was in effect a mortgage, the fact that the wells from which the tract was irrigated were all located on the land belonging absolutely to the corporation does not establish a greater rental value for the corporation's portion of the tract so as to render inequitable an apportionment of the rent received from the entire tract on an acreage basis.

**5. Appeal and error ⟸877(4) — Mortgagee cannot complain because decree gave half interest to heirs of husband of mortgagor.**

In a suit to redeem from a mortgage in the form of an absolute deed and agreement to convey, the defendant cannot object that the judgment required conveyance of a one-half interest to the heirs of the husband of plaintiff, whereas plaintiff was entitled under the contract to the entire interest.

**6. Mortgages ⟸611—Mortgagee held not entitled to question validity of original agreement.**

Where a partnership composed of a man and a woman originally contracted to purchase a tract of land, but that agreement was abandoned and the woman completed the purchase of her portion of the land by securing an advancement from a corporation which took the conveyance in its own name and gave her and her husband the right to purchase, the corporation cannot, in a suit to redeem from the mortgage, raise the issue that the original partnership agreement was intended to defraud the husband's creditors.

In Bank.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Cora S. Lockhart, as executrix of the last will and testament of Otis H. Lockhart, and individually, against the J. H. McDougall Company, to redeem real property from the lien of a mortgage. Judgment for plaintiffs, and defendant appeals. Reversed, with directions.

Anderson & Anderson, of Los Angeles, Daugherty & Thiele, of Salinas, Silas W. Mack, of Monterey, and Stuart M. Salisbury and Wm. B. Himrod, both of Los Angeles, for appellant.

Chas. H. Brock and J. N. Hastings, both of Los Angeles, for respondent.

WILBUR, J. This is an action to redeem certain real property from the lien of a mortgage. Plaintiffs obtained a judgment fixing the amount due, and providing that upon payment thereof defendant should execute a deed to them. The principal controversy between the parties was over the question of whether or not the transaction between them was shown by parol to be a mortgage or was a contract of sale of the real estate in question entered into between the defendant corporation as vendor and the plaintiffs as vendees, as it purported to be. The action was originally brought by Otis H. Lockhart and Cora S. Lockhart, as husband and wife. The husband has since died and his wife has been substituted as executrix. Inasmuch as the husband and wife were the vendees in the contract and the plaintiffs in the action, we will refer to them hereafter as "the plaintiffs," notwithstanding the substitution. The J. H. McDougall Company appealed from the judgment.

We will first outline a few of the outstanding facts. Cora S. Lockhart entered into a partnership agreement with M. E. Post for the purchase of 2,793 acres from the Loma Vista Ranch Company. Subsequently, in order to pay the sum of $40,000 due upon the purchase price of the land from the Loma Vista Ranch Company it was arranged to segregate the partnership interest. The portion allotted to Cora S. Lockhart was conveyed to the J. H. McDougall Company; that company advanced the sum necessary to procure the deed from the Loma Vista Ranch Company and from Post, and took title to the property and executed a contract for the sale of the land to the plaintiffs. This arrangement was found by the trial court to be in effect a mortgage to secure to the J. H. McDougall Company the repayment of the sums agreed upon as the ostensible purchase price of the premises agreed in the contract of purchase to be paid by the plaintiffs as vendees.

[1] Appellant contends that the evidence is insufficient to justify this conclusion of the trial court. It is clear that the defendant took title to the land in question, and executed the contract of sale for the purpose of accommodating the plaintiffs. By this arrangement the defendant ostensibly acquired the legal title, and the plaintiffs the equitable title; defendant's interest in the property as vendor being a right to receive the purchase price and to retain the legal title of the property until it was paid. Aside from the provisions in the contract making time the essence of the contract, the relative rights of the parties to the contract of sale were quite similar to those of a mortgagor and mortgagee. Otis Lockhart testified that J. H. McDougall, representing the defendant, said that he would let plaintiffs have what they needed, and they could pay it off as they liked, even as low as $100 at a time, and that if it was a mortgage it would not be so elastic. The property was worth a great deal more than the purported purchase price, and the difference between the purchase price and the value of the property represented the investment or interest of the plaintiffs in the property which was by their direction conveyed to and vested in the defendant. Without an analysis of the correspondence and dealings of the parties tending to support the finding of the trial court that the arrangement between the parties was a mortgage, it is sufficient to say that the evidence supports the finding of the court, and that the question of whether or not the fact that the transaction constituted a mortgage was established by clear and satisfactory proof was a question for the trial court. Sheehan v. Sullivan, 126 Cal. 189, 58 Pac. 543; Wadleigh v. Phelps, 149 Cal. 627, 87 Pac. 93; De Kahn v. Chase, 177 Cal. 281, 170 Pac. 608.

Two additional questions are raised by the record with reference to the proper allowance of interest to be made to the defendant. It is claimed by plaintiffs and found by the court that a tender of the full amount due was made to defendant, and that because of such tender and refusal thereof the defendant company is not entitled to interest from that date. Civ. Code, § 1504. The appellant claims that the tender made was insufficient to stop the running of interest.

On April 10, 1919, one J. N. Hastings tendered defendant a certified check for $73,000. The finding of the trial court upon the matter of tender is as follows:

"That on or about the 10th day of April, 1919, these plaintiffs made an offer to the officers and directors of the defendant at the office of the defendant in the city of Salinas, Cal., to pay then and there the full amount of indebtedness due on that day to said defendant from plaintiffs, including all accrued interest and bonuses, and demanded that defendant execute a deed to plaintiffs of that part of said property then standing of record in the name of defendant, being the west half of the southwest quarter, and the east half of the southwest quarter and the west half of the southeast quarter of said section 10.

"That the plaintiffs were then and there ready, willing, and able to pay said obligation in full, and made known this fact to said officers and directors, but said officers and directors then and there refused absolutely to entertain the plaintiffs' offer of payment, stating that the matter was closed and the defendant did not care to have any further negotiations. That said officers and directors then

and there further declared and claimed that the defendant was the owner of said property, and that plaintiffs had no ownership, right, title, or interest in or to the said property, or any part thereof, and refused to execute to plaintiffs a deed for all or any part of said property.

"That the money due from the plaintiffs to the defendant was not actually offered to the defendant because of the said statements of said officers and directors of defendant.

"That plaintiffs are now, and at all times since said offer of payment was made have been, ready, willing, and able to pay the balance due on their said indebtedness to defendant, but defendant has at all times since said 23d day of May, 1917, refused, and does now refuse, to accept said payment and to execute to plaintiffs a deed."

It will be observed that the plaintiffs in making the tender demanded a deed to 240 acres of land. During the trial it was stipulated and the court found that the plaintiffs were not entitled to 80 acres of this land. This 80 acres had been hypothecated by the defendant company by a deed of trust executed to the Citizens' Trust & Savings Bank, and had been subsequently purchased at the trustees' sale by the defendant corporation. The money secured by the corporation on the trust deed was applied to the indebtedness due from the plaintiffs to the defendant. The defendant's first claim with reference to this tender is that it was made upon condition that the defendant convey 80 acres more than the plaintiffs were entitled to, and that therefore it was not a tender sufficient to stop the payment of interest.

[2] Did it also constitute a sufficient tender to prevent the running of interest? The plaintiffs had a right to demand a deed to the land held by the defendant as a mortgage (160 acres); the tender of the full amount due was made, and it was not suggested by defendant that there was any distinction between the 80 acres acquired by it by virtue of the sale to it under a trust deed executed by it, and the balance of the land held by it. Apparently none of the parties had this distinction in mind. The defendant declined to negotiate with plaintiffs or consider the question of tender affirming title to the whole 240 acres. The offer of performance was upon a condition not authorized, and hence, if objected to upon that ground, would have been unavailing to stop the running of interest, but where the defendant not only did not object on that ground, but also refused to consider the proposition that the plaintiffs owed any debt, or that they had any interest in the land, the defect in the tender was waived by failure to object thereto on that ground. Civ. Code, § 1501; Kofoed v. Gordon, 122 Cal. 314, 320, 321, 54 Pac. 1115. A good tender having been made, or waived, the indebtedness ceased to bear interest. Civ. Code, § 1504; Stein v. Leeman, 161 Cal. 502, 119 Pac. 663.

Appellant claims that the court erred in failing to allow interest at 7 per cent. per annum on the sum of $15,000 from the date it was due, to wit, February 1, 1914. The court disallowed any interest on this amount, apparently upon the theory that the item was itself interest, and that the contract provided it should not bear interest, and that therefore section 1917 of the Civil Code, which provides that interest shall be payable on all moneys at the rate of 7 per cent. per annum after they become due, unless there is an express contract in writing to the contrary, has no application.

It appears that when the original contract of purchase and sale was entered into between the parties, the vendees agreed to pay $8,000 in addition to the amount of money which the vendor, the defendant, had paid in connection with the acquisition of the title to the land. On May 7, 1909, the defendant company executed an agreement of extension for five years from and after February 1, 1909, containing the following statement:

"Provided, nevertheless, and this extension of time is made upon the express condition, that said parties of the second part in said agreement, shall at the time of the execution of the deed as in said contract stipulated to be made, pay and give to said J. H. McDougall Company, the sum of fifteen thousand dollars, without interest, in place and stead of eight thousand dollars, as in said agreement stipulated, such sum being stipulated as a consideration for this extension of time.

"This extension applies to the balance still unpaid under said contract or agreement, and to the lands still unconveyed pursuant to its terms, and time is of the essence hereof."

It is true that there are cases holding that a bonus paid for the making of a loan is in effect additional interest. If we adopt the respondent's view that the $8,000 payable without interest, agreed upon in the original contract of sale, and the additional $7,000 agreed upon in the extension of February 1, 1909, were items of interest in addition to the 6 per cent. fixed in the contract, then the rate of interest agreed upon in the original contract was 6 per cent. plus $2^{10}/_{11}$ per cent., a total of $8^{10}/_{11}$ per cent., and the agreement for the next five years upon the same basis was $8\ ^{8}/_{10}$ per cent. Malone v. Roy, 107 Cal. 520, 40 Pac. 1040. In that case the court was evidently of the opinion that the difference between the amount loaned and the amount agreed to be repaid was to be considered as interest, and that the total amount so agreed to be paid would bear interest after maturity at the rate of 7 per cent., in the absence of any agreement as to the rate of interest or payment thereof. In that case the parties contemplated that at the end of the year the rights of the vendee or mortgagor should cease and made no provision for continuing their relations. In the case at bar it is clear that, if we regard the transaction as a mort-

gage, as we must under the findings of the court, and consider that the item of $15,000 was made up of two items of interest, $8,000 for the first five years and $7,000 for the second five years, that the rate of interest at the time the obligation of the mortgagor became due was 8 6/11 per cent., and that the parties clearly contemplated that the amounts due were to bear interest. The result of this conclusion would be that the principal of $55,000 would bear interest at the rate of 8 6/11 per cent. from the maturity of the contract to the date of the tender in 1919. Disregarding the question of partial payments, the additional interest, of 2 6/11 per cent. per annum, upon the entire principal of $55,000 for that period, would be over $7,000, while the interest upon $15,000 at 7 per cent. for the five years would be $5,250.

[3] Without ascertaining the date and the amount of the partial payments—something the parties have not undertaken to do—we cannot say which view is more favorable to the appellant. We see no reason, however, why the sum of $15,000 should not be taken, as the parties agreed it should be considered, as the amount to be paid for the five-year extension, and when so considered it must bear interest from the date it was due, notwithstanding the agreement of the parties that it should not bear interest before it became due. Civ. Code, § 1917; Roberts v. Smith, 64 Tex. 94, 53 Am. Rep. 744; Jones v. Gardner, 57 Cal. 641. The defendant is entitled to the allowance of interest at 7 per cent. on $15,000 from the 1st day of February, 1914, to the 10th day of April, 1919.

[4] The appellant next contends that the court committed error in the allowance of $12,000 to the plaintiffs by reason of rents collected for the use of the land in question. The point arises out of the fact that the 80 acres conceded to belong to the defendant were included in the lease of 240 acres made to the American Beet Sugar Company at $25 per acre. The particular point involved is the contention of the appellant that the 80 acres to which it had title was of greater rental value than the other 160 acres, by reason of the fact that certain wells from which water was pumped for the irrigation of the entire 240 acres was located upon the defendant's 80 acres, and that the use of this water increased the rental value of the property $15 per acre. In the absence of anything to the contrary, the court would have been justified in applying the rental value of $25 per acre pro rata, and we think there is nothing in the evidence with regard to the use of water which would justify departure from this rule, and that the trial court was not in error in its application of the amount of $12,000 to the mortgage indebtedness.

[5] The defendant claims that the judgment is erroneous for the reason that the trial court directed that a deed be made to Cora S. Lockhart and the heirs of Otis H. Lockhart jointly upon payment of the amount due. The contract of sale was executed by both husband and wife. The plaintiffs do not complain that the judgment gives the heirs of Otis H. Lockhart a half interest in the property, and the defendant is not interested in that question.

[6] It is suggested, rather than argued, that plaintiffs cannot maintain this action, because the partnership agreement between M. E. Post and Cora S. Lockhart was entered into by the wife instead of the husband to defeat or delay the husband's creditors. We do not see that the defendant is in a position to raise the question as to the invalidity of this original transaction between M. E. Post and Cora S. Lockhart, for both husband and wife are named as vendees in the agreement with the defendant, and such agreement is not tainted with the fraud.

The judgment is reversed, and the lower court is directed to modify the judgment by including therein interest upon the sum of $15,000 from February 1, 1914, to April 10, 1919, at the rate of 7 per cent. per annum, the total amount of the judgment so ascertained to bear interest from the date of the original judgment, May 26, 1921. Appellant to recover its costs on appeal.

We concur: SHAW, C. J.; WASTE, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.; WARD, J.

---

190 Cal. 257

## PEOPLE ex rel. BRADFORD, Dist. Atty., v. JACKSON et al. (Sac. 3396.)

(Supreme Court of California. Jan. 5, 1923.)

**1. Appeal and error ⊂=2—Constitutional law ⊂=55—Legislature can regulate effect of appeal as a stay.**

The Legislature can regulate the effect of an appeal from a judgment as a stay of execution, so that the amendment of Code Civ. Proc. § 949, by the Act of 1921 (St. 1921, p. 95), so as to except from a stay a judgment that a place is a nuisance, and closing it for a period of time, was valid.

**2. Constitutional law ⊂=56—Amendment, excepting petition judgments of stay on appeal, does not deny right to appeal.**

Since the amendment (St. 1921, p. 95) to Code Civ. Proc. § 949, excepting from the effect of an appeal as a stay of execution judgments declaring a building to be a nuisance, and ordering it closed, does not deprive the Supreme Court of authority to issue a supersedeas, or deprive it of its jurisdiction to determine the correctness of the judgment, it is not invalid as an impairment of the power of the Supreme Court under article 6, § 4, to issue of writs and process necessary to the exercise of its appellate jurisdiction.

---

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

**3. Statutes ⊜47—Amendment of statute regulating stay on appeal held not to render it unintelligible.**

The amendment (St. 1921, p. 193) of Code Civ. Proc. § 941, specifying the requirements of a cost bond on appeal so as practically to repeal that section, in view of the amendment of section 940, which no longer requires the bond, does not render unintelligible section 949, providing that, in cases not provided for in sections 942–945, the perfecting of an appeal by giving the undertaking mentioned in section 941 stays proceedings upon the judgment except in specified cases, since the effect of that amendment and the repeal of section 941 was to make the filing of a notice with the clerk effective in all cases to perfect an appeal which would operate as a stay without an appeal bond, except in the specified cases.

**4. Appeal and error ⊜478—Supersedeas refused for unreasonable delay.**

A writ of supersedeas will not be granted in the exercise of Supreme Court's appellate jurisdiction where there has been an unreasonable delay in taking an appeal, or the appeal is merely for the purpose of delay, since supersedeas does not issue of right, but only when necessary to protect the rights of the parties to the appeal.

**5. Appeal and error ⊜478 — Supersedeas should not be granted in abatement suits without showing of merits.**

Since the Legislature (St. 1921, p. 95) by amending Code Civ. Proc. § 949, has indicated that there should be no stay of an action to abate a building as a nuisance and order it closed under the Red Light Abatement Act, the Supreme Court should not lend its aid to the continuance of that business by issuing a supersedeas, staying the abatement judgment pending appeal, in the absence of some showing of merit in the appeal and of diligence in its prosecution.

**6. Appeal and error ⊜478—Delay in prosecuting appeal held to authorize refusal of supersedeas.**

When notice of appeal from a judgment abating a nuisance under the Red Light Abatement Act was served on May 13, and the transcript had not yet been filed when the application for supersedeas was heard the following January, the writ will not be issued.

In Bank.

Action by the People on relation of Hugh B. Bradford, District Attorney of Sacramento County, against Jim Jackson and others, to abate a nuisance under the Red Light Abatement Law. Judgment for relator, and defendants appeal. On petition by appellants for supersedeas. Petition denied.

George E. McCutchen and Ralph H. Lewis, both of Sacramento, for petitioners.

Markham Johnston and Clifford A. Russell, Deputy Dist. Atty., both of Sacramento, for relator.

LAWLOR, J. This is a petition on behalf of Jim Jackson and Elizabeth Jackson for a writ of supersedeas directed to the district attorney, clerk, and sheriff of Sacramento county to restrain the execution of a judgment rendered against petitioners by the superior court of that county. Respondent has filed a demurrer to the petition, without briefs or authorities, and no question of fact is raised.

The judgment was rendered in an action instituted by the district attorney of Sacramento county under the "Red Light Abatement Law" (Stats. 1913, p. 20), and ordered that petitioners refrain from maintaining certain described premises for purposes of lewdness, assignation, or prostitution, directed that the occupants thereof be removed, and that the building be closed for the period of one year. From that judgment petitioners have appealed. They now allege that, notwithstanding their appeal, a writ of execution will be issued to the sheriff by virtue of section 949 of the Code of Civil Procedure, hereinafter considered, directing him to "remove all furniture, fixtures, musical instruments, and other movable property from the said premises and building, and sell the same in the manner provided in said judgment," and that the sheriff, unless restrained, will execute the judgment. It may be noted that it is not ordered by the judgment, as required by the statute, that the furniture, fixtures, musical instruments, and other movable property be removed from the premises or sold. However, as the statute provides that the plaintiff's costs and the expenses of enforcing the judgment shall be paid out of the proceeds of such a sale, it may be assumed such a sale will result from the enforcement of the judgment.

Prior to 1921 section 941 of the Code of Civil Procedure provided that—

"The undertaking on appeal must be in writing, and must be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding three hundred dollars; or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal."

Section 949, also amended in 1921, was as follows:

"In cases not provided for in sections nine hundred and forty-two, nine hundred and forty-three, nine hundred and forty-four, and nine hundred and forty-five, the perfecting of an appeal by giving the undertaking or making the deposit mentioned in section nine hundred and forty-one, stays proceedings in the court below upon the judgment or order appealed from, except where it directs the sale of perishable property. * * *"

In 1921 (St. 1921, p. 193) section 941 was so amended as virtually to amount to its repeal as it formerly read, the section as

amended having no reference to undertakings on appeal. To section 949 was added the following clause:

"And except, also, where it adjudges a building or place to be a nuisance, and as a part of the judgment in the case orders and directs the closing of the building or place against its use for any purpose for any period of time" (St. 1921, p. 95).

Petitioners contend this section is unconstitutional because it, in practical operation, destroys the right of appeal by making the judgment of the superior court final, and that because of the amendment of section 941, providing for the giving of a bond on appeal, section 949 has become so uncertain as to be unenforceable.

[1] It was held in People v. Laine, 177 Cal. 742, 171 Pac. 941, a case similar to the one at bar, but decided before the above amendment was added to section 949, that an appeal in such an action did not stay execution of that portion of the judgment prohibiting the maintenance of the premises for purposes of lewdness, under the rule that an appeal from a prohibitory injunction does not operate to stay its force. Those parts of the decree directing the removal of persons and property from the premises and the removal and sale of the furniture and fixtures were held to be mandatory and stayed by virtue of the appeal. See Wolf v. Gall, 174 Cal. 140, 162 Pac. 115. The effect of the amendment to section 949 is to except also from the stay of execution, by statutory enactment, the portion of such a decree directing the closing of the building against its use for a period of time. Therefore, the only question presented by petitioners' first point is the authority of the Legislature to except mandatory injunctions from the statutory stay of execution provided by section 949, which incidentally involves the authority of the Legislature to put any condition or restriction on a stay of execution. Such an act is an entirely proper exercise of the legislative power. In Ex parte Queirolo, 119 Cal. 635, 51 Pac. 956, considering the effect of the taking of an appeal upon a judgment in a divorce action, it was declared:

"The effect of an appeal from the judgment, as suggested in Foster v. Superior Court, supra, 115 Cal. 279, is purely a matter of statutory regulation, to be determined by a construction of the statute under which the appeal is taken, and by the terms of which, when clear and unambiguous, we are concluded."

[2] Petitioners have cited Haight v. Gay, 8 Cal. 297, 68 Am. Dec. 323, to the effect that—

"The appellate power of the Supreme Court is given by the fourth section of the sixth article of the Constitution, which expressly empowers this court to issue all writs and process necessary to the exercise of its appellate jurisdiction. The Legislature, therefore, can pass no act impairing the exercise of this appellate power."

We are also referred to other cases containing similar language. It is a sufficient answer to this proposition that the execution of a judgment does not deprive this court of its jurisdiction to determine the correctness of the judgment on appeal, and that this court has authority under the Constitution to issue a writ of supersedeas whenever it is essential to preserve the rights of the parties pending the appeal. The mere fact that the Legislature provides that the taking of an appeal shall *not itself* stay the execution does not deprive this court of authority to issue a writ of supersedeas. The amendment to section 949 does not, therefore, take away appellants' constitutional right of appeal.

[3] Nor can the contention that, since the amendment of section 941, section 949 has become unintelligible, be sustained. Under the methods of appeal provided before the year 1921, if the appeal was taken under sections 940 and 941, it was necessary for the appellant to file a bond of $300 for costs in order to perfect the appeal. The appeal then operated to stay all proceedings under the judgment by reason of the provisions of section 949, unless an additional bond was required under sections 942, 943, 944, or 945. Under the alternative method of appeal provided by section 941b, whereby an appeal might be taken by merely filing a notice with the clerk, it was held that an appeal bond was unnecessary (Theisen v. Matthai, 165 Cal. 249, 131 Pac. 747), and that proceedings under a judgment were stayed by the taking of an appeal unless an additional stay bond was required by sections 942, 943, 944, or 945 of the Code of Civil Procedure. It was obviously the purpose of the amendments of 1921 (Stats. 1921, p. 193) to alter this situation, in which if the notice was given under section 941 a bond of $300 was required, but none if it was given under 941b.

The effect of the repeal of section 941b and the amendment of section 940 was to make the mere filing of a notice with the clerk effective to take the appeal in all cases. By reason of the amendment of section 940, removing the requirement of a stay bond to perfect an appeal, section 941, prescribing the bond required, was no longer necessary. It having been in effect repealed by the amendment of section 940, the section numbered 941 was used for a different subject.

Section 949 was amended in 1921, as already pointed out, by the insertion of the provision that a stay of execution under section 941 was not applicable to a judgment for the abatement of a nuisance. Before its amendment, upon perfecting an appeal under section 940 and giving a bond under section 941, a judgment was stayed; upon perfecting an appeal under section 941b by giving the notice of appeal, a judgment was stayed without an appeal bond. People v. Laine, 177 Cal. 742, 745, 171 Pac. 941. In view of

these facts, the subsequent amendment of sections 940 and 941 and the repeal of section 941b merely give to section 949 the meaning that the perfecting of an appeal, without a bond, is sufficient to stay execution of a judgment except when a special bond is required under sections 942, 943, 944 or 945. It follows that the effect of the amendment of 1921 to section 949 is that an appeal, with or without a bond, does not stay execution of the judgment in such a proceeding as the one at bar.

[4] As already indicated, this court, by the amendment to section 949, is not deprived of its authority to issue a writ of supersedeas to stay execution. It remains to consider whether in the exercise of its appellate jurisdiction in the case at bar it should issue such a writ, which does not issue of right, but only when in the judgment of the court it is necessary to protect the rights of the parties on appeal. Luckenbach v. Laer (Cal. Sup.) 204 Pac. 591. It has been held that a writ of supersedeas will not be granted where there has been an unreasonable delay in taking an appeal (Bauer v. Parker, 47 App. Div. 623, 61 N. Y. Supp. 1021), or where the appeal is merely for the purpose of delay (see cases cited in 3 C. J. 1291, note).

[5] The Legislature by enacting section 949 has indicated as its opinion that there should be no stay of an action to abate the character of nuisance complained of in the case at bar, and this court ought not to lend its aid to the continuance of such business, in the absence of some showing of merit in the appeal and some showing of diligence in the prosecution of the appeal.

[6] In the case at bar the notice of appeal was served on May 13, 1922. The order to show cause upon the application for a writ of supersedeas was made May 22, 1922, ordering a stay of proceedings pending a decision upon the application, but the transcript on appeal is not yet filed. Under these circumstances no sufficient reason appears why the writ should be issued.

The petition is denied.

We concur: SHAW, C. J.; WILBUR, J.; WASTE, J.; LENNON, J.; WARD, J.

---

190 Cal. 243

## McCARTHY v. MADISON et ux.

(S. F. 9910.)

(Supreme Court of California. Dec. 30, 1922.)

**Husband and wife ⊂⊃232(3)—Evidence held to support finding that wife did not sign joint and several note as surety only.**

In an action on a note executed by husband and wife in consideration of earlier note of the husband alone, and in form joint and several, evidence *held* sufficient to support the finding that the wife did not sign as surety only.

Shaw, C. J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. J. Van Nostrand, Judge.

Action by Thomas B. McCarthy against Charles Madison and Mrs. Jessie Madison, his wife. From a judgment for plaintiff, the wife appeals. Affirmed.

Powell & Dow, of San Francisco, for appellant.

R. H. Cross, of San Francisco, for respondent.

LAWLOR, J. Plaintiff, Thomas B. McCarthy, commenced this action on September 21, 1915, to recover the amount of a promissory note executed by defendant, Mrs. Jessie Madison, and her husband, Charles Madison, who was formerly a defendant in this action, and who died on June 21, 1917. The note is as follows:

"$6132.50. San Francisco, Cal., Sept. 22, 1911.

"One day after date for value received we or either of us promise to pay to the order of Thomas B. McCarthy at San Francisco, California, six thousand one hundred thirty-two dollars and fifty cents, with interest thereon at the rate of seven per centum per annum, from date until paid, principal and interest payable in United States gold coin only; said interest payable monthly and if not paid as it becomes due, to be added to the principal and become a part thereof, and to bear interest at the same rate. In case suit is brought thereon to compel the payment of this note or any portion thereof, the payers promise to pay costs thereof and such attorney's fees as may be incurred. Chas. Madison.

"Mrs. Jessie Madison.

"Witness R. H. Cross."

On December 30, 1919, the action was dismissed as to defendant Charles Madison.

Defendant's answer was filed on July 3, 1918, and in it she alleged she was induced to sign the note by the threats, menace, and intimidation of plaintiff and his attorneys and that there was no consideration for its execution. On April 16, 1920, she filed an amendment to the answer, in which she alleged she signed the note as surety at the request of defendant, Charles Madison, who was the principal, and that this fact was known to plaintiff and his attorneys. As a supplemental answer or separate defense, she alleged that the release of defendant Charles Madison operated to discharge and release her as surety from all obligation on the note and she pleaded such release as a defense to plaintiff's claim.

Upon the trial the court found that the al-

legations of the answer were untrue and that defendant executed and delivered the note in consideration of the forbearance of plaintiff to sue on a prior note executed in plaintiff's favor by defendant Charles Madison alone, in consideration of its surrender and cancellation and the extension of the time for the payment of the indebtedness. Pursuant to the findings, judgment was entered for plaintiff, from which defendant takes this appeal.

Appellant's contention is that the evidence shows defendant signed the note as surety only, that the findings to the contrary are therefore erroneous, and that the release of defendant Charles Madison operated to release her. Supporting this contention is her own testimony that at the time the note was signed "Mr. Cross wished me to sign the note also, so that if Mr. Madison should come into possession of any property he couldn't turn it over to me. I simply signed as a surety," that with reference to the matter of suretyship "they wished me to sign with Mr. Madison so that I wouldn't have—so that he couldn't turn any property over to me. * * * I only signed as a surety on the note." In a deposition taken before the issue of suretyship was raised by the amendment to the answer, Cross had testified as follows:

"He [defendant Charles Madison] said that he could not pay it, and could not give any security except the indorsement of his wife, Mrs. Jessie Madison, the defendant in this action. * * * Q. Did he say he would undertake to get her to go as his security at that time? A. Yes, and told me she was in the city. * * * Q. Did he suggest to you that she might go security on this note, or did you suggest it to him? A. He suggested it to me. * * * Q. And you had ascertained either through Mr. Madison or by some other means, that she had property, or might have property, and you felt that she would be sufficient, or some, security on that note? A. That is right. * * * Q. At the time the note was signed, did you explain to Mrs. Madison what it was for? A. Yes, sir. Q. What did you say? A. I asked her if she understood what she was doing, and she said she did; that Mr. Madison had explained it to her. I said that Mr. McCarthy held Madison's note and was intending to commence suit upon it, that we required him to give some security, and he had offered her as security on a new note."

He explained his use of the words "security" and "surety" by stating that at the time the deposition was taken the question of suretyship had not been raised, that he was not speaking with reference to it, and was not using those words in a technical sense.

Opposed to the foregoing evidence is the fact that the note was in form joint and several and the testimony of appellant that at the time the note was signed defendant Charles Madison met her on the street and they went to Cross' office together; that there was very little conversation; that Cross asked if they were ready to sign the note, and she said, "Yes"; that she stated to Cross that defendant Charles Madison had told her what the note was for; that he mentioned the fact that there was a prior note; that Cross asked her if she fully understood what she was doing; and that she answered that Mr. Madison had explained what the note was for. She stated this was about all the conversation that occurred. Cross testified that respondent had held an unpaid promissory note of defendant Charles Madison which he had unsuccessfully tried to collect; that defendant Charles Madison had offered to give a new note signed by himself and his wife; that the matter had been placed entirely in his hands by respondent; and that appellant's account of the signing of the second note was practically correct. He further stated that the old note was delivered to defendant Charles Madison when the one of September 22, 1911, was executed; that he did not recall anything having been said concerning the note being given to prevent defendant Charles Madison from transferring property to appellant; and that nothing whatever was said about appellant being a surety for her husband. This testimony presents a conflict on the question as to the capacity in which appellant signed the note.

In Casey v. Gibbons, 136 Cal. 368, 371, 68 Pac. 1032, it was held that in attempting to show, under section 2832 of the Civil Code, that one has signed an obligation as surety only, it is necessary to allege and prove that the payee not only knew of the fact of suretyship, but consented to deal with the signer in the capacity of surety. There is nothing in the evidence in the case at bar to show that respondent or his agent Cross recognized appellant as a surety merely or consented that she act as such. Although in previous discussions the subject of her acting as a surety may have been considered, her own statement that she signed as such is the only evidence that that was the position she assumed when the note was finally executed. The evidence amply supports the finding that she was not a surety.

Because of this conclusion, it is unnecessary to consider the point that appellant, as a surety, was released by the release of defendant Charles Madison.

The judgment is affirmed.

We concur: SLOANE, J.; WILBUR, J.; WASTE, J.; LENNON, J.

I dissent: SHAW, C. J.

(190 Cal. 252)

**JONES v. O'TOOLE et al. (S. F. 10414.)**

(Supreme Court of California. Jan. 5, 1923.)

**1. Evidence ⟸83(2)—Civil service commission presumed to have promulgated rule required by statute.**

Where the civil service commission had credited a patrolman with three additional points in his standing on the eligible list because he was a veteran, it will be presumed that the commission had promulgated a rule for such credit under an amendment to the City Charter ratified by the Legislature January 13, 1921 (St. 1921, p. 1797), § 22, requiring the commission to establish preference for veterans by giving, among other preferences, a credit of three points to veterans in the case of promotional examinations.

**2. Mandamus ⟸154(2)—Allegation action was unlawful is only a conclusion.**

An allegation in the petition for writ of mandamus that the action of respondents was "taken unlawfully and in violation of the rights of petitioner" is only a conclusion of law.

**3. Municipal corporations ⟸176(3) — Statute giving preference to veterans in promotion applies to existing laws.**

The preference given to veterans in case of promotional examinations under the amendment to the San Francisco Charter, approved January 13, 1921 (St. 1921, p. 1797), § 22, can be given on lists of examinations already taken without the requiring of new examinations.

**4. Constitutional law ⟸102(1) — Patrolman has no vested right to place on civil service register.**

A patrolman has no vested right to his place on the civil service register of those eligible to promotion, which cannot be taken away by an amendment to the City Charter.

In Bank.

Petition by C. L. Jones for a writ of mandamus, prayed to be directed to John J. O'Toole and others, as members of the Civil Service Commission of San Francisco, to require the restoration of petitioner to his proper rank on the list of patrolmen eligible for promotion. Writ denied.

Andrew F. Burke, of San Francisco, for petitioner.

George Lull, City Atty., and Maurice T. Dooling, Jr., Asst. City Atty., both of San Francisco, for respondents.

Wm. P. Golden, of San Francisco, amicus curiæ.

SHAW, J. This is a proceeding in mandamus to compel the respondents, as members of the civil service commission of the city and county of San Francisco, to restore the petitioner to his alleged proper rank on the eligible list of patrolmen eligible for promotion to the position of corporal in the police department and to certify him to the police commission of said city and county of San Francisco for promotion to the position of corporal in the police service of said city.

The board of civil service commissioners, on August 3, 1920, made a list of persons eligible for promotion to the office of corporal in the police service, ranking them on such list in the order of their relative excellency. James Casey, then a patrolman in the employ of the city, had a rating on said list, at that time, less than that of C. L. Jones. Jones was No. 29 thereon, and Casey was No. 31 thereon. On September 12, 1922, the civil service commission, on ascertaining that he was a veteran of the war of 1917, added 3 per cent. to the rating of Casey thereon, thereby raising his percentage to an amount greater than that of the petitioner. It is this action that the petitioner seeks to have canceled.

An amendment to the charter was ratified by the Legislature on January 13, 1921, which provides as follows (section 22 [St. 1921, p. 1797]):

"The civil service commission shall by rule establish preference for veterans as follows: In the case of entrance examinations to establish eligible lists in the police and fire departments, veterans who become eligible for appointment by attaining the passing mark established for the examination, and whose service as veterans exceeds three months, shall be classified on such eligible lists in the relative order of the individual ratings attained and ahead of all non-veterans passing such examinations, and shall be eligible for appointment on the basis of such order of standing on such eligible lists. This preference shall expire five years after the ratification of this amendment."

"In the case of all other entrance examinations, veterans with thirty days or more of service, and widows of veterans who were married to such veterans on or before November 11, 1918, who become eligible for appointment by attaining the passing mark established for the examination, shall be allowed an additional credit of five points, which shall be added to the percentage attained in such examinations by such veterans, and they shall be placed on eligible lists and be eligible for appointment in the order and on the basis of the percentages attained by them in examinations after such credit of five points shall have been added. All ties shall be decided in favor of veterans; provided, however, in the case of promotional examinations a credit of three points shall be allowed to veterans and widows of veterans who were married to such veterans on or before November 11, 1918, who shall have been in the city and county service prior to July 1, 1920."

The civil service commissioners, in undertaking the action which they did, were assuming to act under the provisions of said amendment, and added 3 per cent. to the rating of Casey on account of the fact that he

was a veteran of the late war and was already employed as a patrolman.

We think from the provisions of the charter that they had the power to do this. Section 7 of article 13 of the Charter of the City and County (St. 1899, p. 351) has the following provision:

"From the returns of the examiners, or from examinations made by the commissioners, the commissioners shall prepare a register for each grade or class of positions in the classified service of the city and county of the persons whose general average standing upon examination for such grade or class is not less than the minimum fixed by the rules of the commissioners, and who are otherwise eligible. Such persons shall take rank upon the register as candidates in the order of their relative excellence, as determined by examination, without reference to priority of time of examination."

The only allegation concerning the manner in which the civil service commission carried out this provision of the charter is that about September 12, 1922, "under the assumed authority of said section 22 of article 13 of said Charter, but unlawfully and in violation of the rights of the petitioner and of said F. X. Latulipe, A. L. Christiansen, and H. H. Ludolph, added 3 per cent. to the percentage secured by said James Casey on his examination as hereinbefore alleged, and thereupon credited said Casey with a percentage of 84.54 per cent., and raised his rank on said register above that of each of the other persons named in paragraph 4 hereof, and gave to said Casey a rank of No. 16½ on said register."

[1-3] This would all be in strict accordance with section 22 aforesaid, provided the commissioners had made a rule that they would carry out the said amendment in that manner. The making of a rule to that effect would seem to be almost a superfluity if the amendment embodied in section 22 furnishes rule enough. It declares that said credit shall be given to veterans asking for promotion, and gives the commission no power to refuse. But, however that may be, official duty is presumed to have been performed, and as there is no allegation that they did not make a rule to that effect, nor any argument based on the fact that they did not do so, before taking the action alleged, it will be presumed that they did so. The allegation that they assumed to act under section 22 must be taken in connection with the presumption that they made the rule preceding their action. There is no return made by the civil service commission, but it has presented the case to this court upon a demurrer to the petition. Hence all the legal steps which they are required to take prior to their making the order complained of will be supposed to have been taken, except in so far as the petition denies that they have taken them. The allegation in the petition that the action was taken "unlawfully and in violation of the rights of the petitioner" is nothing more than a conclusion of law, and does not add anything to the force of the allegation. It was said in support of the contention of the petitioner that the amendment is not retroactive and that it was ineffectual to deprive him of his supposed right of preference by reason of being on the eligible list before the amendment was adopted.

This is not the giving of a retroactive effect to the amendment, but is merely making it take effect at once upon its adoption. Accordingly, the persons whose percentage is thus raised should be given rank upon the register according to their new percentage, and this is what the commissioners did. We can see nothing unlawful in this action. It would be a proper and right construction of the amendment that it was intended to give the veterans on the existing register who had not been given the percentage allowed thereby, to receive it at once and enter the same upon the old register, in which event they would have their rating increased accordingly. They would then come under the provision that they take rank upon the register "without reference to priority of time of examination," as provided in section 7 aforesaid.

[4] There may be a vested right in an office, once the appointment is received, but the petitioner was not vested with any right, which an amendment to the charter could not take away, by virtue of having his name placed on the register prior to the appointment.

The demurrer to the petition is sustained and the petition for a writ of mandate is denied.

We concur: LENNON, J.; WASTE, J.; WARD, J.; LAWLOR, J.

WILBUR, J. I concur.

Section 8 of article 13 of the Charter, as amended by St. 1913, p. 1613, deals with the question of promotion, and is as follows:

"The commissioners shall provide for promotion in the classified service on the basis of ascertained merit and standing upon examination; and shall provide, wherever practicable, that vacancies shall be filled by promotion. All examinations for promotions shall be competitive among such members of the next lower rank, as established by the commissioners, as desire to submit themselves to such examinations. The commissioners shall submit to the appointing power the names of not exceeding three applicants having the highest rating for each promotion."

Section 22 of article 13 of the Charter, relating to preference to be given to veterans upon entrance examinations, contains the following:

"All ties shall be decided in favor of veterans; provided, however, in the case of promotional examinations a credit of three points

shall be allowed to veterans and widows of veterans who were married to such veterans on or before November 11, 1918, who shall have been in the city and county service prior to July 1, 1920."

Assuming that section 4 and section 7 of article 13 apply to applicants for promotion and that the commissioners are required to prepare a register "for each grade or class of positions in the classified service of the city and county of the persons whose general average standing upon examination for such grade or class is not less than the minimum fixed by the rules of the commissioners, and who are otherwise eligible," and that "such persons shall take rank upon the register as candidates in the order of their relative excellence, as determined by examination, without reference to priority of time of examination," the question submitted for our decision is whether the relative rank of candidates upon the register can be altered without an entirely new examination, wherein all the candidates upon the register receive the credit given on said examination and the veterans taking such examination are allowed 3 per cent. in addition thereto.

Of course, it might be true that by the holding of a new examination the relative position of eligible candidates upon the register might be changed and that veterans so examined might lose sufficient credits upon the examination to offset the credit given to them as veterans. It is clear, however, that the civil service commission, in giving the credit to veterans upon the eligible list on the register, has provided "for promotion in the classified service on the basis of ascertained merit and standing upon examination" within the meaning of the charter as amended, which provides a new method of ascertaining the merits of candidates, namely, by giving a credit of 3 per cent. to veterans.

---

190 Cal. 263

## BAKER et al. v. MILLER. (L. A. 6930.)

(Supreme Court of California. Jan. 5, 1923.)

**1. Pleading ⟸8(6)—Complaint in suit for specific performance, alleging that contract was just and fair held demurrable as stating mere conclusions.**

A complaint in a suit to compel specific performance reading, "at or about the date of the contract the estate of said deceased was of the appraised value of $22,753, and said contract was in all respects just and fair and liberal in its provisions in favor of said defendant," *held* demurrable; there being no attempt to state facts, but mere conclusions of law with no facts to support them.

**2. Specific performance ⟸121(9)—Evidence held sufficient to sustain finding that contract was fair, liberal, and in favor of defendant.**

Evidence *held* sufficient to sustain a finding that contract was fair, just, and liberal in its provisions in favor of defendant.

**3. Appeal and error ⟸1170(3)—Court will not set aside judgment for error in pleading unless error results in miscarriage of justice.**

Where a complaint was properly demurred to, but the demurrer was overruled, and it did not appear whether defendant demurred as a matter of form only, and thereafter a fair trial was had, the appellate court will not set aside the judgment, in view of the Constitution forbidding reversal where substantial rights are not affected.

**4. Specific performance ⟸56—Stipulation in a contract held to mean defendant should pay plaintiff $1,700 in event defendant could not obtain title for her, but not to make performance optional.**

An added stipulation to a contract, reading, "If the title thereto is not secured for her [plaintiff] as herein provided, she shall be paid for or in lieu of said lot and premises $1,700 out of the two said insurance policies," *held* not intended to make performance optional, but defendant was obligated to do all in her power to secure title to the lot and convey it to plaintiff, and should pay plaintiff $1,700 in the event defendant could not obtain clear title.

**5. Descent and distribution ⟸84—Statute forbidding executors and administrators from purchasing estate property held not to prevent heirs from making contract for division, though one of them is administrator.**

Code Civ. Proc. § 1576, forbidding an executor or administrator from purchasing directly or indirectly any property of the estate he represents, or be interested in any sale thereof, does not prevent the heirs from making a contract for the division of the estate, even though one of them is also the administrator; the statute being merely a declaration of the principle of law existing before its enactment that a trustee must not deal with himself.

In Bank.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by Cora Lee Baker and G. R. Baker against Orrilla Z. Miller, for specific performance. Judgment for plaintiffs, and defendant appeals. Affirmed.

Kemp & Clewett, of Los Angeles, for appellant.

Geo. E. Cryer, of Los Angeles, for respondents.

WASTE, J. The defendant appeals from a judgment and decree in specific performance.

Plaintiff alleged and the court found that

Art O. Miller died intestate, leaving an estate in the county of Los Angeles consisting of real and personal property. Cora Lee Baker (who has since married, and whom we will refer to as the "plaintiff") was the surviving widow, and the defendant, Orrilla Z. Miller, was the surviving mother of said deceased. They were his sole heirs at law. In due time plaintiff was appointed and qualified as administratrix of the estate. The defendant, who was the principal creditor of the deceased, filed claims against his estate approximating $8,500. She also held a second lien upon certain of the real property, which appears to have been the home of the decedent and the plaintiff. The deceased was further indebted to the defendant for other sums of money, to secure the payment of which he had during his lifetime assigned certain policies of life insurance.

Before the filing of an inventory and appraisement of the estate the plaintiff and defendant entered into a written contract, by the terms of which plaintiff agreed to at once resign as administratrix of the estate in favor of O. A. Miller, son of the defendant, and to request and secure his appointment as administrator of said estate. By the terms of the agreement plaintiff was to receive the sum of $100 as her commissions as administratrix of the estate to the date of the contract, and the sum of $500 in cash, and the real property hereinbefore mentioned, together with certain personal property, defendant to release the real property from her indebtedness, and to reduce the first lien thereon to the sum of $1,000, the defendant thereupon to receive the rest, residue, and remainder of the estate. Plaintiff also agreed to assist the defendant "in all respects in and by the exercise of her rights as widow and heir of said deceased in all the steps in the proceedings advised and desired to be taken in the administration of the estate," and stipulated that defendant might hold as security for the performance of the agreement the policies of insurance assigned by the deceased to the defendant as collateral security for the indebtedness already mentioned. In pursuance of this agreement the plaintiff filed an inventory and appraisement of the estate, and resigned as administratrix, the son of the defendant being appointed in her place.

Plaintiff performed all the conditions of the contract on her part to be performed. The defendant did not pay the $500 in cash, did not reduce, or offer to reduce, the mortgage on the real property, did not convey, or offer to convey, the title hereto to the plaintiff, but, on the contrary, she caused the property, which had in the meantime been set aside to the plaintiff as a probate homestead, to be sold under the terms of her trust deed for the alleged nonpayment of the indebtedness secured thereby. She purchased the property at the trustee's sale for the sum of $300, and thereupon proceeded to evict plaintiff's tenant in possession. This real property has since been sold by the agreement of the parties, and the proceeds of the sale deposited in court, pending the determination of this action.

Defendant alleged, and sought to prove, that she was induced to enter into the contract through the false and fraudulent misrepresentations of the plaintiff, and that by reason of the insolvency of the deceased his estate was in that condition which rendered the contract without consideration. It appeared that the negotiations between the plaintiff and the defendant were mainly conducted by an attorney of the defendant's own choosing, who continued to act as the legal advisor of the substituted administrator. The plaintiff, so the trial court found, was inexperienced in matters of business, and had practically no knowledge of the affairs of her deceased husband's estate, and that the defendant and her son, O. A. Miller, were at all times better informed than plaintiff as to the condition and value of the estate, and that the defendant was not induced to enter into the contract by any false misrepresentations or fraud on the part of the plaintiff. As to the alleged insolvency of the estate, it appears that the business affairs of the decedent at the time of his death were very much involved. There is considerable testimony from which the defendant argues that the estate was insolvent. The trial court found to the contrary, and we think the evidence sustains the finding.

[1] Appellant contends that the complaint fails to state a cause of action, in that there is no allegation of fact tending to show that the consideration provided for in the contract sought to be enforced is adequate, or that the contract is just and reasonable to the defendant. The only averment in that connection is that "at or about the date of the contract the estate of said deceased was of the appraised value of $22,753, and said contract was in all respects just and fair and liberal in its provisions in favor of said defendant." Aside from the statement of the value of the estate, there is not here any attempt to state facts at all—nothing more than the general language of the statute, which amounts to a mere conclusion of law without facts to support it. Joyce v. Tomasini, 168 Cal. 234, 237, 142 Pac. 67; Stiles v. Cain, 134 Cal. 170, 172, 66 Pac. 231. If it be contended that the statement of facts in the complaint, including the contract, set out in exact words, together with an allegation of the appraised valuation of the estate, constitute an inferential averment not amounting to an absolute want of facts, the cases relied upon to support the contention merely hold that if, "no demurrer is interposed, the pleading will be held good after judgment."

Estate of Behrens, 130 Cal. 416, 418, 62 Pac. 603, 604. Viewed as a whole, we feel there is no escape from the conclusion that the complaint is insufficient, and the general demurrer interposed by the defendant should have been sustained. We are not inclined, however, to reverse the judgment for that reason.

[2] Whether the defendant called the attention of the court below to the infirmity of plaintiff's complaint, or only demurred as a matter of form, does not appear. After the demurrer was overruled, however, she answered, denying generally and specifically the averment of the complaint attempting to allege the adequacy of the consideration and the fairness of the contract. The greater part of the testimony was directed in support of her contention that the consideration was inadequate, and that as to her the contract was unjust. The trial court found that the defendant could fulfill the contract mentioned in plaintiff's complaint, and that the aggregate amount to be paid by defendant for the right acquired by her under the contract would not exceed $2,000. The plaintiff relinquished absolutely all claims to the estate of her deceased husband, in return for the homestead, with its incumbrances reduced to the amount specified in the agreement, and a few articles of personal property. She released her claim to the further fees of herself and her attorney for administering the estate, relinquished her right for a family allowance, and for an order setting apart to her all of the personal property of the estate exempt from execution, including the proceeds of certain of the insurance policies on the life of the decedent, provided the annual insurance premiums paid thereon did not amount to more than $500. The estate was not insolvent. With all of the evidence before it, the trial court found that the contract between the parties was fair and just and liberal in its provisions in favor of the defendant. The evidence, we think, amply supports the findings.

[3] The case presented is one which falls squarely within the constitutional inhibition that no judgment shall be set aside for any error as to any matter of pleading, unless after an examination of the entire case, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

[4] Two other points relied upon by the appellant for a reversal were satisfactorily disposed of by the District Court of Appeal of the Second Appellate District, Division 2, as follows:

"After the principal contract was signed, it appears from a copy of the contract set forth in the complaint that the parties added a further paragraph and appended their signatures thereto. It is claimed that this addenda to the contract makes it optional with defendant to pay plaintiff $1,700 instead of conveying the real property in question and otherwise carrying out the provisions of the main contract. The added paragraph is to the effect that 'if the title thereto is not secured for her [plaintiff] as herein provided she shall be paid for or in lieu of said lot and premises $1,700 out of the two said insurance policies,' etc. We do not think this stipulation was intended to relieve defendant of the obligation of doing all that might be in her power to secure title to the lot and then conveying it to plaintiff. The fair construction of the language employed is that defendant should pay plaintiff $1,700 in the event of being unable to obtain clear title.

"Defendant also contends that this contract is void under the provision of section 1576 of the Code of Civil Procedure, which reads: 'No executor or administrator must, directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale.' The case of O'Connor v. Flynn, 57 Cal. 293, and others cited by appellant are not in point. They are instances of an administrator buying property of the estate. The rule against such conduct does not prevent heirs making a contract for the division of the estate even though one of them is also the administrator. This section of the Code of Civil Procedure is only declaratory of the principle of law existing before its enactment, that a trustee must not deal with himself. Burris v. Adams et al., 96 Cal. 664, 31 Pac. 565."

The judgment is affirmed.

We concur: SHAW, C. J.; WILBUR, J.; WARD, J.; LAWLOR, J.; LENNON, J.

---

190 Cal. 278

## In re BELSHAW'S ESTATE.

## CLARK et al. v. OXNER et al.

## (S. F. 10167.)

(Supreme Court of California. Jan. 5, 1923. Rehearing Denied Feb. 1, 1923.)

**1. Descent and distribution ⇐14—Kindred of half blood not excluded from inheriting, though estate came to intestate by descent as gift from ancestor.**

Civ. Code, § 1394, providing that "kindred of the half blood inherit equally with those of the whole blood in the same degree unless the inheritance comes to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance," is applicable only where there are kindred of equal degree to those of the half blood, and, in view of section 1386, subd. 5, kindred of the third degree, though only of half blood may succeed when the next in line of succession is of kindred more remote than the third, and this is true, though the decedent obtained by descent property from both mother and father and the half blood was on father's side.

**2. Courts ⊂⊃93(3)—Rule of property not disturbed.**

Where an interpretation of a statute has become a rule of property, it will not be disturbed, though the holding may be against the weight of authority.

**3. Descent and distribution ⊂⊃22—Half-sister of decedent's father is kindred of half blood.**

A half-sister of decedent's father, having one common ancestor with decedent, is kindred of the half blood.

In Bank.

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

In the matter of the Estate of Charles Mortimer Belshaw, deceased. Proceeding to determine heirship by Elizabeth Oxner Clark and others against Bert Oxner and others. From judgment, plaintiffs and all defendants except Violetta H. Purchase appeal. Affirmed.

Charles M. Peck, and Henry C. McPike, both of Oakland, and F. P. Webster, Gerald C. Halsey, and Frederick T. Leo, all of San Francisco, for appellants.

M. R. Jones and Creed, Jones & Dall, all of San Francisco (W. K. Powell, of San Francisco, of counsel), for respondent.

LAWLOR, J. This is a proceeding in the nature of an action to determine heirship, under section 1664 of the Code of Civil Procedure, in the matter of the estate of Charles M. Belshaw, deceased, who died on November 23, 1919. A testamentary disposition of all his property to his first wife having failed because of her death before his own, his estate is to be distributed according to the rules of succession applicable to cases of intestacy.

[1] Mortimer W. Belshaw, decedent's father, died April 28, 1898, and his estate was distributed one-half to his wife, Jane E. Belshaw, and one-half to decedent. Jane E. Belshaw died June 26, 1900, whereupon the property she had inherited from Mortimer W. Belshaw also passed to decedent.

The sixteen plaintiffs and defendant Burton J. Oxner are second cousins of decedent, in the sixth degree of relationship to him. They are descendants of three sisters and two brothers of Conrad Oxner, decedent's maternal grandfather. Defendant Violetta H. Purchase, formerly Violetta Belshaw, is a half-sister of Mortimer W. Belshaw, decedent's father. She is a daughter of Mortimer W. Belshaw's father by a second wife and is in the third degree of relationship to decedent. The other ten defendants are descendants of two sisters of Mary Rhodes, decedent's paternal grandmother, who was the mother of Mortimer W. Belshaw, but not of Violetta H. Purchase. These defendants are cousins of decedent in the fifth, sixth, and seventh degree of relationship.

The trial court found that "defendant Violetta H. Purchase is a kindred of the third degree to Charles Mortimer Belshaw, deceased, on the paternal side and that said Violetta H. Purchase is the sole heir at law of said Charles Mortimer Belshaw, deceased." From judgment entered pursuant thereto, plaintiffs and all of the defendants except Violetta H. Purchase appeal.

It is conceded by all the parties that the distribution of the estate is to be governed by subdivision 5 of section 1386 of the Civil Code, which provides:

"If the decedent leaves neither issue, husband, wife, father, mother, brother, nor sister, the estate must go to the next of kin, in equal degree, excepting that, when there are two or more collateral kindred, in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote."

The principal question presented on this appeal is whether respondent, Violetta H. Purchase, being a half-sister of decedent's father, is inhibited, under section 1394 of the Civil Code, from inheriting that portion of decedent's estate which came to him from his mother. That section is as follows:

"Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance come to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance."

Violetta H. Purchase is not of the blood of decedent's mother, Jane E. Belshaw.

Appellants contend the second clause of section 1394, the portion following the word "unless," applies to all cases wherein next of kin of the half blood claim the property which has come to a decedent from an ancestor not of the blood of the claimants, and that its effect is to exclude such kindred from the inheritance. Respondent's position is that the second clause is operative only when there are kindred of the whole blood of the same degree as the kindred of the half blood and that kindred of the half blood inherit such property in preference to those of the whole blood of more remote degree.

Estate of Smith, 131 Cal. 433, 63 Pac. 729, 82 Am. St. Rep. 358, is cited by respondent as determining this proposition in her favor. In that case the deceased, who died intestate, inherited the property distributed from her father. She left surviving her her husband and two half sisters on the mother's side. It was decided the half sisters were entitled to share the estate with the husband under the provisions of subdivision two of section 1386 of the Civil Code. The court

held that the word "unless" should be given the same meaning as "except" and that the last clause—

"can therefore apply only to the class described in the first, or, in other words, to the class from which it constitutes an exception, which is, kindred 'in the same degree'" and that "the effect of the provision is therefore simply to subdivide each of the classes as determined by degree of relationship into two classes, namely, those of the full and those of the half blood, and in each class to postpone the latter to the former."

Appellants insist the decision in that case should not be followed for the reason that it placed a wrong interpretation on section 1394, and it is further claimed the remarks concerning that section were obiter dictum. Exhaustive arguments are presented for the purpose of showing wherein the court erred in arriving at the conclusion therein announced, it being contended by appellants that the natural and ordinary meaning of section 1394 is that it should apply to all cases where estates are claimed by kindred of the half blood; that the second clause contains a declaration of a general policy of exclusion of the half blood from ancestral property and not a rule to be applied to an unusual state of facts, as when there are kindred of the half blood and whole blood in the same degree; that the construction contended for by appellants is in harmony with the provisions of the statute regulating succession wherever attention is given to the source of a decedent's title, such as subdivisions six and seven of section 1386; that the construction placed on the section by respondent limits the application of the second clause to cases where there are kindred of the whole blood and of the half blood in the same degree, without a corresponding limitation of the first clause; that is, it allows kindred of the half blood to inherit the property in the first place without the existence of others of the whole blood in the same degree. It is stated that "wherever the first clause of section 1394 authorizes the half blood to take, the second clause excludes the half blood not of the blood of the ancestor from taking ancestral property" and that respondent's "only hope is that the first clause enables her to take as next of kin without limitation, and that a restricted application be given to the second clause confining it to the next of kin 'in the same degree.'"

After a careful consideration we are of the opinion we must adhere to the decision in Estate of Smith, supra. It may first be said the statements therein construing section 1394 were not obiter dictum. It was necessary in that case to determine whether section 1394 excluded all kindred of the half blood not of the blood of the ancestor from inheriting ancestral property, for if such were its effect, the half sisters of the decedent in that case would have received nothing, notwithstanding they were within a class mentioned in section 1386 as entitled to inherit. In order to decide whether or not it had such an effect, the court was required to interpret the section in order to determine whether it applied in that case.

The court there adopted the interpretation placed upon similar statutes by the Supreme Court of Michigan in Ryan v. Andrews, 21 Mich. 229, 234; Rowley v. Stray, 32 Mich. 70; and by that of Indiana in Robertson v. Burrell, 40 Ind. 336. Two cases reaching contrary conclusions (Perkins v. Simonds, 28 Wis. 90, and Kely v. McGuire, 15 Ark. 555) were distinguished, it being stated that subsequently the former was in effect overruled. An extended discussion of those cases and the merits of the court's comments concerning them is unnecessary. The question presented here has arisen in several other jurisdictions under statutes having the same general effect as section 1394 of the Civil Code. Such statutes are usually regarded as enabling laws, conferring on kindred of the half blood a right not theretofore enjoyed to inherit equally with those of the whole blood, those of the half blood being excluded from the inheritance at common law. 1 Cooley's Blackstone (4th Ed.) p. 614. In a majority of decisions the courts have construed the exception referring to ancestral property as excluding in every case all kindred of the half blood not of the blood of the ancestor, the construction favored by appellants. Perkins v. Simonds, supra; Kelly's Heirs v. McGuire, supra; Den v. Searing, 8 N. J. Law, 349; Conkling v. Brown, 57 Barb. (N. Y.) 276; Amy v. Amy, 12 Utah, 278, 42 Pac. 1121; Cox v. Clark, 93 Ala. 400, 9 South. 457, wherein it was held that, but for a special provision not contained in the other statutes, the court would have held all kindred of the half blood excluded. Cutter v. Waddingham, 22 Mo. 206; Rotenbach v. Young (Sup.) 196 N. Y. Supp. 220. But in the case of Ryan v. Andrews, supra, it was said:

"The obvious and natural connection of the various provisions would confine the operation of the rule of exclusion to those cases where there is more than one person in the same degree of kinship, and where they are not all relatives of the blood of the ancestor from whom the estate is derived. This construction gives the property in all cases to the nearest kindred, but excludes such as are not of a particular stock. It avoids the incongruity of passing over near kindred for those who are remote, and satisfies all the words of the section, while it prevents very serious mischiefs. We think, therefore, that under the statute the estate can, under this section, never go to any one else but the nearest of kin, according to the degrees of the civil law. If there is but a single next relative, he or she will take the whole estate without reference to whether the kindred is on the side of one parent or the other. If there are several next of kin, and

they are not all related on the same side, then only such of them will take as are of the blood of the ancestor from whom the estate was derived."

In Rowley v. Stray, supra, it was held the statute meant that "when the inheritance falls to a certain designated class of persons, these will share it equally, unless the estate was ancestral, in which case the half blood not of the blood of the ancestor shall be excluded."

[2] The latter interpretation was adopted in Estate of Smith, supra, and, although the weight of authority may be opposed to such a construction, it cannot be said it is not without precedent or that it does not give a reasonable effect to the language of the statue. See, also, In re Pearsons, 110 Cal. 525, 42 Pac. 960. We therefore see no cause for overruling that case or departing from its interpretation of the statute, which has become a rule of property. Estate of Nigro, 149 Cal. 702, 87 Pac. 384.

Appellants attempt to distinguish Ryan v. Andrews, supra, and Rowley v. Stray, supra, cited as authority in Estate of Smith, supra, on the ground that in Rowley v. Stray, supra, it was said:

"Ours is but the expression of a general policy which has always characterized our legislation, beginning with the Ordinance of 1787, and which a part of the time in all respects, and all the time in most respects, has put the half blood on a footing of equality with the whole blood in the law of descents. See Ordinance of 1787, § 2; 1 Ter. Laws, p. 352; 2 Ter. Laws, p. 20; Laws 1833, p. 308; R. S. 1838, p. 208; R. S. 1846, p. 274. A discrimination against the half blood is the exception, and is not to be extended by construction beyond the obvious intent."

It is insisted that in this jurisdiction the inclusion of the half blood is an exception, to be strictly construed. There appears to us no distinction between the Michigan case and our own. The statute in question became a part of the law of Michigan through the ordinance of 1787 and the statute now embodied in section 1394 of our Civil Code was first adopted in 1850. Stats. 1850, p. 221. The court in Rowley v. Stray, supra, was speaking of the law of Michigan as it has stood since the adoption of the Ordinance of 1787. It cannot now be said there was any difference in the purpose of the adoption of the two statutes, though that of our own state was adopted at a later date than that of Michigan.

It is also contended that public policy favors an interpretation of section 1394 which would insure to a property owner that his estate would descend upon his death to those of his own blood, which would encourage continued exertion on the part of one about to become an "ancestor" within the meaning of the Code. However, it must be borne in mind that it is the estate of the decedent, not that of the ancestor, which is being distributed, and that, as far as the ancestor is concerned, his property has descended to one of his own blood, who has had the enjoyment of it for his lifetime. In addition, as pointed out in Ryan v. Andrews, supra, if the construction asked by appellants were placed upon section 1394—

"it would follow that in the absence of paternal kindred the estate would escheat in preference to passing to near kindred on the maternal side, which is also a result not to be needlessly attributed to the legislative intent."

[3] Counsel for the sixteen appellants, who were plaintiffs in the trial court, advance the argument that respondent is neither of the whole blood nor half blood of decedent and not entitled to succeed to any of his property because she "has the same blood as the father, Mortimer Belshaw, to the extent of one-half. But the father, Mortimer Belshaw, contributed only one-half to the blood of the son, Charles M. Belshaw. Therefore, only one-half of that one-half which was contributed by the father, is the same blood as that of Violetta Purchase, or one-quarter." Such a proposition is entirely devoid of merit. In 1 Cooley's Blackstone (4th Ed.) p. 615, it is said:

"A kinsman of the whole blood is he that is derived, not only from the same ancestor, but from the same couple of ancestors. For, as every man's own blood is compounded of the bloods of his respective ancestors, he only is properly of the whole or entire blood with another, who hath (so far as the distance of degrees will permit) all the same ingredients in the composition of his blood that the other had."

It clearly appears from this that respondent, being a half sister of decedent's father, and having one ancestor in common with decedent, is a kindred of the half blood.

The contention is made that "There is no evidence to support finding XV, 'That defendant, Lillie Abbie Carruth, is a kindred of the 5th degree to Charles Mortimer Belshaw, deceased, on the paternal side;' and there is no evidence whatever in support of defendant-appellant, Lillie Abbie Carruth's alleged relationship to decedent." It is unnecessary to consider this claim, for, in view of the conclusions we have reached with reference to the meaning of section 1394 of the Civil Code, appellant Lillie Abbie Carruth is not entitled to succeed to any of the estate of decedent, even though the relationship be established.

The judgment is affirmed.

We concur: SHAW, C. J.; WASTE, J.; LENNON, J.; WILBUR, J.; WARD, J.

190 Cal. 269

## BURNS v. ROSS et al. (S. F. 9511.)

(Supreme Court of California. Jan. 5, 1923.)

**1. Trusts ⟸366(3)—Vendor and person forging assignment of contract not necessary parties to suit to establish resulting trust.**

Where one to whom plaintiff intrusted a contract for the purchase of land, forged assignment to himself and made pretended assignment to defendants, who paid the balance due and took a conveyance, the vendor and the forger were not necessary parties to a suit to establish a resulting trust, under Code Civ. Proc. § 379, as to joining persons claiming an adverse interest or necessary to complete determination.

**2. Action ⟸50(10)—Complaint held not to improperly join causes of action.**

A complaint alleging that plaintiff contracted to purchase lands from a third person, that thereafter she intrusted the contract and other papers to F. who, without her knowledge or authority, forged an assignment to himself and made a purported assignment to defendants, who paid the balance due and received a deed, and that plaintiff had tendered to defendants the amounts paid, and asking that a resulting trust be declared, did not purport to state a cause of action to quiet title under Code Civ. Proc. § 738, or section 749a and hence there was no improper joinder of causes of action.

**3. Quieting title ⟸22—Holder of mere equity cannot institute suit.**

One having a mere equitable right to have a trust in land declared in her favor cannot institute a suit to quiet title against the holder of the legal title, under Code Civ. Proc. § 738, or section 749a.

**4. Trusts ⟸72—Vendee not entitled to have resulting trust declared as against one claiming under forged assignment.**

Where plaintiff intrusted a contract for the purchase of land to one who forged an assignment to himself and made a purported assignment to defendants, who paid the balance and took a conveyance, no trust resulted in plaintiff's favor under Civ. Code, § 853, relative to transfers of real property to one person when the consideration is paid by another.

**5. Trusts ⟸95—Purchaser entitled to have constructive trust declared as against persons claiming under forged assignment.**

Where plaintiff intrusted contract for purchase of land to one who forged an assignment to himself and made purported assignment to defendants, who paid the balance of the price and received a deed, plaintiff was entitled to have constructive trust declared in her favor under Civ. Code, § 2224, declaring one gaining a thing by fraud, etc., an involuntary trustee.

**6. Principal and agent ⟸160½—No rights acquired by forged assignment though assignee a bona fide purchaser.**

Where one to whom plaintiff intrusted a contract of sale forged an assignment to himself and made a purported assignment to defendants, no title to the contract passed, and plaintiff's rights cannot be defeated even though defendants were bona fide purchasers.

**7. Appeal and error ⟸762—Court may decide case on points not taken by counsel.**

Though appellant should state in his opening briefs the points upon which he relies, and though matters first raised in a reply brief may be disregarded, the court may decide a case upon any points that its proper disposition may seem to require, whether taken by counsel or not.

**8. Trusts ⟸95—That purchaser had not fully paid for land does not prevent relief against persons claiming under forged assignment.**

Where plaintiff intrusted a contract for the purchase of land to one who forged an assignment to himself, and made a purported assignment to defendants who paid the balance and received a deed, the fact that plaintiff had never paid the last installment did not defeat her right to have a constructive trust declared in her favor.

**9. Principal and agent ⟸160½—Principal not bound to anticipate that agent would commit forgery.**

Plaintiff, who intrusted a contract for the purchase of land to one who forged an assignment to himself and then made a purported assignment to defendants, was not bound to anticipate that such person would commit forgery, and her rights were not defeated by his act.

**10. Trusts ⟸343—Failure to record contract held not to defeat right to enforce constructive trust.**

Where person to whom plaintiff intrusted contract for purchase of land forged an assignment to himself, and then made purported assignment to defendants, plaintiff's negligence in failing to record her contract does not defeat her right to have a constructive trust declared in her favor.

**11. Limitation of actions ⟸202(2)—Assumed that action was commenced within time allowed.**

In the absence of anything to show the contrary, it must be assumed that an action to have a trust declared was commenced within the four years allowed by Code Civ. Proc. § 343.

**12. Trusts ⟸365(5)—Complaint held not demurrable on ground of laches.**

In suit to establish constructive trust in land which plaintiff had contracted to purchase and to which defendants had received a deed because of a forged assignment of plaintiff's contract, complaint *held* not to allege facts showing that any injury would result from delay in suing, so as to render it demurrable on the ground of laches.

In Bank.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Palma Burns, formerly Palma Cuneo, against William M. Ross and another, to establish a resulting trust. From a judgment for defendants on demurrer, plaintiff appeals. Reversed.

Hoefler, Cook & Snyder, of San Francisco, for appellant.

J. J. Dunne, of San Francisco, for respondents.

LAWLOR, J. Plaintiff brought this action to have declared a resulting trust in her favor in certain land to which defendants hold the legal title, and to compel a conveyance of the land to her by the defendants upon her payment to them of such a sum as the court should deem equitable. A demurrer, both general and special in form, interposed to plaintiff's second amended complaint, was sustained without leave to amend, and from judgment entered pursuant thereto plaintiff appeals.

The complaint alleged that on June 28, 1911, the Richmond Center Land Company owned the land in question, and on that date entered into a written agreement with appellant for its sale to her for $2,000, payable in installments. A copy of the agreement was attached to and made a part of the complaint. It was further alleged that in January, 1913, appellant became ill and bedridden, and while in that condition delivered to one John A. Fitzgerald, at his request, the contract of sale and other papers, and that thereafter, until May, 1917, she regularly delivered to him sufficient money to pay the monthly installments provided for in the contract of sale; that on January 6, 1913, Fitzgerald, without her knowledge or authority, forged her name to an assignment of the contract of sale to himself; that on November 3, 1913, he executed, without appellant's knowledge or consent, a purported assignment of the contract from himself to respondents; that before the latter assignment appellant "had paid on account of the said purchase price of said lots of land, the sum of $1,040, together with $26.40 interest and $28 taxes"; that after November 26, 1913, respondents paid on account of the purchase price $960, together with $69.30 interest and $29.40 taxes; that thereafter, by virtue of the contract and the assignments thereof and the payments made thereunder, respondents demanded and the company executed to them a deed of the land in question, which deed was recorded; that appellant first learned in June, 1917, of the purported assignments of the agreement of sale and that respondents had secured a deed of the land; that she was informed of those facts after she wrote to the company on May 30, 1917, requesting a statement of the amount of taxes due on the land.

In the complaint appellant also tendered to respondents the sums of $960, $69.30, and $29.40, alleged to have been paid by them in connection with the land, or any other sums which the court should find they had so paid.

The agreement of June 28, 1911, provided that appellant should make an initial payment of $200, receipt of which amount was thereby acknowledged; that she should make payments of not less than $30 per month, together with interest at the rate of 6 per centum per annum on deferred payments; that the whole of the principal and interest should be paid within six months of the date of the agreement; that the title to the land should remain in the seller until all money due should have been paid; that the seller should pay all taxes for the first two years and the buyer should pay them thereafter; that if, after one-fifth of the price had been paid, the buyer should be unable to meet any payment, an extension of 90 days might be had, and that time should be of the essence of the contract.

[1] Three objections to the sufficiency of the complaint are now advanced by respondents. The first is that John A. Fitzgerald and the land company should have been joined as parties defendant, under section 379 of the Code of Civil Procedure, it being insisted they have some interest in the property adverse to appellant. The complaint is not defective in this particular, for whatever interest Fitzgerald or the land company had in the property has been assigned to respondents, the land company admittedly having been fully paid for its interest. Nothing is asked from either of them and they are in no way necessary parties to a determination of the respective rights of appellant and respondents in the property which is sought in this action.

[2, 3] The second objection to the complaint is that there is an improper joinder of causes of action, in that a cause of action to have a trust decreed in land is joined with one to quiet title. But there is no claim of any title in appellant other than the equitable right to have a trust in her favor declared, and the enforcement of that right is all she asks in this action. The complaint does not purport to be one to quiet title either under section 738 or section 749a of the Code of Civil Procedure, proceedings under which sections she could not, as the holder of a mere equity, institute against the holder of the legal title. Buehner v. Malloy, 155 Cal. 253, 100 Pac. 687.

Respondents' third and principal contention is that the complaint fails to state facts sufficient to constitute a cause of action. It is claimed it does not state facts sufficient to constitute any trust in favor of appellant, whether pro tanto or otherwise; that where one of two innocent persons must suffer by the act of a third, he who has enabled such third person to cause the loss, in this case appellant, must bear it; and that it affirmatively appears from the complaint that if ap-

pellant ever had any right it is barred by her laches.

Appellant insists the complaint shows the major portion of the consideration for the transfer of the land was paid by her, and that therefore a trust results in her favor pro tanto; that, even if this position is not maintainable, respondents have no right to retain the property as a result of Fitzgerald's act in forging the assignment, and that under one theory or the other a cause of action is stated.

[4] The complaint is not specific in many respects and certain allegations which might well be set forth, such as those concerning the dates of the transfers of the property, are omitted. But in our opinion it does state facts sufficient to constitute a cause of action and to justify the declaration of a trust in appellant's favor. This conclusion is not reached upon the theory, chiefly relied on by appellant, that a resulting trust arose under section 853 of the Civil Code, which provides:

"When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

Respondents are to be regarded instead as constructive trustees under section 2224 of the Civil Code, which is as follows:

"One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

That the facts presented here are not embraced within the theory of resulting trusts is obvious from a consideration of the following cases, wherein that principle was considered. In Woodside v. Hewel, 109 Cal. 481, 42 Pac. 152, it was said that—

"The equitable principle that when, upon the purchase of lands, the consideration therefor is furnished by one person, and the conveyance is taken in the name of another, a resulting trust in the lands is created in favor of the one from whom the consideration came, is well recognized, as is also the rule that a resulting trust is created pro tanto where only a specific part of the consideration was so furnished."

In Lezinsky v. Mason Malt Whisky Distilling Co., 185 Cal. 240, 247, 196 Pac. 884, 888, the court declared:

"The furnishing of the consideration, by reason of which a resulting trust arises, is a furnishing, not to the seller of the property bought, but to the purchaser. The whole theory upon which a trust is imposed upon the purchaser in such a case is that, as between him and a third person, it was the latter who furnished the consideration with which the property was acquired, so that it will be presumed that as between them it was intended that the purchase be for the benefit of him who supplied the means with which to make it. * * * A resulting trust is not founded on the simple fact that money or property of one has been used by another to purchase property. It is founded on a relationship between the two, on the fact that as between them, consciously and intentionally, one has advanced the consideration wherewith to make a purchase in the name of the other. The trust arises because it is the natural presumption in such a case that it was their intention that the ostensible purchaser should acquire and hold the property for the one with whose means it was acquired."

In the case at bar there are no circumstances which raise any presumption that the parties herein intended the land for the benefit of appellant. No money was paid by appellant to respondents or on their behalf; in fact, respondents presumably considered they had acquired from Fitzgerald any interest which appellant had in the land, and that they themselves had purchased it with their own money. In Lezinsky v. Mason Malt Whisky Distilling Co., supra, it is also said (185 Cal. 247, 196 Pac. 888):

"Manifestly, this theory has no application to a case where the purchaser uses what he believes to be his own property in making the purchase. So far as he is concerned, the consideration for the sale is what he himself furnished."

[5, 6] But in our opinion the facts alleged bring the case within the application of section 2224 of the Civil Code and entitle appellant to have a constructive trust in her favor imposed upon the property. The equitable principle contained in that section is thus stated in Mandeville v. Solomon, 33 Cal. 38, 44:

"Where the circumstances of a transaction are such that the person who takes the title to property cannot be permitted to hold and enjoy it, in whole or in part, without necessarily violating some principle of equity, a constructive trust will be raised for the benefit of the party entitled in equity to its beneficial enjoyment. It is because he holds the property, or some interest therein, which it is inequitable for him to enjoy, that the court declares the trust and fastens it upon his conscience, and wrests the property or interest from him and causes it to be transferred to the person equitably entitled to it."

In Pomeroy's Equity Jurisprudence (4th Ed.) vol. 2, p. 1919, it is said:

"Where an owner has been apparently deprived of his title by a fraudulent conveyance or assignment which is void, as where he was procured to execute it by the fraudulent representation and under the conviction that it was an entirely different instrument, or where it was fraudulently executed in his name without any authority express or implied, or where, after being executed by him for one purpose it

was fraudulently altered without his knowledge or authority, so as to include the property, *or where it was a forgery*, and he has done no collateral act with reference to it which might amount to an equitable estoppel by conduct, and the property, by means of such transfer, comes into the hands of a purchaser for value and without notice, the original defrauded owner is not barred of his remedy." (Italics ours.)

According to the complaint, appellant intrusted Fitzgerald with the contract of sale, and he by a forged assignment of it to himself and another to respondents enabled them apparently to secure the right to purchase the land and later the land itself. It is true respondents are assignees of the wrongdoer, and it is not alleged they themselves were guilty of any wrongful act or were not bona fide purchasers. But the original assignment having been forged, no title to the contract passed, and the rights of appellant under it cannot be defeated, even, as respondents contend, by a bona fide purchaser.

[7] Respondents object to a consideration of this point that a cause of action was stated under section 2224 of the Civil Code, on the ground that it was presented for the first time in appellant's reply brief. Although it is true an appellant should state in his opening brief the points upon which he relies and that matters first raised in a reply brief may be disregarded, this court "is undoubtedly at liberty to decide a case upon any points that its proper disposition may seem to require, whether taken by counsel or not." Hibernia Sav. & Loan Soc. v. Farnham, 153 Cal. 578, 584, 96 Pac. 9, 12 (126 Am. St. Rep. 129).

[8] It is argued by respondents that, inasmuch as the contract provided the title should not pass until the purchase price was fully paid, and appellant never paid the last installment, she could claim no right to the property whatever. But appellant is not asking anything of the land company, which has fully performed its obligations under the agreement of sale and transferred title to respondents upon their performance of the purchaser's obligations. Nor is she seeking to assert a legal title paramount to that held by respondents. She is endeavoring to recover only her proportionate share of the property from respondents, who have paid the last installment and who hold the title.

[9, 10] In support of their second contention, respondents insist that appellant, by giving Fitzgerald charge of her papers, made him her business representative; that she thereby invested him with the management of her affairs and put into his hands the means of wrongdoing. Schultz v. McLean, 93 Cal. 329, 357, 28 Pac. 1053, 1058, is cited to the point that—

"The vendee will not be compelled by a court of equity to lose the benefit of a bargain obtained in all fairness and honesty, because of a fraud practiced upon the vendors by their own agents."

However, in Walsh v. Hunt, 120 Cal. 46, 52, 52 Pac. 115, 117 (39 L. R. A. 697), wherein the court considered the liability of a maker of a promissory note which had been altered through the forgery of the maker's agent, it was held:

"But, if it were conceded that the finding established carelessness or negligence by defendant, which might in some degree have contributed to the successful execution of the fraud by which plaintiff was deceived into parting with her money, it would not then constitute an estoppel. This is upon the principle that a party is not bound in transactions of this character either to anticipate or take precaution against the commission of a crime by which another may be deceived; that where it is through the instrumentality of a criminal act that the wrong is accomplished, it is the crime and not the negligent act which is the proximate cause of injury; and in such a case the maxim that where one of two innocent persons must suffer from the wrongful act of another, the loss must fall upon the one making the act possible, has no application."

In the case at bar, appellant was not bound to anticipate that Fitzgerald would commit forgery and assign her contract, and, as already pointed out, her rights cannot be defeated by his act in that regard. As respondents' claim is based solely on the assignment from Fitzgerald, appellant's negligence in other particulars, such as her failure to record her contract, is immaterial.

Respondents' argument with reference to their third point is that it must be presumed appellant has stated her cause as favorably as possible to herself and that the parties have followed the ordinary course of business; that from this presumption follows another that, inasmuch as appellant alleged respondents paid the balance of the purchase price and took the deed from the land company after November 26, 1913, they took the deed and had it recorded on November 27, 1913. From this is would follow that, as the second amended complaint was filed on August 22, 1918, nearly five years after appellant had the means of knowledge of respondents' claim, her cause of action is barred by laches and by the statute of limitations.

In the demurrer it was stated "that the cause of action attempted by said plaintiff to be set forth in said second amended complaint is barred by laches." There was no allegation that it was barred by the statute of limitations. It is said in Hecht v. Slaney, 72 Cal. 363, 366, 14 Pac. 88, 89, cited with approval in Lezinsky v. Mason Malt Whisky Distilling Co., supra, that—

"Whatever may once have been the rule, it is now well settled that the statute of limitations runs in favor of a defendant chargeable as a trustee of an implied trust, and it is not necessary, in order to set the statute in motion, that he should have denied or repudiated the trust [citing authorities]. In such a case, the stat-

ute begins to run when the wrong complained of is done, and under our code the limitation is four years. Code Civ. Proc., sec. 343; Piller v. S. P. R. R. Co., 52 Cal. 42."

[11] It must be assumed, in the absence of anything to the contrary, that the action was commenced within the four years allowed by the statute.

[12] In Meigs v. Pinkham, 159 Cal. 104, 112 Pac. 883, the court declared that—

"Under our law, as the statute of limitations is applicable to both legal and equitable actions, there can be no laches in delaying the bringing of an action if it is brought within the period of limitation [citing authorities], unless there are some facts or circumstances attending the delay which have operated to the injury of the defendant."

There are no facts alleged in the complaint from which it appears that any injury will result from appellant's delay in instituting the proceeding.

Inasmuch as appellant has offered to do equity, she is entitled to her own equitable relief.

The judgment is reversed.

We concur: SHAW, C. J.; LENNON, J.; WASTE, J.; WILBUR, J.; WARD, J.

---

190 Cal. 294

KALES et al. v. HOUGHTON. (S. F. 9833.)

(Supreme Court of California. Jan. 6, 1923.)

**1. Master and servant ⊂⊃70(3)—Contract to obtain and handle construction contracts construed.**

In an action for an accounting under a contract of employment providing for a division of profits and losses on construction contracts, plaintiffs to "exclusively give their services to obtaining and handling of contracts to be entered into" between defendant and others, *held*, that defendant, having interpreted the agreement to apply to contracts which were "obtained" by plaintiffs, but not "handled" by them, and upon contracts "handled," but not "obtained," by them, could not contend that, unless a contract was both obtained and handled by plaintiffs, they were not entitled to participate in profits thereon.

**2. Contracts ⊂⊃170(1) — Where language doubtful, construction by parties during course of execution will be adopted.**

When the meaning of the language of a contract is doubtful, the construction which the parties placed upon it during its execution will be adopted, where the language will reasonably permit such interpretation.

**3. Account ⊂⊃22—Finding of ultimate amount due in accounting held sufficient to sustain judgment, although subsidiary finding as to elements on which based not expressed.**

In an action for an accounting under a contract whereby plaintiffs were entitled to share with defendant employer in the profits of certain construction work, defendant to render a statement every year, costs of administration to be charged against plaintiffs in proportion to the overhead of defendant's office, a finding by the court as to plaintiffs' share in the net profits of the year *held* sufficient to sustain a judgment based thereon, notwithstanding it did not expressly find as to the scope and effect of an oral agreement by the parties relating to the amount of overhead to be charged.

**4. Master and servant ⊂⊃80(9)—Finding of oral agreement as to overhead expenses sustained.**

In an action for an accounting under a contract of employment, whereby plaintiffs were to share the profits of certain construction work, costs of administration to be charged in proportion to the overhead of the employer's office, where it was claimed that as to certain construction work a special oral agreement was made as to overhead charges, evidence *held* sufficient to sustain a finding that such oral agreement was made.

**5. Set-off and counterclaim ⊂⊃44(1)—Personal indebtedness of one of parties to joint agreement cannot be set off against amount due to both of them.**

Where plaintiffs agreed with defendant to share profits and losses of certain construction work, defendant could not, in making a statement of account, offset against the sum due to both of plaintiffs the amount of a personal note of one of them made before the agreement was entered into, since, in the absence of insolvency or of other facts making applicable rules of equitable set-off, the personal indebtedness of one of the parties to a joint agreement cannot be availed of as a set-off so as to affect the other party without his consent.

**6. Contracts ⊂⊃266(1)—On rescission that which party is in any event entitled to retain need not be restored.**

One who seeks to rescind an agreement is not bound to restore that which he would be entitled in any event to retain.

**7. Damages ⊂⊃67—Interest on several sums making up aggregate of amount due held allowable.**

Plaintiffs recovering judgment *held* entitled to interest on the several sums making up the aggregate of the amount found due from the dates when payable at the legal rate, under Civ. Code, § 3287, allowing a person entitled to recover damages interest from the day the right of recovery vests in him.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. J. Van Norstrand, Judge.

Action for an accounting by Franklin A. Kales and another against Shirley Houghton. Judgment for plaintiffs, and defendant appeals. Affirmed.

---

James P. Sweeney and Courtney L. Moore, both of San Francisco (Adair & Winder, of Riverside, of counsel), for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondents.

PER CURIAM. This appeal is by the defendant from a judgment in the plaintiffs' favor in an action for an accounting.

On or about the 12th day of July, 1915, the plaintiffs herein and the Van Sant-Houghton Company entered into the following written agreement:

"San Francisco, June 22, 1915.

"Messrs. Van Sant-Houghton Co., 503 Market Street, San Francisco, California—Gentlemen: The undersigned offer to enter your employment for the period of five years, commencing July 1, 1915, and to exclusively give their services towards obtaining and handling of contracts to be entered into between yourselves and others. This service shall exclude:

"(1) All contracts to the carrying out of which your Unit-Bilt system of concrete construction is adaptable.

"(2) All contracts to the carrying out of which your pneumatic concrete Placing System is adaptable.

"(3) All work in Alameda county.

"(4) All railroad work.

"This service shall particularly include:

"(1) All residence work outside of Alameda county.

"(2) More particularly all work in the Bay counties not specifically mentioned as excluded above.

"(3) Any contracts for construction work not excluded above where same are undertaken with the consent of Shirley Houghton and R. H. Van Sant, Jr.

"(4) By special agreement between the parties concerned, work may be undertaken in the territory or under the classifications excluded above.

"Every twelve months a statement of profits and loss shall be drawn up on the work closed during the preceding twelve months, and we shall be entitled to draw out one-half of our share of the profits then earned, the balance to remain with Van Sant-Houghton Company as protection against any possible loss during the ensuing year.

"The division of the profits or losses shall be 50% to Van Sant-Houghton Co. and 50% to ourselves.

"During the period of the year from July 1, 1915, to June 30, 1916, Van Sant-Houghton Company are to advance to us the sum of $500.00 at the end of each month. These advances are to be charged against our share of the profits during our period of service.

"Any additional advances after June 30, 1916, that may be agreed upon must be warranted by the work completed or then in the course of construction.

"The costs of administration which are chargeable against us will be based on that portion the overhead of the office of Van Sant-Houghton Company which is chargeable against our work.

"In the event of the death of either of the undersigned, this agreement may be terminated at the option of Van Sant-Houghton Company.

"Franklin A. Kales.
"Jasper S. Connell.

"Accepted this 12th day of July, 1915.
"Van Sant-Houghton Co.,
"By Shirley Houghton and
"R. H. Van Sant, Jr."

At the time of entering into this agreement the Van Sant-Houghton Company was, and for several years prior thereto had been, engaged in business as construction engineers with headquarters of the same in San Francisco, but with its operations, which were quite extensive, reaching into several other states. The plaintiffs herein were also engineers of considerable past experience in similar lines of work, and had in fact been in the employment of the said firm, Van Sant-Houghton Company, prior to the execution of the written agreement above set forth. A few months after its execution Mr. Van Sant transferred all of his interest in the firm to his associate, the defendant herein, who thereupon assumed all of the obligations and became entitled to all of the benefits of the foregoing agreement. The service of the plaintiffs herein began on July 1, 1915, according to the terms of said agreement, and were to continue for the period of five years thereafter. The activities of the respective parties under said agreement actually continued for a period a little over two years and eight months, when, discords having arisen between them over the state of their accounts, the plaintiffs, after some efforts made to arrange a compromise of these difficulties, left defendant's employ on or about March 9, 1918, and then undertook to repudiate and rescind said agreement. On March 25, 1918, they commenced the present action for an accounting, alleging in substance that the defendant had failed and neglected to furnish them with the statements of account provided for in said agreement, and to collect the account for and pay over to them sums from time to time due thereon. The defendant demurred to the plaintiffs' complaint unsuccessfully and then answered, admitting the execution of said agreement, but denying any breach thereof upon his part, and that any sum whatever was due said plaintiffs thereunder. He also filed a cross-complaint against said plaintiffs setting forth said agreement and alleging that said plaintiffs had without cause made default in the terms and conditions thereof to be by them performed, whereby the defendant and cross-complainant had sustained damages in the sum of $18,000, for which he prayed judgment. Plaintiffs answered said cross-complaint with denials of the allegations thereof. The cause went to trial before the court sitting without a jury upon the issues thus joined, at the conclusion of which the court

made and filed its findings of fact and conclusions of law. In the first paragraph of its said findings the trial court found generally that the first five paragraphs of the complaint, having reference to the making of said agreement and to the defendant's alleged breach thereof, were true, and that the facts were as alleged therein. The trial court then proceeded to make specific findings as to the amount due to said plaintiffs and for which they were entitled, stating that said amount was in excess of the sum of $20,000, which the defendant had refused and neglected to pay The court then proceeded in its findings to go into further and more specific details as to the sources from which it derived the conclusion that an amount in excess of the above sum was due and unpaid the plaintiffs. It is certain of these specific findings which the defendant particularly assails on this appeal as unsupported by the evidence in the case.

The primary contention of appellant in this regard has to do with the interpretation which the trial court placed upon said agreement as affecting its findings as to the several amounts due the plaintiffs upon certain construction work undertaken thereunder by the defendant. It is the appellant's contention that the plaintiffs were entitled to share in the performance of no construction contracts which they did not "obtain and handle." This contention is based upon the phrasing of the first paragraph of the plaintiffs' offer, which reads as follows:

"The undersigned offer to enter your employment for the period of five years, commencing July 1, 1915, and to exclusively give their services towards obtaining and handling of contracts to be entered into between yourselves and others."

[1] It is the appellant's claim that the words "obtain and handle" in the foregoing paragraph of the plaintiffs' accepted offer are to be used in the conjunctive in their application to the succeeding provisions there. There are several sufficient reasons why this interpretation should not be placed upon these words. To so interpret them would be to allow the plaintiffs no part in the performance of any construction contract which they obtained and turned over to said defendant, unless they also "handled" the construction work thereon. It would also lead to the denial of any share in the performance of any construction work of the defendant upon which the plaintiffs worked, but the contract for which they did not "obtain" or assist in obtaining. The result would be that the plaintiffs' motive and advantage in entering into the contract at all would be largely taken away, as well as any motive or advantage to them to exert themselves in obtaining construction contracts for their employer which they were not to handle, or for handling construction work or contracts which they did not assist in obtaining. A further reason for denying to this clause in the agreement the interpretation which the defendant now claims for it is to be found in the interpretation which the parties themselves placed upon it at the time and in respect to several construction contracts which were obtained and handled during the period of plaintiffs' activities under their said agreement. In the case of the Sperry flour contract the evidence shows that this contract was obtained by or through the efforts of the plaintiff Kales, but that practically no work was done by either of said plaintiffs in handling the construction work thereon. This contract resulted in a loss, and the evidence shows that the defendant charged 50 per cent. of said loss to the plaintiffs under the provision of said agreement, which provides for a sharing of the losses as well as profits upon work undertaken during the term of said agreement. Another example is that of the contract for a foundry building for the Union Iron Works which the plaintiff Kales also obtained, but which neither of the plaintiffs handled, and upon which there also was a loss, one-half of which the defendant charged to the plaintiffs' account. Still another example of the defendant's conduct in the interpretation of said phrase is to be found in the so-called Floriston contract, in the execution of which there was a profit, 50 per cent. of which the trial court awarded to the plaintiffs. There is a conflict in the evidence as to whether the plaintiffs obtained this contract, which conflict the trial court resolved in the plaintiffs' favor. The appellant concedes that by reason of such conflict and of the court's conclusion thereon he cannot now attack that portion of the finding of the trial court; but he insists that the trial court was in error in making any award to the plaintiffs thereon for the reason that the undisputed evidence was that the plaintiffs did not handle said job. The evidence, however, divulges that the defendant charged the plaintiffs with their proportion of the agreed expense of the San Francisco office, which under the terms of the agreement was chargeable as "costs of administration" against the plaintiffs' work. This could only have been done upon the theory that the plaintiffs would ultimately be entitled to share in the performance of the Floriston contract, although they did not "handle" the work upon said contract. The defendant, having thus placed an interpretation upon said agreement which operated to his benefit, cannot be heard to deny the same interpretation thereof when it would operate to the plaintiffs' benefit.

[2] It is a well-settled rule of law that, when the meaning of the language of a contract is doubtful, the construction which the

parties to it place upon it during the course of its execution will be adopted where the language will reasonably permit such an interpretation. Hill v. McKay, 94 Cal. 5, 29 Pac. 406; Keith v. Electrical Engineering Co., 136 Cal. 178, 68 Pac. 598; Kennedy v. Lee, 147 Cal. 586, 82 Pac. 257. We are of the opinion, therefore, that the trial court was not in error in interpreting this agreement as to allow the plaintiffs their due share of the profits upon all construction work covered by the terms of said agreement which they assisted in obtaining, but did not handle, or which they handled but did not obtain.

The next contention of the appellant is that the trial court was in error as to its conclusion as to the proper basis for the ascertainment and distribution of the "costs of administration" between the parties in respect to construction work in which the parties were to share profits or losses under the terms of said agreement. The provision in said agreement relating to this subject reads as follows:

"The costs of administration which are chargeable against us will be based on that portion the overhead of the office of Van Sant-Houghton Company which is chargeable against our work."

The importance of interpreting and applying the foregoing provisions in the agreement consists in the fact that every 12 months during the term of the agreement a statement of profit and loss was to be drawn up as to the work closed during the preceding 12 months upon which the plaintiffs were entitled to draw one-half of their share of the profits therein shown to have been earned, on the basis of a 50 per cent. division of said profits; the plaintiffs' other half thereof to remain with the defendant as a protection against possible loss during the ensuing year. The undisputed evidence shows that a statement was prepared and presented by the defendant's bookkeepers at or about the close of the first 12 months of the operations of the parties under said agreement, which statement showed that during said year the Houghton Company had handled work in which the plaintiffs were not interested, aggregating $470,761.39, and that during the same period the Houghton Company had handled work in which the plaintiffs were interested aggregating $173,845.80. Upon the basis of these figures and under what would seem to be a reasonable interpretation of the somewhat vague provisions of the clause above quoted as to the division of overhead expense, the plaintiffs should be charged with 27 per cent. of such overhead and the defendant with 73 per cent. thereof. This first statement was prepared upon this basis and was apparently accepted by the parties and by the court as exemplifying the proper interpretation of the above-quoted provision. The trial court found that this first statement as thus agreed to constituted a stated account between the parties, and with this finding both parties apparently agree. This first statement, however, contained one specification as to overhead charges upon a particular piece of work then in progress which was to be prolific of trouble between the parties in their later accountings: The item referred to reads as follows: "Overhead Ocean Falls, $40.00, 2 mos—$120.00." The construction contract thus referred to was one which had been entered into in the early part of the year 1916 between the Pacific Mills, Limited, and the defendant, the work upon which was to be done at Ocean Falls, British Columbia. This particular contract differed from the other construction contracts in which the parties had become interested during the life of their agreement in the respect that, while the plaintiffs were to be the superintendents in charge of the work at Ocean Falls, neither they nor the defendant were to furnish any of the labor, materials, or capital to be employed in the construction part of said work. All of this, with the exception of the superintendency of the job, was to be supplied by the Pacific Mills, Limited, who were to furnish all of the clerical and office work and do all of the bookkeeping connected with said job. The sole connection which the parties hereto had with said work was that of superintending the job, which was to be done by the respondents herein as employees of the defendant herein, and for which there was to be fees on the basis of 5 per cent. of the cost of the work as the same proceeded. Payments on account of these fees were to be made monthly to the defendant, whose sole overhead expense in connection with said contract was that of receiving and crediting the monthly check for the fees earned through the respondents' superintendency during the preceding month. When the time arrived for the preparation of the first annual statement, the question arose between the parties hereto as to the basis of overhead charge on account of this contract, upon which at that time about $300,000 worth of work had been done, and upon which fees aggregating $15,000 had been received by the defendant. The parties hereto are in substantial agreement in their evidence as to the basis of overhead charge which was agreed upon between them with relation to this particular contract. Mr. Keating, the defendant's office manager at San Francisco, testified upon that subject as follows:

"Why you see we had been discussing this overhead matter for weeks, and possibly months, and, after Mr. Kales and I had become rather peeved at each other, Kales said, 'It

doesn't make any difference what you say, Keating, I will settle with Mr. Houghton, and fix it up with him;' and that is what they did, fixed it up between them. Then the question of the proper charge of Ocean Falls overhead came up, and Mr. Houghton seemed to think it ought to be about $75 and Mr. Kales thought it should be about $40 per month. And he asked me if I thought $40 would cover it, and I said I did not know. As a matter of fact I said we do not know what the overhead has been, there was not very much done up there, and we have no way of gauging overhead up there, and then decided to let it go at $40 per month."

Mr. Kales testified upon the same subject that—

"It was finally agreed upon that my contention was right and an arbitrary amount of $40 per month was finally agreed upon and charged to the Houghton Construction Company in San Francisco against Ocean Falls account."

He further testifies that—

"Forty dollars per month was finally agreed upon by all parties and accepted as the legitimate overhead to be charged against the Ocean Falls work."

This was accordingly done in the first statement above referred to, which explains the item therein referring to the Ocean Falls work. The second annual statement between the parties hereto was delayed until December, 1917, but was made as of the date of July 1, 1917. In the several statements as made up by the defendant and presented to the plaintiffs in December, 1917, it appeared that the total amount of construction work undertaken by the defendant and upon which the plaintiffs were entitled to a share in the profits was $2,364,884.20, and that the construction work undertaken by the defendant in which the plaintiffs were not entitled to share was $1,135,435.76. The percentage from these figures upon which the plaintiff estimated the proportionate charge on account of overhead expense was 68½ per cent. to the plaintiffs and 31½ per cent. to the defendant. In presenting these figures and making this estimate and charge the defendant included the Ocean Falls contract, the work upon which alone aggregated $2,364,884.20. In making up this second statement the defendant ignored the previous arrangement between the parties whereby the overhead charge was to be made against the Ocean Falls contract at $40 per month and undertook to charge the plaintiffs with overhead expenses of administration upon the whole amount of work according to the foregoing percentages, which resulted in a charge of approximately $20,000 against the plaintiffs on account of overhead expense upon the Ocean Falls job. When this second statement embracing this charge was presented to the plaintiffs in December, 1917, they objected to the same upon the ground that the foregoing was an erroneous charge, and that the only amount chargeable as overhead to the Ocean Falls job was that of $40 per month as originally agreed upon between the parties. There were certain other objections to this statement which will be considered later. After considerable dispute and much conflict in the evidence as to what actually occurred between the parties during such dispute, a tentative offer of compromise was made by Mr. Connell, representing the plaintiffs, by the terms of which he appears to have been willing to waive the objection to the overhead charge against the Ocean Falls account and also to waive certain other objections to said statement provided a cash payment of the amount shown to be due the plaintiffs thereon was immediately made. Some comparatively small payments were made by the defendant pursuant to this tentative offer of settlement, but after considerable effort on the plaintiffs' part to obtain the full settlement thus tentatively agreed upon the plaintiffs in the month of April, 1918, left the defendant's employ, withdrew their offer of compromise, gave notice of a rescission of their agreement, and commenced the present action for an accounting. Upon the foregoing facts and with relation to the second statement made by the defendant the trial court did not make a specific finding as to whether the overhead charges for costs of administration chargeable to the Ocean Falls contract were to be estimated according to the oral agreement between the parties providing for a charge of $40 a month as overhead against said job, or according to the basis fixed in the original agreement between the parties as to the chargeable overhead against work in which the plaintiff had a right to share; but the trial court made findings upon the ultimate fact of the net amount to which the plaintiffs were entitled as their share of the profits of the business covered by said second statement of account, and this finding is obviously based upon the implied conclusion of the trial court that the said oral adjustment between the parties of the amount of overhead chargeable to the Ocean Falls job was that calculated upon the basis of said oral agreement. The appellant herein in respect to said finding of the trial court makes two contentions, the first thing that by reason of the failure of the trial court to make a specific finding as to the scope and effect of said oral agreement amounts to a failure to find upon a material issue for which the judgment must be reversed, and the second being that the evidence is insufficient to support the general finding of the trial court as to the net amount to which the plaintiffs are entitled upon the work covered by said second statement of account.

[3] With respect to the first of these contentions we are of the opinion that the finding of the trial court as to the ultimate fact of the plaintiffs' due share in the net profits for the year covered by said second statement of account, involving as it does the court's implied conclusion regarding the probative facts upon which to predicate its express conclusion as to the ultimate fact, is sufficient to sustain the judgment based upon such finding.

[4] As to the appellant's second contention that the court's said finding of the ultimate fact is unsupported by the evidence in the case, his conclusion in that regard rests upon his claim that the undisputed evidence shows that the arrangement between the parties as to the agreed basis of $40 per month or as an arbitrary overhead charge for costs of administration to be made against the Ocean Falls contract was a merely temporary arrangement made in the earlier stages of the work being done under said contract for convenience in making up the defendant's first statement of account, and that it was never the intention of the parties that such arrangement should be given application to the entire work to be done during the execution of said contract. We are unable to give our assent to this contention, since an examination of the record sufficiently shows that there is substantial evidence upholding the implied finding of the trial court. The Ocean Falls contract was entered into in January, 1916. It was unique among the construction contracts of the defendant during the period of his agreement with the plaintiffs in the respect that there were to be and were practically no overhead expense for costs of administration to be incurred during the execution of this contract. At the time, in June, 1916, that the parties entered into their oral arrangement as to the adoption of an arbitrary overhead charge of $40 per month as applicable to this particular contract, about $800,000 worth of work had been reported to the defendant as having been done by the Pacific Mills, Limited, which was doing the construction work thereon, under the plaintiffs' superintendency. There was therefore no apparent reason for the making of a mere temporary arrangement between the parties hereto as to an arbitrary overhead charge to be made against said contract; neither was there anything in the arrangement as to such arbitrary charge as testified to by all of the parties thereto to indicate that the adjustment of overhead thus to be made was temporary. It would seem, in fact, to have been an altogether equitable arrangement in view of the fact that there was to be no overhead costs of administration in the course of the performance of their part of said contract by the parties herein concerned; while, on the contrary, it would appear quite inequitable for the defendant herein to have been permitted to charge against the plaintiffs' share in the profits of said contract over $20,000 of overhead costs of administration which he had not incurred or expended. It was doubtless these considerations which moved the trial court to arrive at the conclusion that the arrangement between the parties as the arbitrary overhead charge of $40 per month, applied during the early stages of this particular piece of work, was intended by them to be given application to the entire period of execution of the Ocean Falls work. We are not disposed, therefore, to disturb the ultimate findings and conclusions of the trial court in this regard.

[5] The appellant makes the further contention that the trial court was in error in its refusal to allow the defendant in his said second statement of account to offset against the sum shown therein to be due to both of these plaintiffs the amount of $2,538.60, which he claimed to be due him on account of the personal note of Mr. Kales, one of said plaintiffs, made by him to the defendant in the course of a transaction antedating the agreement between the parties hereto and with which Mr. Connell, the other of the plaintiffs herein, had nothing to do. The evidence shows that Mr. Connell objected to the making of said offset in said second statement of account, and that he persisted in said objection between the time of the rendition of said statement of account and the final breach between the parties a few months later, except as he was willing by way of compromise to waive said objection in case an immediate payment of the balance to be paid upon such account would be made. The appellant insists that he was lawfully entitled to make such offset and to have the same allowed, but such is not the law applicable to such a situation. The authorities appear to be uniform that, in the absence of insolvency or of other facts calling for the application of the rules of equitable set-off, the personal indebtedness of one of the parties to a joint agreement or obligation cannot be availed of as a set-off so as to affect the other party to such agreement or obligation without his consent. Collins v. Butler, 14 Cal. 223; Roberts v. Donovan, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599; McDonald v. Poole, 113 Cal. 437, 45 Pac. 702. The appellant does not dispute this rule, but insists that the plaintiff, Connell, consented to said offset. This contention is based in the main upon the appellant's next contention that the acts and conduct of the plaintiffs subsequent to the presentation of the defendant's said second statement of account embracing said offset ren-

dered the same a stated account. Without attempting to review in detail the evidence in the case relating to the acts and conduct of the parties in their conference and correspondence between December, 1917, and April, 1918, when the final break occurred, we are satisfied that the finding of the trial court that said second statement of account never took on the quality of a stated account finds substantial support in the evidence, and that the contention of the appellant to the contrary is without substantial merit. We reach the same conclusion as to the appellant's further contention that the plaintiffs were not entitled to withdraw from said compromise agreement and work a rescission of the same at the time early in April, 1918, that they attempted to do so, for the reasons either that there had been no breach of said agreement of compromise on the part of the defendant justifying such rescission, or that the plaintiffs had not acted promptly in making the same, or that the plaintiffs, at the time they did so rescind, were not entitled to do so without returning the moneys which they had been paid by the defendant on account of said compromise agreement. The evidence in the case, we think, sufficiently shows that the defendant did not perform his part of said proposed compromise; that the plaintiffs during the months between December, 1917, and April 1918, were diligently seeking to prevail upon him to make such performance, and hence cannot be held to have waived during that brief period their right of withdrawal from such compromise. The evidence further shows that whatever payments the defendant made to or on account of the said plaintiffs, or either of them, during that period, amounted in the aggregate to less than the amount which was actually due the plaintiffs in any event.

[6] The rule upon that subject is well settled to the effect that one who seeks to rescind an agreement is not bound to restore that which he would be entitled in any event to retain. 9 Corpus Juris, p. 1210, sec. 97; Richards v. Fraser, 122 Cal. 456, 55 Pac. 246; Gatje v. Armstrong, 145 Cal. 370, 78 Pac. 872.

[7] As to the appellant's final contention that the trial court was not entitled to allow interest upon the plaintiffs' judgment: It is based wholly upon his claim that the plaintiffs were not entitled to any judgment in their favor, and hence were not entitled to any interest thereon. The trial court having correctly, as we conclude, found in the plaintiffs' favor as to the principal amount they are entitled to recover under their within agreement with the defendant, it follows, that they were entitled to interest upon the several sums which make up in the aggregate the amount found due from the dates when the same became payable at the legal rate under section 3287 of the Civil Code.

The judgment is affirmed.

SHAW, C. J., and LAWLOR, LENNON, and WASTE, JJ., concur.

---

(190 Cal. 246)

## KISH v. CALIFORNIA STATE AUTOMOBILE ASS'N. (S. F. 9896.)

(Supreme Court of California. Dec. 30, 1922.)

**1. Master and servant ⟸302(6)—Servant acting for himself not acting within scope of authority.**

A master is not responsible for injuries caused by his servant, though they could not have been caused without facilities afforded by the master unless the servant was engaged at the time in the transaction of his master's business, that is, was using the facilities in furtherance of the business of the master and not merely for his own personal ends, in which event the relation would be that of lender and borrower.

**2. Master and servant ⟸302(1)—Scope of employment defined.**

In order that the acts of the servant shall be within the scope of his employment so as to render the master liable, it is not necessary that the servant shall be engaged in the direct performance of the thing which is the ultimate object of his employment, but it is sufficient if his acts incidentally or indirectly contribute to the service.

**3. Master and servant ⟸302(6)—Truck driver going to supper held not within employment.**

A truck driver, who was employed to put up highway signs and paid so much per day and his expenses, including the cost of his meals, and who was allowed to fix his own working hours, was not engaged in his master's business, when, after finishing his work for the day, he had gone home to clean up and then started out for supper, so that the master is not liable for his negligence while driving the truck to his supper, though authorized to include the cost of his meals in his expense account.

**4. Master and servant ⟸330(1)—Proof servant was within scope of employment essential to prima facie case against master.**

Proof that the servant was acting within the scope of his employment at the time his negligence caused the accident is as essential to a cause of action against the master as proof of the employment itself, so that proof only that the negligent truck driver was in the general employ of defendant is not sufficient to prevent a nonsuit.

In Bank.

Appeal from Superior Court, Fresno County; M. F. McCormick, Judge.

Action by Mabel Kish against the California State Automobile Association to recover

damages for personal injuries sustained in an automobile collision. From an order granting a nonsuit, plaintiff appeals. Affirmed.

G. L. Aynesworth and L. N. Barber, both of Fresno, for appellant.

Everts, Ewing & Wild and J. R. Fitch, all of Fresno, for respondent.

LENNON, J. This is an appeal from a judgment of a nonsuit in an action for damages for personal injuries alleged to have been suffered by plaintiff as the result of a collision between an auto truck owned by the defendant and driven by an employee of the defendant, California State Automobile Association, and another auto truck in which the plaintiff was riding at the time of the accident. The relationship of employer and employee is admitted by the defendant, and this appeal presents the single question of whether or not the evidence adduced by the plaintiff was sufficient to show that, at the time of the accident, the employee was acting within the scope of his employment. In support of her cause of action the plaintiff relies solely upon the testimony of Kelley, the employee of defendant and the driver of the truck at the time of the collision. The facts as embodied in his testimony, which are pertinent to the point presented, briefly stated, are these: Kelley and one Daughters were employed by the California State Automobile Association in the work of installing road signs, and used in this work a truck of the defendant association. They had no stated hours of employment, the number of hours depending upon the territory to be covered and the trips to be made. While engaged in this work for the association, they were allowed their meals as part of their expense account and were permitted to use the truck in going to and from their meals. On the day of the accident Kelley and Daughters had been installing road signs near Clovis and had finished this particular work at about half-past 5 or 6 o'clock in the evening. Instead of going to supper immediately upon the conclusion of their day's work, they rode in the defendant's truck to their home at 147 Coast avenue, Fresno, to wash and clean up and change their clothes. After they were cleaned up and while they were riding in the defendant's auto truck on their way down town to get their evening meal, the accident which caused plaintiff's injury occurred.

[1] It is, of course, elementary that, the master's liability being predicated upon the fact of the employment, the master is not responsible for the acts of the servant while the servant is pursuing his own ends, even though the injury complained of could not have been committed without the facilities afforded to the servant by his relation to his master. 26 Cyc. p. 1536; Stephenson v. S. P., 93 Cal. 558, 29 Pac. 234, 15 L. R. A. 475, 27 Am. St. Rep. 223; Brown v. Chevrolet Motor Car Company, 39 Cal. App. 738, 179 Pac. 697; Berry on Automobiles, § 684. Whether or not the master is responsible for the act of the servant at the time of the injury depends, therefor, upon whether the servant was engaged at that time in the transaction of his master's business or whether he was engaged in an act which was done for his own personal convenience or accommodation and related to an end or purpose exclusively and individually his own. In other words, if the servant used the automobile of his master not in furtherance of his master's business, but for his own individual use, he is merely a borrower, and, the relation of master and servant not existing during the course of such use, the master is not liable for his acts. Gousse v. Lowe, 41 Cal. App. 715, 183 Pac. 295.

[2] In determining whether a particular act is within the scope of the servant's employment, it is obvious that if the servant is directly engaged in the duties which he was employed to perform, or if his acts are directly producing the result desired by the master, that the servant is at that time in the course of his employment. It is not, however, necessary in order to hold the master liable, that the servant shall be engaged in the direct performance of the thing which is the ultimate object of his employment, for also included within the scope of the servant's employment are those acts which incidentally or indirectly contribute to the service. Hall v. Puente Oil Co. (Cal. App.) 191 Pac. 39; Jessen v. Peterson, Nelson & Co., 18 Cal. App. 349, 123 Pac. 219.

The test, as laid down in Chamberlain v. Southern California Edison Co., 167 Cal. 500, 140 Pac. 25, for determining whether or not a particular act was done in the course of the servant's employment, "is whether the act was done in the prosecution of the business in which the servant was employed to assist." The act of the servant must be connected directly or indirectly with the business of the employer and be in furtherance of the object for which the servant was employed. In other words, if the act is for the benefit of the employer, either directly or incidentally, the act is within the general scope of the servant's employment; but if the act performed is not in any way connected with the service for which he is employed, but for his own particular and peculiar purpose, then the act is not within the scope of the employment.

[3] Having in mind the primary and principal purpose of the employment of the driver of the truck and his associate—the installation of road signs—we are of the opinion that, at the time of the accident, which occurred after the employees had finished the job of putting up signs for the day and after they had gone home and while they were on their way down town for supper, the employ-

ees were not in the performance of an act either directly or indirectly connected with the business of the employer nor incidental thereto, but were engaged in an act for their own individual and personal convenience, and from which the employer was to derive no benefit.

It may be conceded that the use of the truck for transportation to and from their work to their home was for the benefit of the employer indirectly for the reason that it permitted them to devote more time to accomplish the results of installing road signs, for which they were employed. Also, from the fact that they had what may be termed a "roving commission," having no fixed hours of employment and no fixed place of employment, it may be admitted that their employment commenced when they left the house in the morning and did not terminate until they returned in the evening. This point was, however, the utmost boundary of their employment and was not enlarged by the fact that they were permitted the use of the truck in going to places to get their meals. This was permitted solely for the accommodation of the employees themselves. We cannot assent to the reasoning of plaintiff that because it was necessary for employees to eat and sleep in order to perform the labor for which they are employed, that these acts are incidental to their employment.

Kelley and his associate were paid so much per day and their expenses. It was no concern of the employer what they did after returning home, nor can it be inferred that the employer had any control over them after that time. At that time they were through for the day, and it was no concern of the employer as to when they ate or where they ate. If, for instance, the employees had decided to defer dinner until after the theater, could it be said that during the interim they were engaged in the employer's business? Or if the employees had concluded that they would go to an adjoining town, 20 or 30 miles away, to get a meal, surely it could not be said that the trip was within the scope of their employment.

Nor do we believe that the inclusion of the employees' meals in their expense account extended the employer's business to that of boarding its employees. To so hold would be to make the employer's business coextensive with the employee's expense account and extend the liability of the employer for acts of a servant as being within the scope of employment to acts having no relation whatever to the actual business of the employer and to the accomplishment of the results for which the servant was hired.

Having in mind the purpose of the employee's employment and the results to be accomplished thereby, the act of the employee in going to dinner, not on his way from work but after having gone home, cannot be said to have any relation to this business either directly or incidentally; it was not in furtherance of the master's business of installing road signs, nor for the benefit of that business nor was it in the line of the servant's duties in the installation thereof. It was not, therefore, within the scope of his employment.

[4] It is insisted by plaintiff that the evidence adduced having conclusively shown the relation of master and servant, a prima facie case was made out of the responsibility of the master which must be overcome by the defendant, and that a nonsuit was therefore improper. But to recover against an employer upon the theory of respondeat superior, it is necessary for the plaintiff to establish the two distinct facts of (1) the status of master and servant, and (2) that the act was done within the scope of the servant's employment. The latter is as important and vital to plaintiff's cause of action as the former. If the same testimony which proved the relationship of master and servant proved that, at the time of the act for which it is claimed the master was liable, the servant was not acting within the scope of and in the course of his employment, the prima facie case made by plaintiff is rebutted by the very proof offered to prove the first fact. It is not necessary, therefore, for the defendant to negate the master's liability, inasmuch as the plaintiff has done so herself. The proof at that stage lacks an essential element to support plaintiff's cause of action, and an order granting a nonsuit is therefore proper.

Judgment affirmed.

We concur: SHAW, C. J.; LAWLOR, J.; SLOANE, J.

WASTE, J., being disqualified, does not participate in the foregoing.

190 Cal. 286

## Ex parte MURPHY. (Cr. 2466.)

(Supreme Court of California. Jan. 5, 1923. Rehearing Denied Feb. 1, 1923.)

**1. Municipal corporations ⟹592(1)—General traffic laws of state are not superseded in charter cities.**

The provision of the San Francisco Charter that, except as otherwise provided in the Charter or in the state Constitution, the supervisors shall have power to control the use of streets, does not supersede the Motor Vehicle Act (St. 1919, p. 191), within the city, since the regulation of traffic is not a municipal affair in which by the Constitution chartered cities are given power superior to that of the state Legislature.

**2. Municipal corporations ⟹703(1)—Provision of general traffic laws excepting subjects for regulation by cities not invalid curtailment of rights of cities.**

The provision of Motor Vehicle Act (St. 1919, p. 191), § 22, subd. d, that local authorities shall have no power to enact traffic regulations inconsistent therewith with certain specified exceptions, could not limit the power of local legislative bodies to pass regulations not inconsistent with the general law, in view of Const. art. 11, § 11; but, since the Motor Vehicle Act was intended to cover the whole field of traffic regulation and any regulation by a city would be inconsistent therewith, the section in effect confers on the cities the right to regulate with respect to the excepted matters and is valid.

**3. Municipal corporations ⟹592(2)—City ordinance is inconsistent with state statute prescribing punishment for the same offense.**

Motor Vehicle Act (St. 1919, p. 215) § 20, subd. a, requiring careful driving, creates the same offense as San Francisco Ordinance No. 1857, New Series, § 2, and the ordinance is therefore inconsistent with the Motor Vehicle Act, since a conviction under the ordinance would prevent a conviction under the state statute, so that the ordinance is void under Const. art. 11, § 11.

**4. Habeas corpus ⟹30(2)—Reference to city ordinance in complaint does not prevent conviction thereunder for violation of state law.**

That a complaint on which a conviction was based charged violation of a city ordinance does not entitle accused to discharge on habeas corpus, where the conviction may be sustained under the state law; the acts alleged constituting the offense charged.

**5. Municipal corporations ⟹707—Complaint held to charge violation of Motor Vehicle Act.**

A complaint charging that defendant operated his vehicle upon a city street in a careless and reckless manner without due regard to the safety and convenience of pedestrians and other vehicles, thereby violating a specified city ordinance, contrary to the form of the statute, while not in the exact language of the Motor Vehicle Act (St. 1919, p. 191), in substance charges a violation of section 20, subd. a, of that act, and is sufficient to sustain a conviction thereunder.

**6. Municipal corporations ⟹707—Recital of ordinance number in judgment is not jurisdictional.**

In a judgment of conviction for violation of a city ordinance, the omission in the recital of the ordinance violated of the words "New Series," after the number, was not a jurisdictional defect available on habeas corpus.

In Bank.

Application by Della Murphy for writ of habeas corpus to procure the release of John H. Murphy from custody after conviction of operating an automobile carelessly and recklessly on a public street. Writ discharged, and prisoner remanded to custody.

Clarence A. Henning, of San Francisco, for petitioner.

R. M. J. Armstrong, of San Francisco, for sheriff.

LAWLOR, J. Petitioner, Della Murphy, instituted this proceeding to secure the release of one John H. Murphy, who was convicted of a misdemeanor in violating Ordinance No. 1857 (new series) of the city and county of San Francisco by operating an automobile in a careless and reckless manner upon a street in the said city and county, and who was sentenced to imprisonment in the county jail for 50 days. A writ of habeas corpus was issued by this court, and it is now contended that the said ordinance is unconstitutional and void on the ground that it is in conflict with the provisions of the Motor Vehicle Act (Stats. 1919, p. 191), and that the said John H. Murphy should be discharged.

[1] Preliminarily it may be said that under the decision in Ex parte Daniels, 183 Cal. 636, 192 Pac. 442, it cannot be held that the general laws of the state with respect to traffic regulation are superseded by the provision of the charter of the city and county of San Francisco that—

"Except as otherwise provided in this charter or in the Constitution of the state of California [the board of supervisors shall have power] to regulate and control for any and every purpose, the use of the streets, highways, public thoroughfares, public places, alleys and sidewalks of the city and county." Subdivision 2, § 1, c. 2, art. 2.

In that case the court reached the conclusion that—

"The regulation of traffic upon the streets of a city is not one of those municipal affairs in which by the Constitution chartered cities are given a power superior to that of the state Legislature, but that such power is subject to the general laws of the state, and ordinances inconsistent therewith are invalid."

It was there held that notwithstanding a provision in the charter of the city of Pasadena which delegated the power to regulate

traffic to the city, an ordinance passed for that purpose was in conflict with the general law and invalid.

Section 22, subd. (d), of the Motor Vehicle Act (St. 1919, p. 223), provides that—

"Limitations as to the rate of speed herein fixed shall be exclusive of all other limitations fixed by any law of this state or any political subdivision thereof. Local authorities shall have no power to enact, enforce or maintain any ordinance, rule or regulation in any way in conflict with, contrary to or inconsistent with the provisions of this act," excepting the regulation of traffic at street crossings or where traffic is heavy, of vehicles offered to the public for hire, of streets for the use of processions and assemblies, of traffic in cemeteries and parks, of vehicles used for carrying merchandise and freight, the use of trailers, the exclusion of heavily laden vehicles from particular streets or the declaration that they should be "one way" streets.

Section 2 of Ordinance No. 1857 (New Series) of the city and county of San Francisco provides that—

"Every person, riding, driving, propelling or in charge of any vehicle upon any of the streets, shall ride, drive or propel such vehicle upon such streets in a careful manner and with due regard to the safety and convenience of pedestrians and all other vehicles upon such streets."

Section 11, art. 11, of the Constitution, is as follows:

"Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

[2] It is necessary to determine whether the Legislature, by section 22, subd. (d), may lawfully restrict the local authorities in their control of traffic within their respective jurisdictions to the subjects enumerated therein. In Ex parte Daniels, supra, it is said that—

"The legislative declaration that 'local authorities shall have no power to enact, enforce or maintain any ordinance, rule or regulation in any way in conflict with, contrary to or inconsistent with the provisions of this act' amounts to no more than the similar constitutional declaration that general laws control municipal police regulations. (Const. art. XI, § 11.) If it were to be construed as an attempt to limit the power of local legislative bodies to pass regulations not inconsistent with such general law it would of course be unconstitutional."

It is further stated in the same opinion that "it cannot be doubted that the Legislature in enacting section 22 (d) with relation to the authority of municipalities to regulate speed intended to occupy the whole field of traffic regulation," and that "this legislation would seem to occupy the whole field of traffic regulation."

The Motor Vehicle Act being intended to cover the whole field of traffic regulation, any local ordinance on that subject in conflict with it would be unconstitutional and void without the declaration to that effect in the act. But if the Legislature had the power to enact the statute, intending it to cover the whole field of traffic regulation, it also had authority to make the exceptions enumerated in section 22, which amounted to a declaration that they should not be included in the general scheme of legislation. Section 22, subd. (d), must therefore be regarded as excluding such exceptions from the operation of the act. Such subjects being excepted from the field of regulation of the general law, local ordinances with respect to them are not in conflict with it. But conversely, other subjects, not so excepted, falling within the scope of the act, must be considered as included in its operation and may not be effected by inconsistent local ordinances. Viewed in this light, section 22, subd. (d), is a valid enactment and not an attempted statutory curtailment of the authority of the local legislative bodies. The ordinance involved in the case at bar does not fall within any of the exceptions to that subdivision.

[3] Section 20, subd. (a), of the Motor Vehicle Act, provides:

"The driver or operator of any vehicle in or upon any public highway shall drive or operate such vehicle in a careful manner with due regard for the safety and convenience of pedestrians and of all other vehicles or traffic upon such highway, and wherever practicable shall travel on the right-hand side of such highway." Stats. 1919, p. 215.

The section contains other subdivisions specifically providing certain rules of conduct on the part of drivers of vehicles, as, for instance, giving signals upon turning at intersections. It also regulates the speed of vehicles, fixing a general maximum limit and maximum limits for business and other closely built-up districts and for other localities such as crossings. Thus it prohibits the operation of vehicles in an unsafe manner at any time and declares that in particular contingencies a failure to follow the rules there laid down is unsafe. Ordinance No. 1857 (New Series) of the city and county of San Francisco prohibits the operation of vehicles in an unsafe manner, without defining what shall constitute an unsafe method of operation. It is at once apparent that the two laws prohibit the same acts.

In the case of In re Sic, 73 Cal. 142, 14 Pac. 405, wherein was involved an ordinance which was intended to prohibit opium dens, and which was substantially the same as a section of the Penal Code, it was said:

"It would seem that an ordinance must be conflicting with the general law which may operate to prevent a prosecution of the offense

under the general law. The Constitution provides that no one shall be twice put in jeopardy for the same offense. If tried and convicted or acquitted under the ordinance, he could not be again tried for the same offense under the general law. The contrary doctrine has been held in some states, but this conclusion seems more in consonance with reason and justice. * * * It will be observed that we only hold that there is a conflict where the ordinance and the general law punish precisely the same acts."

It was held in Ex parte Daniels, supra, that—

"If we seek to uphold the local legislation by concluding that it is not in conflict with the state law for the reason that the ordinance, as well as the state law, prohibits an unreasonable speed, we are met with the proposition that a local ordinance cannot prohibit exactly the same thing prohibited by the state law and still be valid."

It follows that section 2 of Ordinance 1857 (New Series) of the city and county of San Francisco is in conflict with the general law of the state, and therefore void under section 11, art. 11, of the Constitution.

[4] However, we are of the opinion that the prisoner is not entitled to his discharge, but that his conviction may be upheld under the provisions of the Motor Vehicle Act. As already pointed out, section 20 (a) of the Motor Vehicle Act and section 2 of Ordinance 1857 (New Series) prohibit the same acts. Section 83 of the ordinance provides a penalty for a violation of its provisions consisting of a fine of not more than $100 or imprisonment for not more than 50 days. Section 32 (a) of the Motor Vehicle Act (St. 1919, p. 225) provides that—

"Except as in this act otherwise provided, or where a different penalty is expressly fixed by this act, any person violating any of its provisions * * * shall be guilty of a misdemeanor, and upon conviction thereof, unless in this act otherwise provided, shall be punished by a fine not exceeding five hundred dollars or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

Certain specified acts are declared by the statute to be misdemeanors, others are made felonies and in addition to the punishment provided for a violation of its terms courts are empowered to suspend an operator's or chauffeur's license for a period of 30 days and such license may be revoked by the motor vehicle department. The penalty for the act in question in the case at the bar is provided by section 32 (a).

In the Matter of Rogers, 160 Cal. 764, 118 Pac. 242, the prisoner was arrested on a charge of violating the provisions of section 330a of the Penal Code, making it a misdemeanor to keep or maintain any mechanical device upon the result of the operation of which money or other valuable thing is staked or hazarded. The court said:

"The prisoner's machine, operated as it is manifestly designed to operate, is nothing more nor less than a lottery as defined in section 319 of the Penal Code, and by section 320 every person who contrives, prepares, or sets it up is guilty of a misdemeanor. And, so far as lawfulness of the imprisonment is concerned, it is of no consequence that a violation of section 330a was charged in the complaint, instead of sections 319, 320, under which the facts bring the offense."

This reasoning is equally applicable to the case at bar and the prisoner's conviction and detention under the Motor Vehicle Act entirely lawful if a commission of the offense there defined is charged by the complaint. In Ex parte Mansfield, 106 Cal. 400, 39 Pac. 775, the petitioner was convicted under a complaint of carrying on the business of selling liquor without having first procured a license so to do, contrary to ordinance number 124 of Butte county, which in section 1 required that such a license be procured and in section 5 provided that any one failing to procure such a license should be guilty of a misdemeanor. It was held section 1 was a valid exercise of the licensing power of the county, but that the penal provision of section 5, which was severable from the remainder of the statute, conflicted with section 435 of the Penal Code, which provides:

"Every person who commences or carries on any business, trade, profession, or calling, for the transaction or carrying on of which a license is required by any law of this state, without taking out or procuring the license prescribed by such law, is guilty of a misdemeanor."

The question was presented whether a crime was charged under section 435, inasmuch as the complaint did not follow the language of that section and only charged the commission of an offense under Ordinance No. 124. The court considered the common-law rule that in charging a statutory crime the conclusion of an indictment contra formam statuti is required, and it was held that the complaint was sufficient. It was there said:

"The defendant in this case was plainly informed of the nature of his offense. It consisted, in the language of the complaint, in carrying on the business of selling distilled, fermented, malt, vinous, and other spirituous liquors and wines without having procured a license so to do, contrary to the provisions of Ordinance No. 124 of Butte county, Cal., which ordinance is fully set forth. This was his alleged offense. If guilty of it he became amenable to section 435 of the Penal Code. * * * The essentials to a criminal complaint in a justice's or police court, as set forth in section 1426 of the Penal Code, do not include a conclusion to the statute. Expressio unius est exclusio alterius. As to complaints for misdemeanors in justices' and police courts at least,

the common law rule has been changed. The complaint in this case complies with the requirements of the law, and states a cause of action against the defendant."

[5] In this case the complaint charged that—

The prisoner "did willfully and unlawfully drive, ride, propel and operate said vehicle upon a certain Fell street, between Masonic avenue and Ashbury street, in the city and county of San Francisco, state of California, in a careless and reckless manner without due regard to the safety and convenience of pedestrians and other vehicles upon said street.

"Thereby violating the provisions of sections 2 and 83 of Ordinance No. 1857 (New Series) of the board of supervisors of the city and county, contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California."

While it was not in the exact language of the Motor Vehicle Act, it is in substance the same and could not have failed to inform the prisoner of the nature of his offense, and it clearly recited an act forbidden by the Motor Vehicle Act.

[6] It is urged on behalf of petitioner that the judgment is void in that in describing the misdemeanor of which the prisoner was convicted it omits to add the words "New Series" after the number of the ordinance. This is not a jurisdictional defect (Ex parte Turner, 75 Cal. 226, 16 Pac. 898), and in addition we are holding it is not a prosecution under the ordinance but one under the Motor Vehicle Act. The other specifications in support of the petition are without merit for the same reasons.

The writ is discharged and the prisoner remanded.

We concur: SHAW, C. J.; WILBUR, J.; WASTE, J.; LENNON, J.; WARD, J.

---

59 Cal. App. 734

## HOLMAN v. MUSSER. (Civ. 4341.)

(District Court of Appeal, First District, Division 2, California. Nov. 23, 1922.)

**1. Vendor and purchaser ⊜97—No forfeiture for nonpayment of installments on land contract where deed not tendered as required thereby.**

A contract for the purchase of real estate, providing that, if no objection to title was made, the balance of the purchase price was to be paid in a certain manner upon the delivery to the purchaser of a properly executed and acknowldged deed, and also providing that fire insurance, rents, and water rates were to be prorated as of date of the delivery of the deed, *held* to require the seller to deliver a deed of the property at the time the first of the installments became due, and hence no forfeiture could be declared for nonpayment where the seller had not tendered such a deed.

**2. Vendor and purchaser ⊜46—That construction of land contract is unusual held immaterial.**

That the construction placed upon a contract for the sale of real estate is unusual is immaterial.

**3. Vendor and purchaser ⊜46—Land contract must be construed if possible to avoid forfeiture of purchaser's deposit.**

Forfeitures are not favored in law, and a contract for the purchase of real estate must be construed if possible so as to avoid a forfeiture of the purchaser's deposit.

**4. Vendor and purchaser ⊜341(3)—Evidence held to sustain finding that purchaser had not abandoned contract so as to make tender of deed unnecessary.**

In an action to recover a deposit paid under a contract for the purchase of real estate claimed by the seller to have been forfeited for nonpayment of installments due, a finding that the purchaser had not announced an intention not to go on with the contract, so as to relieve the seller from tendering a deed, *held* sustained by the evidence.

**5. Vendor and purchaser ⊜334(6)—Vendor cannot insist upon forfeiture of deposit where he himself is in default.**

Where the parties to a preliminary contract for the purchase of real estate had agreed to execute a formal final agreement, the seller could not retain a deposit on the purchase money made at the time of the execution of the preliminary agreement on the ground of default in payment of installments where he himself was in default in failing to tender a deed within a given time.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by Everett A. Holman against Leo P. Musser. Judgment for plaintiff, and defendant appeals. Affirmed.

Ezra Cox, of Oakland, for appellant.

C. S. Morbio, of San Francisco, for respondent.

LANGDON, P. J. This action was brought by the plaintiff to recover $500, money paid by him on a contract to purchase from defendant certain real property in Oakland, Cal., on the ground that the defendant had abandoned and refused to perform said contract. The contract entered into between the parties was dated November 12, 1920, and was as follows:

"Received from Everett A. Holman the sum of five hundred dollars, being deposit on account of seven thousand nine hundred dollars, United States lawful money, the purchase price of the property this day sold to him subject to owner's approval, situate in city of Oakland, county of Alameda, state of California, and described as follows, to wit:

"House and lot located at 628 Capel St. sub-

ject however to certain repairs mentioned in letter Nov. 12th, 1920. Price offered by buyer, $7,900.00; $500.00 deposit this day paid, and the balance to be paid as follows: Fifty dollars on Dec. 1st, 1920, and fifty dollars or more on the 1st of each month thereafter including interest 7%. It is further agreed that $500.00 or more shall be paid on July 1st, 1921, and $500.00 more each six months thereafter.

"10 days from date hereof are allowed Byron S. Arnold Co. in which to secure owner's approval; 10 days additional are allowed purchaser to examine title to said property and to report in writing all valid objections thereto to Byron S. Arnold Co. at its office. If no such objections to title are so reported the balance of said purchase price shall be paid by said purchaser to said Byron S. Arnold Co. in the manner hereinabove specified, upon the delivery to said purchaser at said office of a properly executed and acknowledged grant, bargain and sale deed of said property.

"If any such objections to title are so reported sixty days are allowed seller to perfect title, and if, after the expiration of said term (unless extended by mutual consent) the title shall not have been perfected, said deposit shall be returned; otherwise said deposit shall be retained by the seller's agent.

"Taxes for the current fiscal year shall be prorated as from July 1st to July 1st; fire insurance, rents and water rates shall be prorated as of date of the delivery of deed.

"Time is of the essence of this contract.

"Byron S. Arnold Co.

"I hereby agree to purchase the property above described upon the terms and conditions hereinabove expressed. Everett A. Holman."

The foregoing contract was set out in the complaint, and it was alleged that Byron S. Arnold Company was the agent of the defendant; that the contract of purchase and sale was duly signed and ratified by the defendant; that plaintiff paid $500 in reliance upon said contract; that defendant never tendered to plaintiff any deed or conveyance of the title to said property, and that on December 16, 1920, defendant notified plaintiff that all his interest in said property was forfeited and the money paid upon the purchase price thereof was forfeited because of the nonpayment of $50 on December 1, 1920.

Defendant answered, and admitted the making of the agreement set out in the complaint; denied that the defendant failed to perform any conditions binding upon him; denied that the plaintiff had performed the conditions of his agreement, and specifically denied "that he (defendant) did not offer a good and sufficient deed or conveyance of the premises to the plaintiff." Consequently, the issue upon the trial was whether or not the defendant had performed his obligations under the contract, which resolved into the questions: Was defendant bound to offer to plaintiff a good and sufficient deed conveying the title to said property under the terms of the contract? and Did he do so? The answer to the first of the questions depends entirely upon the construction placed upon the contract hereinbefore set out. The plaintiff urged upon the trial court the equitable principles that forfeiture is not favored in the law and that a contract will be construed, if possible, so as to avoid a forfeiture.

[1] The trial court construed the contract as requiring the defendant to deliver to the plaintiff a deed to the property at the time the first of the installment payments became due and payable. The language justifying such a construction was:

"If no such objections to title are so reported (prior to December 2, 1920) the balance of said purchase price shall be paid by said purchaser to said Byron S. Arnold Company in the manner hereinabove specified (first installment payment due December 1, 1920), upon the delivery to said purchaser at said office of a properly executed and acknowledged grant, bargain and sale deed of said property."

The construction placed upon the contract by the trial court was further justified by the following clause in the contract:

"Taxes for the current fiscal year shall be prorated as from July 1st to July 1st; fire insurance, rents and water rates shall be prorated as of date of the delivery of deed."

As the trial court pointed out, if the deed was not to be delivered for several years, or until the last installment payment was made by the plaintiff, as contended by defendant, then, under the terms of the contract, the defendant would be charged with fire insurance premiums, rents and water rates until the time of the delivery of said deed. It is admitted by defendant's witness Arnold that an adjustment of taxes, insurance, etc., was insisted upon by him, as defendant's agent, as of a date prior to December 1, 1920. This fact is valuable in arriving at a construction of the contract, being the interpretation which the parties themselves placed upon it.

[2, 3] The fact that the construction placed upon the contract makes it an unusual one is immaterial. Parties are not bound to enter into the usual contracts, and there is no legal presumption that they will do so. The defendant was protected by his vendor's lien, but that circumstance is also immaterial. Forfeitures are not favored in law, and the trial court was bound to construe the contract, if possible, so as to avoid a forfeiture of plaintiff's deposit. Forfeitures will be avoided upon any reasonable showing. Knarston v. Man. L. Ins. Co., 124 Cal. 77, 56 Pac. 773.

[4] The only other matter urged by the appellant is that the evidence shows that the plaintiff announced an intention not to go on with the contract prior to December 1, 1920, and therefore the defendant was relieved from the necessity of offering him a deed on that date, but might rely upon the anticipatory breach by the plaintiff. It is argued that, in legal effect, the situation amounted

to a prevention of performance by the plaintiff. The trial court found that defendant was not prevented by any act of plaintiff from performing the terms and conditions of said contract. And this finding was supported by the evidence, for, while the testimony of defendant's agent was that the plaintiff stated, about November 22, 1920, that he would not go on with the contract, the testimony of plaintiff with regard to this matter is that, upon being told that he could not get back his deposit, he stated that he would go on with the contract, and he indicated his willingness and determination to go on with it by treating the property as his own, advertising it for sale, etc. As to these latter matters, he is corroborated by the testimony of defendant's agent. The record presenting a conflict of evidence upon this question, we are bound by the conclusion of the trial court.

It is also contended that the evidence shows that the contract set out herein was a preliminary agreement or deposit receipt, and that a further or final agreement was to be entered into between the parties which was to include all the terms and conditions of the sale of the property, and provide for the delivery of a deed at a time other than that mentioned in the preliminary agreement as construed by the trial court and by this court. Upon this phase of the case, it seems apparent that any final or more formal agreement must, necessarily, embody the terms set out in the preliminary agreement, even though additional ones were to be added. If the terms of this preliminary agreement, as construed by the trial court, are not binding upon the defendant so as to compel inclusion thereof in any more formal agreement concerning the subject-matter, assuredly none of its terms are binding upon the plaintiff. Defendant's only claim to the money in controversy is under the terms of the preliminary agreement. It is not provided that plaintiff should forfeit this $500 if he failed to agree upon the terms of a final agreement, and the validity of such a provision is not before us. If defendant is seeking to retain this amount as damages for plaintiff's alleged refusal to enter into the final formal agreement, defendant can only do so by showing that such an amount represents his actual damages, and, further, that the plaintiff was in default in refusing to execute the final agreement. To prove this latter point, it would be necessary for defendant to show that the final agreement offered by him to plaintiff conformed to the preliminary agreement as to the matters touched upon in the preliminary agreement. Levin v. Saroff (Cal. App.) 201 Pac. 961. This he failed to do. He also made no showing that he had been damaged in any amount by the plaintiff's failure to execute the final agreement. It appears that he resold the house, and, so far as the record shows, he may have received a substantially larger amount than the plaintiff was to pay for it.

[5] Conceding, therefore, that the parties had agreed to execute, later, a formal final agreement, and that the plaintiff refused to enter into such an agreement, defendant thereupon sought to hold plaintiff to the terms of the preliminary agreement, as he had a right to do. Levin v. Saroff, supra, and cases cited therein. He accordingly sought to retain the deposit made under the preliminary agreement. In holding plaintiff to the terms of the preliminary agreement, defendant must necessarily be bound thereby, and the rights of the parties, respectively, are determined with reference to its terms as such terms were construed by the trial court. In the light of such construction, the defendant was found to be in default by the trial court, because of his failure to furnish a deed. This was the important issue raised by the pleadings in the action. In this situation, defendant announced in writing to the plaintiff that he considered the contract at an end. This amounted to an abandonment of the same, and entitled the plaintiff to recover his deposit. In other words, the defendant may not hold the plaintiff to the terms of the preliminary agreement and retain his deposit made thereunder unless he is also held to a performance of the terms of such agreement. The interpretation of such agreement we have discussed heretofore herein.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

---

59 Cal. App. 776

## PEOPLE v. RYAN. (Cr. 1021.)

(District Court of Appeal, First District, Division 2, California. Nov. 24, 1922. Hearing Denied by Supreme Court Jan. 22, 1923.)

**1. Criminal law ⇐1134(3)—Court of Appeal on appeal by state held authorized to review order sustaining demurrer to information for violating the Medical Practice Act.**

Where a demurrer to an information for violating the Medical Practice Act has been sustained and the case dismissed pursuant to Pen. Code, § 1008, on refusal to amend, the Court of Appeal has power on appeal by the state to review the order sustaining the demurrer.

**2. Physicians and surgeons ⇐6(9)—Information for practicing medicine without license held not demurrable for failing to allege that patients were human beings.**

An information for violating the Medical Practice Act by treating "the sick and afflicted in this state" without having a certificate from the board of medical examiners *held* not demurrable because it failed to allege that the sick and afflicted were human beings.

Appeal from Superior Court, Santa Cruz County; Benj. K. Knight, Judge.

Al Ryan (as Al Rhyan) was charged with violating the Medical Practice Act. A demurrer to the information was sustained, and from an order of dismissal the People appeal. Reversed.

See, also, 207 Pac. 269.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

Lucas F. Smith, of Santa Cruz, Lucas F. Smith, Jr., of Los Angeles, and Stanford G. Smith, of Santa Cruz, for respondent.

LANGDON, P. J. This is an appeal taken by the people of the state of California from an order dismissing an action pursuant to section 1008 of the Penal Code, upon the failure of the district attorney to amend an information for misdemeanor, to wit, violation of Medical Practice Act (St. 1913, p. 722) filed against the defendant, to which information a demurrer had been sustained.

[1] Upon this appeal this court has power to review the order sustaining the demurrer. People v. Apple (Cal. App.) 206 Pac. 487.

The portion of the information material here is:

"The said Al Rhyan, on or about the 5th day of July, 1921, at and in the county of Santa Cruz and state of California, and before the filing of this information, willfully and unlawfully did practice, attempt to practice and advertise and hold himself out as practicing a system or mode of treating the sick and afflicted in this state, without having at the time of so doing a valid unrevoked certificate from the board of medical examiners of the state of California. * * *"

The trial court sustained the demurrer upon the ground that the information did not state a public offense, because it did not allege that the sick and afflicted upon whom the defendant is alleged to have practiced were "human beings."

In the cases of People v. Ratledge, 172 Cal. 402, 156 Pac. 455, People v. Poo On (Cal. App.) 192 Pac. 1090, and People v. Cochran (Cal. App.) 205 Pac. 473, indictments substantially identical with the one in the present case were approved. The case of People v. Cochran, supra, discusses the precise question involved here in the following language:

"The charging part of the information reads as follows: 'That the said A. D. Cochran on or about the 16th day of December, 1920, at and in the county of Los Angeles, state of California, did willfully, unlawfully and feloniously practice, attempt to practice, and advertise and hold himself out as practicing, a system and mode of treating the sick and afflicted in the state of California, without then and there having a valid unrevoked certificate, authorizing him to practice a system or mode of treating the sick and afflicted in the state of California, from the state board of medical examiners of the state of California.'

"The principal contention of the defendant and appellant is that the information does not state facts sufficient to constitute a public offense. Our attention is called to the fact that in addition to the Medical Practice Act * * * there is a statute in force in this state regulating the practice of veterinary surgeons. We think no person of common understanding could fail to know from a reading of the information that it charges the defendant with having treated sick and afflicted persons in violation of the Medical Practice Act rather than having violated the statute concerning the practice of veterinary surgeons. This information complies with section 950 of the Penal Code, in that it is fully sufficient to charge a public offense."

[2] The orders dismissing the action and sustaining the demurrer to the information are reversed.

We concur: STURTEVANT, J.; NOURSE, J.

---

60 Cal. App. 24

## APPLEGARTH v. WEINTRAUB.
(Civ. 4260.)

(District Court of Appeal, First District, Division 1, California. Nov. 29, 1922. Rehearing Denied Dec. 29, 1922. Hearing Denied by Supreme Court Jan. 25, 1923.)

**1. Sales ⟹149—Bill of sale held not to show that Liberty Bond given in consideration was permanent instead of temporary bond as understood by seller.**

A bill of sale of an automobile, reciting that the consideration was "Liberty Bond No. B 00096672 of the Fourth Liberty Loan * * * from which all interest coupons have been cut off and which does not mature until October 15, 1938," etc., *held* not to show that the bond was a permanent, instead of a temporary, one as understood by the seller, suing for possession; the description fitting either.

**2. Sales ⟹38(9)—Sale vitiated by buyer's failure to disclose fact that Liberty Bond given as part consideration was permanent bond.**

Where an automobile buyer, knowing that a Liberty Bond given as part consideration was a permanent bond from which he had detached all interest coupons, did not disclose such fact to the seller and a bank clerk, by whom it was appraised as a temporary one, and the seller promptly rescinded the contract on discovering the mistake, no title passed, the sale being vitiated by the buyer's deceit, by which the seller was misled to his injury.

**3. Replevin ⟹109—Judgment for possession of automobile or value thereof if delivery could not be had, and for damages for detention, construed.**

A judgment for possession of an automobile, or the value thereof, if delivery could not be had, and for damages for detention, construed as a judgment for damages for deten-

tion, if defendant returned the car, and for the value thereof at the time of the taking, if he failed to return it.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by George A. Applegarth against S. S. Weintraub. Judgment for plaintiff, and defendant appeals. Affirmed.

Hiram W. Johnson, Jr., and Carl E. Day, both of San Francisco, for appellant.

Keyes & Erskine, of San Francisco, for respondent.

ST. SURE, Justice pro tem. Plaintiff advertised his Dodge sedan automobile for sale for the sum of $750. Defendant sought to purchase, offering a Fourth Liberty Loan Bond of the par value of $500 on account of the price. Plaintiff not knowing what the bond was worth, both parties went to the Mercantile Trust Company, where plaintiff did his banking. The bond was exhibited to Mr. Ahnfeld, clerk in the bond department, and in the presence of plaintiff and defendant Mr. Ahnfeld stated that the bond was a "temporary" bond, worth about $480. Defendant knew at the time that the clerk had made a mistake when he stated the bond was a "temporary" bond. Defendant knew the bond was a "permanent" bond, as he had previously detached from it some 34 coupons and had used them in another transaction. Defendant knew that the bond, with coupons detached, was worth about $200 instead of $480. But he made no disclosures. The parties then went to plaintiff's office, where the deal was closed. Defendant delivered to plaintiff the Liberty Bond and a certified check for $240, and plaintiff delivered the automobile to the defendant, together with a bill of sale which recited that the consideration for the sale was "Liberty Bond No. B 00096672 of the Fourth Liberty Loan, and of the denomination of $500, and from which all interest coupons have been cut off and which does not mature until October 15, 1938, and the sum of $240, gold coin, etc. Next morning plaintiff went to the bank for the purpose of cashing the bond and was then informed that a mistake had been made; that the bond was not a "temporary" bond, as had been supposed, but that it was a "permanent" bond with all the semiannual coupons detached. Plaintiff and Mr. Ahnfeld went immediately to the residence of defendant, demanded the detached coupons or the return of the automobile, and offered to return the bond and the certified check. Both plaintiff and Mr. Ahnfeld testified that at this interview defendant said that he knew all of the time that a mistake had been made about the bond, but that he considered that he had done a good stroke of business, and he refused to accept a return of the bond and certified check and return the automobile to plaintiff, or to make good the value of the detached coupons. A policeman was then called, and all the parties went down to the Mercantile Trust Company and discussed the matter with Mr. W. B. Bakewell, vice president of the company. Mr. Bakewell in testifying said in part:

"I then suggested that if he (defendant) did not want to give back the car that he give Mr. Applegarth the coupons which had been detached from the bond. He stated he could not do that because he had used them in another deal, * * * and I asked him if he thought that was an honorable thing to do, and he said he thought it was good business. * * * I told him I thought he ought to be ashamed of himself for taking advantage of Mr. Applegarth."

From the testimony it appears that defendant claimed for the first time at the trial that he had agreed to purchase the automobile for $440 and that plaintiff was accepting the bond at $200, and that plaintiff knew it was a permanent bond.

An action in claim and delivery was commenced the day following the transfer of the automobile, and the sheriff was requisitioned to take the property. Defendant filed a bond and secured a return of possession. The action was tried by the court without a jury. Judgment was given and entered for possession of the automobile, or, in case delivery could not be had, for the value thereof, which was fixed at the sum of $650, and for $350 damages for detention, and costs of suit.

Findings usual in an action of claim and delivery were made, to the effect that plaintiff is the owner of the automobile; that it was unlawfully taken and detained; and that there were demand for return and refusal thereof.

The court further found:

"That it is not true that on the 21st day of December, 1921, for a good and valuable or good or valuable consideration or for any consideration paid by the defendant to the plaintiff or at all, said plaintiff sold and transferred or sold or transferred said automobile to the defendant herein; that on the last-mentioned date the plaintiff agreed to sell to the defendant and the defendant agreed to buy from the plaintiff the said Dodge car for the sum of $750 payable as follows: $240 in cash and the balance by a United States Fourth 4¼ per cent. Liberty Bond. Thereupon the said plaintiff signed and gave to the said defendant a bill of sale of said automobile and delivered possession of said automobile to said defendant and the said defendant gave the said plaintiff the said sum of $240 and a permanent Fourth Liberty Loan Bond maturing 1938, bearing interest at 4¼ per cent. with all the interest coupons detached; that plaintiff accepted the said permanent bond believing that it was a temporary bond and not knowing that it was the permanent bond with all the coupons detached; that the said defendant knew at all times that the said plaintiff was

making this mistake and said plaintiff gave the said bill of sale and the said automobile to the defendant solely on account of this mistake and would not have done so except for said mistake.

"That on the 22d day of December, 1921, and as soon as plaintiff discovered the said mistake he notified the defendant thereof, tendered and offered to return to the said defendant the said sum of $240 and the said permanent bond with the coupons detached and demanded the return of the said automobile; that said defendant refused and still refuses to return the said automobile to the plaintiff."

Defendant appeals upon the judgment roll and a transcript of the testimony. He asks for a reversal of the judgment upon the following grounds:

"(1) The bill of sale itself positively shows that plaintiff was to get a Liberty Bond, but was not to get any coupons.

"(2) Title passed to defendant under the bill of sale, and this action of replevin cannot be maintained in the absence of a showing of fraud.

"(3) There is a total absence of any showing of fraud. * * *

"(4) The damages allowed for depreciation was outside the issues and unauthorized."

[1] 1. The description of the bond given in the bill of sale fits either a "temporary" or a "permanent" bond. A photograph of the bond involved in the litigation is attached to the record as an exhibit. An inspection of it shows how easily one might be mistaken as to its classification. Indeed, the evidence is undisputed that the bank clerk made such a mistake.

[2] 2, 3. Accepting the findings of the trial court as true and fully supported by the evidence, we are unable to agree with the contention of defendant that there was a "total absence of any showing of fraud." In its findings the trial court describes the conduct of defendant and says, in effect, that such conduct induced plaintiff to give the bill of sale. The bond transaction is called a mistake. It seems to us immaterial how the transaction is labeled. The suppression of facts by the defendant at the time the Liberty Bond was examined and appraised at the bank misled plaintiff to his injury. Inherent in every business transaction should be that sincerity which insures fair dealing between parties. Defendant's conduct in the premises was the very essence of deceit and vitiated the sale. Plaintiff promptly rescinded. No title passed to the vendee through the bill of sale under such circumstances. Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 412, 95 Pac. 1029.

[3] 4. We adopt the construction given the judgment by plaintiff. It is stated in his brief as follows:

"The judgment under consideration means that if defendant returns the automobile plaintiff may have judgment for $350 damages for detention, and if defendant fails to return the automobile plaintiff may have the value thereof at the time of the taking, to wit, $650."

And we are of opinion that such a construction is sustained by the decision of this court in the case of Morris v. Allen, 17 Cal. App. 684, 121 Pac. 690.

The judgment is affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

---

(59 Cal. App. 785)

## PEOPLE v. McMILLAN. (Cr. 639.)

(District Court of Appeal, Third District, California. Nov. 27, 1922.)

**1. Criminal law ⇐1166½(8) — Overruling challenge of juror for cause, subsequently peremptorily challenged, without showing that any juror unsatisfactory, held insufficient to warrant reversal.**

Where after the challenge of accused of a juror for cause had been overruled, he was challenged peremptorily by accused, who thereafter exhausted his 10 peremptory challenges, and it did not appear that any juror who served on the trial was unsatisfactory to accused, the ruling on the challenge for cause is not enough to warrant reversal.

**2. Witnesses ⇐318—Evidence of reputation of accused for truth and honesty and for peace and quiet held properly rejected.**

In a prosecution for rape, where no element of force or violence was involved, and no attempt made to impeach accused as a witness, evidence of his reputation for truth, honesty, and integrity and for peace and quiet was not admissible to show accused worthy of belief, on the ground that his testimony had been squarely contradicted by the prosecutrix.

**3. Witnesses ⇐318—Reputation of witness for truth inadmissible until challenged by evidence of party against whom he has testified.**

The reputation of a witness for truth cannot be supported by evidence until it has been challenged by evidence produced by the party against whom he has testified.

**4. Criminal law ⇐379—General reputation of accused for traits of character involved in charge against him admissible.**

Evidence of the general reputation of accused for traits of character involved in the charge against him is admissible.

**5. Rape ⇐42—Traits of character involved for which evidence admissible on reputation of accused, virtue, chastity, and morality.**

The traits of character admissible in support of the reputation of accused, charged with rape, are virtue, chastity, and morality, and he could not give evidence of general reputation for integrity, peace, and quiet.

**6. Rape ⊜59(3)—Charge that conviction may be had on uncorroborated testimony of prosecutrix of satisfying jury beyond reasonable doubt held proper.**

An instruction that a conviction is warranted in a prosecution for rape upon the uncorroborated evidence of the prosecutrix, if it creates in the minds of the jury a satisfying conviction and belief, beyond a reasonable doubt, of the guilt of accused, *held* proper.

**7. Criminal law ⊜1172(1)—Truism by court in concluding correct instruction held not prejudiced.**

The remark by the court, after concluding correct instruction, that, if the instruction was not the rule, many offenses of such character would go unpunished, was a mere truism or commonplace, within the knowledge of all the jurors, and, if argumentative, was not prejudicial.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

John McMillan was convicted of rape, and he appeals. Affirmed.

Thomas H. Selvage and E. S. Selvage, both of Eureka, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant appeals from the judgment of conviction herein of the crime of rape upon a girl of the age of 14 years and from the order denying his motion for a new trial.

[1] Appellant contends that the court erred in denying defendant's challenge for cause interposed to one of the jurors on the ground of actual bias. The juror was subsequently challenged peremptorily by defendant. He thereafter peremptorily challenged other jurors, and exhausted his ten peremptory challenges, but it does not appear that any juror who served on the trial was unsatisfactory to defendant. The facts are similar to those in the case of People v. Schafer, 161 Cal. 573, 576, 119 Pac. 920, 921, where it is said:

"While the record shows that the defendant did subsequently exhaust his 10 peremptory challenges, it does not appear that he had occasion or desire to use an additional peremptory challenge, or that each and all of the 12 jurors finally accepted and sworn were not entirely satisfactory to him. * * * This is not enough to warrant reversal for error in the ruling on the challenge for cause." To the same effect is the holding in People v. Kromphold, 172 Cal. 512, 157 Pac. 599. In view of the authorities cited it is unnecessary to decide whether the ruling was error.

[2-5] The court sustained objections to evidence of defendant's reputation for truth, honesty, and integrity and for peace and quiet. No element of force or violence was involved in the charge, and no attempt had been made to impeach defendant as a witness. Appellant argues that, since the defendant squarely contradicted the testimony of the prosecutrix, the evidence offered was highly important to show that he was worthy of belief. The reputation of a witness for truth, however, cannot be supported by such evidence until it has been challenged by evidence produced by the party against whom he has testified. Evidence of his general reputation for traits of character involved in the charge against him may, of course, be given, but the evidence offered did not relate to such traits. The traits of character involved in a charge such as this are virtue, chastity, and morality. State v. Snover, 63 N. J. Law, 332, 43 Atl. 1059; State v. Brady, 71 N. J. Law, 330, 59 Atl. 6; State v. Thompson (Utah) 199 Pac. 161. Evidence of general reputation for peace and quiet is not admissible. Wistrand v. People, 218 Ill. 323, 75 N. E. 891. See, generally, People v. Fair, 43 Cal. 138; People v. Burke, 18 Cal. App. 72, 122 Pac. 435; People v. Romero (Cal. App.) 207 Pac. 933; People v. Thomas, 208 Pac. 343; State v. Bloom, 68 Ind. 56, 34 Am. Rep. 248. The court refused to give an instruction proposed by the defendant to the effect that evidence of the nature offered to establish the good character of defendant was pertinent to the issue of guilt or innocence. Under the foregoing authorities, it is clear that the ruling was not error.

[6] The court gave the following instruction:

"You are instructed that it is your province to determine the weight and credibility to be given the testimony of a female upon whom it is alleged in an information that a rape has been committed, and who testifies to the facts and circumstances of such rape as of any other witness testifying in the case. And if such testimony creates in the minds of the jury a satisfactory conviction and belief, beyond a reasonable doubt of the defendant's guilt, it is sufficient of itself without other corroborating circumstances or evidence to justify a verdict of guilty of rape upon the trial of the case. If this were not the rule, it is quite clear that many offenses of this character would go unpunished."

[7] With the exception of the last sentence thereof, the instruction has been often approved and it correctly states the law. The last sentence is not a statement of law, but of a mere commonplace, or truism, within the knowledge of all jurors. The district attorney, in his argument to the jury, doubtless made the same statement, and its truth is self-evident. While the statement may be said to be argumentative, it is highly improbable that any juror was influenced thereby.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

59 Cal. App. 753

## HOLLMAN v. WOLF. (Civ. 4265.)

(District Court of Appeal, First District, Division 1, California. Nov. 24, 1922. Hearing Denied by Supreme Court Jan. 22, 1923.)

**1. Appeal and error ⟹1140(3)—Case proper one for disposition on appeal.**

Where the error in findings of fact in action for partnership accounting was purely clerical, and awarded judgment for plaintiff in an amount greater than he was entitled to, and which he consents to modify, it was a proper case for affirmance on condition of remittitur.

**2. Costs ⟹238(2)—Defendant not attempting to get relief from clerical error in finding assessed with costs of appeal.**

Where, in an action for partnership accounting through clerical error in findings, plaintiff was awarded a judgment in an amount greater than entitled, and defendant made no attempt to get relief in the court below, costs of appeal will be assessed to him.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action for accounting by F. W. Hollman against A. C. Wolf. From a judgment for plaintiff, defendant appeals. Affirmed on condition of remittitur.

Arthur W. Bolton, of San Francisco, for appellant.

Walter H. Linforth and Samuel M. Samter, both of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment in favor of the plaintiff for the sum of $2,326.01.

Plaintiff and defendant entered into a copartnership about June 1, 1906, for the purpose of carrying on a real estate business. The articles of copartnership drawn up at that time specified that all expenses, gains, profits, and increase growing out of said business should be divided between the partners, share and share alike. However, during the continuance of the partnership, first one partner, the defendant, withdrew more money from the common fund than the plaintiff, and later on the plaintiff drew more than the defendant. A trial balance prepared by the bookkeeper of the firm June 30, 1919, showed a balance due the defendant of $434.25 and an overdraft of the plaintiff in amount of $1,170.75. It was shown that this result was reached by ignoring all entries in the books of the firm up to and including the end of the year 1914, during which time the overdrafts of the defendant occurred. This was done on the theory that at that time the partners struck a balance, and thereafter made a readjustment of the net profits. The plaintiff in turn insists that from the beginning the defendant withdrew more money than plaintiff, due to the fact that he was a married man and required more money, and that an oral agreement was entered into that the first $400 profits was to be divided in the proportion of $225 to defendant and $175 to plaintiff, and that, when the profits of the business justified, the difference in withdrawals would be adjusted. This arrangement is alleged to have continued until some time in 1910. Taking this version of the agreement, the excess of profits drawn by defendant over that of plaintiff is $4,043.02, one-half of which is $2,021.51, or $304.50 less than the amount found by the court to be due plaintiff. Plaintiff concedes the amount allowed by the court to be $304.50 too much, and consents to a reduction of the amount of the judgment to that extent.

The court found that the partnership was created in June, 1906, and continued until May 29, 1917, when it was by mutual assent dissolved; that during that period the defendant appropriated from the partnership funds an amount in excess of that taken by plaintiff, equal to $4,652.02, due to the fact that during the latter part of 1908, all of 1909 and 1910, the defendant was given $225 out of the first $400 profits each month; that it was never agreed but that there should be an equal division of the profits, and the difference between the aforesaid amounts would be adjusted at a later date and the overdrafts would be made good to plaintiff.

Some question was raised about a nickelodeon business in which the partners were interested, and in which the defendant alleged the plaintiff spent all his time for a considerable period. The court found on this question that the partners were jointly interested in the nickelodeon, and that the real estate business was also conducted for the benefit of both.

The court also found that the trial balance hereinbefore referred to, and which showed an overdraft against the plaintiff, was prepared by the bookkeeper, solely at the instance of the defendant, and that said trial balance was not true or correct, and did not show the true condition of the account between the parties; that a true and correct account had been prepared from the inception of the partnership to its dissolution, showing therein the entire profits of the copartnership during the entire period, and that the same showed that defendant had drawn $4,652.02 more than had the plaintiff. As conclusions of law from the foregoing findings the court found that plaintiff was entitled to have and recover from defendant the sum of $2,326.01, and judgment was rendered accordingly.

The first contention of the appellant is that the judgment is not supported by the findings in relation to the amount thereof. The respondent concedes that the judgment is for too large a sum, due to a clerical error of the

trial court, and consents that the judgment be modified so as to reduce the amount thereof by $304.50. However, this admission disregards another clerical error in plaintiff's favor, to the extent of $100, which we find exists in the addition of the amounts drawn by Hollman in the year 1908, as shown by his account. It is evident, therefore, that the amount of the judgment of the trial court should be reduced by $404.50. This would make the amount due $1,921.51.

The next contention of appellant is that the findings and judgment are not supported by the evidence, and in support of this contention attempts to show that there were three different methods of keeping the books during certain periods of the life of the partnership, and that as far as the personal accounts of the partners were concerned there must have been a different amount of compensation during those periods. However, taking into consideration the articles of copartnership having reference to the distribution of profits, there seems to be no contract or change sufficient to show otherwise than what the court found.

Appellant urges that the findings are contradictory, in that they find that the partnership was carried on under the original articles, and then finds to the contrary as to the division of the profits. There is no inconsistency in the findings; the court found that this arrangement was temporary, and not intended to change the original articles of agreement.

The finding that there was no accounting between the parties is assailed as not being supported by the evidence; the contention being made that there was an accounting in 1914, and also that the 1917 trial balance should therefore not be excluded. There is no sufficient evidence to support this contention, and we feel the finding of the court to the contrary in this particular should not be disturbed.

[1, 2] The question of costs is interjected into the case. It is conceded that the judgment must be modified, but whether such modification would place the burden of costs on respondent is the question. Respondent insists that the well-settled rule is that when a judgment is for a larger amount than it should have been, and respondent consents to a modification thereof, the appellate court will make the modification and affirm the judgment as thus modified. Respondent also insists that the error of $304.50 being purely clerical, and made by the court itself in its calculations, is one which the court below, if the matter was brought to its attention, would have corrected, and to which respondent would then have consented. The error in addition could also have been taken care of at the same time. The appellant insists, however, that the mistake is more than clerical, and that in order to arrive at the figures of respondent this court must exercise some of the functions of the trial court in an accounting. However, this is not the main point of appellant's case; it is only incidental, since he strenuously insists that the trial court erred in its conclusions, and that the proper judgment should show a balance in favor of defendant of $725. In disagreeing with this conclusion we feel that this is a proper case for the modification of the judgment, the record showing that the rights of the parties can best be determined in this manner (Fox v. Hale & Norcross, 122 Cal. 221, 54 Pac. 731; Atherton v. Fowler, 46 Cal. 320; Perine v. Lewis, 128 Cal. 241, 60 Pac. 422, 772; State Loan & Trust Co. v. Cochran, 130 Cal. 247, 62 Pac. 466, 600; McConnell v. Corona City Water Co., 149 Cal. 64, 85 Pac. 929, 8 L. R. A. [N. S.] 1171; Pearsall v. Henry, 153 Cal. 315, 95 Pac. 154, 159), and that it is also a proper case for the assessment of the costs to the appellant, since he made no attempt to get relief in the lower court (Tryon v. Sutton, 13 Cal. 490, 491; Cassin v. Marshall, 18 Cal. 689; Noonan v. Hood, 49 Cal. 293; Behlow v. Shorb, 91 Cal. 145; 27 Pac. 546; Cutting Fruit Packing Co. v. Canty, 141 Cal. 693, 75 Pac. 564).

The conclusion of this court is that the judgment should be reduced in the amount of $404.50. If the respondent shall within 15 days from the date of filing this opinion file in this court a remission of the sum of $404.50 from said judgment, the judgment, as thus modified, will be affirmed; otherwise the judgment will be reversed. It is so ordered.

---

59 Cal. App. 740

## PEOPLE v. WOODS. (Cr. 904.)

(District Court of Appeal, Second District, Division 2, California. Nov. 23, 1922. Hearing Denied by Supreme Court. Jan. 22, 1923.)

**1. False pretenses ⟹4—Defendant receiving checks charged against witness held guilty of obtaining money, though another may have received the money.**

In a prosecution for obtaining money under false pretenses, evidence that checks obtained by the accused by misrepresentations were charged against the bank account of the complaining witness, though it did not appear who received the money, was sufficient, under Pen. Code, § 532, denouncing obtaining money by false pretenses, so that evidence that accused, in making misrepresentations as to real property for which the checks were given, acted as the agent of another, and received only a commission on the sale, did not warrant a requested instruction that, unless the check was cashed by him and he received the money, he was not guilty.

**2. Criminal law ⟸829(1)—Refusal of instructions covered by others not error.**

In a prosecution for obtaining money under false pretenses, a refusal to give instructions asked by the accused, the ground of which was covered by other instructions, was not error.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

J. K. Woods was convicted of obtaining money by false pretenses, and he appeals. Affirmed.

W. T. Kendrick, Jr., L. W. Blodgett, and Victor H. Kendrick, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

WORKS, J. Defendant appeals from a judgment convicting him of the crime of obtaining money under false pretenses.

[1] The information under which appellant was prosecuted alleged that he had obtained from the prosecuting witness in the case, pursuant to certain fraudulent misrepresentations he had made to her, a certain sum in lawful money of the United States. The evidence showed without dispute that he had received from her two checks which totaled the amount alleged. Appellant contends that the trial court erred in refusing to instruct the jury:

"That unless you believe from the evidence that the check [sic] which was given to the defendant * * * was cashed (by the defendant) and that the defendant received the money, then you will find the defendant not guilty."

This instruction was doubtless requested for the reason that there is in the record some evidence tending to show that appellant was not the owner of the real property which was the subject of his misrepresentations, that he sold it to the complaining witness as the agent of a third party, and that he received merely a commission for making the sale. The requested instruction, however, does not correctly state the law. The fact that appellant was only an agent and that the purchase price was not received by him, if it were a fact, was immaterial. In prosecutions for obtaining property under false pretenses it is not necessary that the property "be obtained by the accused for himself," but "it is sufficient if, induced by his false representations, it is delivered to another, either for the benefit of that other or for accused's benefit." 25 C. J. 606. Section 532 of the Penal Code, denouncing the crime of obtaining money by false pretenses, contains nothing inconsistent with this statement of the effect of the decided cases.

There was here undisputed evidence showing that the two checks were cashed and charged against the account of the complaining witness at her bank, although it does not appear who got the money. This was all that was necessary, even if that much were required (People v. Hutchings [Cal. App.] 205 Pac. 480), speaking in view of the fact that the charge against appellant was for obtaining money.

[2] Appellant insists that the trial court erred in refusing to give two other instructions requested by him, but it is palpable that the ground covered by the two was also covered by instructions that were given. This is so plain to us that we do not further discuss the two questions presented.

Several other points are first made by appellant in his closing brief. It has been determined many times that points so made will not be considered.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

59 Cal. App. 778

## DICKSON v. PARKER. (Civ. 4168.)

(District Court of Appeal, First District, Division 1, California. Nov. 25, 1922.)

**1. Justices of the peace ⟸75(2)—Demurrer properly sustained to complaint of cause erroneously transferred to circuit court.**

Where a cause was erroneously transferred by a justice of the peace to the circuit court, and the complaint upon its face showed that the justice had no jurisdiction of the subject-matter of the action, a demurrer was properly sustained.

**2. Appearance ⟸9(2)—To test jurisdiction, not general appearance giving jurisdiction on merits.**

An appearance to object to the jurisdiction of the court was not a general appearance, and gave the court no jurisdiction on the merits of the case.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by J. E. Dickson against Tenia Parker. From a judgment for plaintiff, defendant appeals. Reversed.

C. K. Bonestell, of Fresno, for appellant.

Geo. G. Graham, of Fresno, for respondent.

ST SURE, Justice pro tem. This is an appeal from a final judgment, and included in the appeal is a review of an order of the trial court refusing to quash service of summons. This court on June 23, 1922, affirmed the judgment. Rehearing was granted.

The respondent leased to the appellant certain real property at an agreed rental of $250 per month. Default being made in the pay-

ment of rent, the respondent gave notice, in conformity with the terms of the lease, that the estate of the appellant was terminated and thereafter commenced this suit in a justice's court. The appellant demurred therein to the complaint. The demurrer was sustained. Thereafter the justice erroneously transferred the cause to the superior court. After the filing of the papers in the clerk's office, that official issued a summons to the appellant, requiring her to appear and answer the complaint within three days, instead of the usual ten. This summons was served upon the appellant, and in due course, no answer having been filed, a judgment by default was entered against her. Thereafter she moved the court for certain relief. This motion is stated in the bill of exceptions in the following words:

"That on the 7th day of July, 1921, defendant, by her attorney, orally moved the court to set aside the default and the said judgment upon the ground that the court had no jurisdiction of the person of the defendant because there was no complaint properly on file in the above court and because the complaint that was on file therein did not state a cause of action against the defendant for forcible detainer, or any cause of action wherein the defendant might be brought into court on service of a summons requiring her to appear within three days after service of the same."

Subsequently the appellant filed in the case a written notice of motion to quash the summons, and she assigned the following grounds as the basis of the motion:

"(1) That there was no complaint properly on file with the clerk in the above-entitled court upon which to base the issue of a summons. (2) That said summons required defendant to appear within three days instead of ten days as required by law."

The court denied the motion on the ground, probably, that the special appearance waived the objection to the form of the summons. The appellant declined to avail herself of the opportunity afforded by the court to file an answer within the period of ten days, and, in due course, her default was entered, and judgment was entered against her.

[1] We are of the opinion that the motion to quash the summons should have been granted. The complaint filed in the justice's court clearly showed upon its face that the justice's court had no jurisdiction of the subject-matter. The demurrer interposed was properly sustained, and the action should have been dismissed. Shealor v. Superior Court, 70 Cal. 564, 11 Pac. 653; Ballerino v. Bigelow, 90 Cal. 500, 27 Pac. 372; Hoban v Ryan, 130 Cal. 96, 62 Pac. 296; Null v Superior Court, 4 Cal. App. 207, 87 Pac. 392, Bates v Ferrier, 19 Cal. App. 79, 124 Pac. 889. The action was dead, and the erroneous transfer of the pleadings in the case by the justice to the superior court and the subsequent filing of same in the office of the county clerk did not resurrect it. "The mode in which the jurisdiction of a court may be invoked is regulated by the Legislature." Raisch v. Sausalito Land Co., 131 Cal. 215, 63 Pac. 346; McAllister v. Tindal, 1 Cal. App. 236, 81 Pac. 1117. Section 838 of the Code of Civil Procedure provides under what circumstances and how an action shall be transferred from the justice's court to the superior court.

[2] Each time appellant appeared before the superior court she objected to its jurisdiction. Contention is made that in voicing her objection she used language which constituted an appearance in the action and thus conferred jurisdiction upon the court. With such contention we cannot agree. We think the record fairly shows that appellant never intentionally submitted herself to the jurisdiction of the court "for the purpose of obtaining any ruling or order going to the merits of the case." Davenport v. Superior Court, 183 Cal. 506, 191 Pac. 911.

The judgment is reversed.

We concur: TYLER, P. J.; KERRIGAN, J.

---

59 Cal. App. 772

## GANZ v. J. D. & A. B. SPRECKELS SECURITIES CO. (Civ. 4176.)

(District Court of Appeal, First District, Division 1. California. Nov. 24, 1922. Rehearing Denied Dec. 23, 1922. Hearing Denied by Supreme Court, Jan. 22, 1923.)

**Brokers ⟸86(8) — Finding that defendant agreed to pay extra commission on sale of sugar not sustained by evidence.**

In a broker's action to recover commission alleged to have been earned in the consummation of a sale of sugar by defendant to a third party, evidence *held* insufficient to sustain a finding that defendant agreed to pay a commission greater than 2 cents per 100 pounds.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Frederick M. Ganz against the J. D. & A. B. Spreckels Securities Company, a corporation doing business under the firm name and style of the Western Sugar Refinery. Judgment for plaintiff, and defendant appeals. Reversed.

Morrison, Dunne & Brobeck and Edward Hohfeld, all of San Francisco (H. A. Judy, of San Francisco, of counsel), for appellant.

Grover O'Connor, of San Francisco (Goodfellow, Eells, Moore & Orrick, of San Francisco, of counsel), for respondent.

PER CURIAM. This is an action to recover from the defendant a commission, al-

leged to have been earned by plaintiff in the consummation of a sale of sugar by the defendant to one C. F. Buelow.

The plaintiff is a broker, and was engaged at the time of the transaction out of which this suit arose in consummating sales of beans, walnuts, and peanuts, and who, during 1920, at which time sugar was a valuable and scarce commodity, also engaged in the sugar brokerage business. The defendant was engaged in the business of refining sugar and selling the same in its refined state through a firm in San Francisco, paying therefor on all such sales a commission of 2 cents per 100 pounds, which fact, it is alleged by the defendant, plaintiff well knew.

Early in 1920 the plaintiff called on W. H. Hannam, general manager of the defendant company, and introduced as his agent in charge of his sugar department one L. W. Goeppert. Plaintiff at that time sought to buy from defendant some raw sugar. This was refused upon the ground, as stated by Hannam, that the defendant, Western Sugar Refinery, was a buyer, not a seller, of raw sugar. On June 21, 1920, subsequent to the visit aforementioned, Goeppert again called on Hannam, bringing with him one C. F. Buelow. It was represented to Hannam that Buelow was very anxious to buy 430 tons of raw "Java" sugar. The sugar was wanted in certain peculiar lots and tonnages, and had to be delivered by a specific date, which was close at hand, thus accounting for the anxiety felt by Buelow and Goeppert. Hannam again advised them that the firm did not sell raw sugar, but that he would, as a matter of accommodation, endeavor to match up the lots. This was done, and upon the occasion of the next call of Buelow and Goeppert the former brought with him a draft of contract for the sale of the sugar in question. The record is silent as to whether or not said contract contained any provision relating to a commission, but it appears that Hannam was not satisfied with the contract, and changed certain portions thereof.

Rabjohn, the assistant sales manager of the defendant company, was also present at the time of signing the contract, and when said contract was entirely written to be submitted to the parties for signature, Goeppert inquired of Rabjohn: "Where do I come in?" Rabjohn replied that Goeppert being a stranger to him, he knew nothing of it, and suggested taking the matter up with Hannam. This was done, the result being that Hannam in no uncertain terms stated that no commission would be paid, that the Western Sugar Refinery Company was making the deal as an accommodation, had not solicited the business, and was not going through with the deal under those circumstances. This was evidently the first intimation Hannam had that Goeppert sought a commission. The happenings at this time constitute the main bone of contention. Goeppert was, in his own words, "in a box, and the sugar was necessary and needed by Buelow" so that when Hannam stated that: "We won't pay a commission of 1 per cent.; we won't pay a commission of any kind;" and then upon second thought said: "We are in business here in San Francisco. We make it a point to try to get along with our customers without any friction and without any misunderstanding. I thought there was nothing in this except the matter of accommodation to you, but inasmuch as we pay brokerage in San Francisco, 2 cents on 100 pounds, which is the amount we pay month in and month out, * * * we will pay you the same commission." Goeppert was nonplussed, and replied: "I don't know what Mr. Ganz will think of that." Hannam replied that he did not care what Ganz thought, and said: "You will either accept right now, or I will tear the contract up and kiss the sale good-bye." There is a conflict as to the remaining portion of this conversation, Hannam and Rabjohn insisting that Goeppert accepted the 2 cents per 100, and Goeppert, in turn, stating that he insisted he could not accept any reduction. Buelow's testimony was taken by deposition, and his version was that nothing further was said after Hannam repeated his statement that he would not pay 1 per cent. Hannam's testimony indicated that after announcing his stand he said, "Shall I sign?" intimating that he desired an answer to his proposal and Goeppert said, "Sign." This is also testified to by Goeppert.

With the issues thus framed the cause was submitted to the jury, which returned a verdict in favor of plaintiff for $1,913.50. Judgment was accordingly given for that amount, from which judgment defendant prosecutes this appeal.

Defendant's chief contention is that the evidence is insufficient to justify or support the verdict of the jury. Except for the variance in the testimony of the witnesses on the question as to whether or not Goeppert accepted or refused the terms as laid down by Hannam the evidence is in substantial agreement. It is agreed that Buelow was brought to Hannam unsolicited, and that Goeppert and Buelow were told at that time that the Western Sugar Refinery was a buyer, not a seller, of raw sugar. However, Hannam testified that they seemed to be very anxious to get the sugar, and he agreed to sell. Nothing further appears with reference to a commission until the contract was ready for signature, at which time the commission feature was interjected into it. Goeppert himself testified that a brokerage clause was "usually" in the contract, and undoubtedly, standing on custom as he does, should have insisted upon it. Buelow, in his deposition—not cross examined—testified that he said to Goeppert, after the signing of the contract:

"I told Mr. Goeppert that he had been of some service to me, and I would be glad to pay him something for his services."

From this testimony of Buelow but one reasonable conclusion can be drawn, and that is that there had been no understanding on the part of the agent that any larger commission was to be paid than the 2 cents per 100 pounds, and that for that reason Buelow was willing to grant to the broker a portion of the commission which he had failed to receive from the company. This leaves only the testimony of Goeppert for our consideration which is to the effect that he (Goeppert) stated that he could not accept anything but the regular commission, and signed the contract under pressure, as above indicated. We do not regard that mere statement as sufficient to constitute a positive demand for the payment of the commission, and, as it would seem to be the fact that Hannam would not have entered into the contract unless Goeppert had accepted his gratuitous offer, we feel that the signing of the contract by Goeppert was an acceptance of the terms laid down by Hannam. Therefore we consider the evidence insufficient to sustain the verdict and judgment of the trial court.

The judgment is reversed.

---

60 Cal. App. 48

## O'MALLEY v. CARRICK et al. (Civ. 4336.)

(District Court of Appeal, First District, Division 1, California. Dec. 1, 1922. Hearing Denied by Supreme Court Jan. 29, 1923.)

**1. New trial ⊜138—Administratrix's interest in result of setting aside verdict against estate held not to require that she be served with notice of codefendant's intention to move for new trial.**

That setting aside a verdict against two codefendants as administrator and administratrix of an estate and granting a new trial might result in additional expense to the estate *held* insufficient on which to predicate injury to the administratrix, who admitted the allegations of the complaint, but did not join with plaintiff in asking the relief claimed, so as to require that she be served with notice of the administrator's intention to move for a new trial, as the immediate result would be beneficial rather than adverse to her interest as administratrix, though she was personally satisfied with the verdict.

**2. New trial ⊜66—Errors in refusing and giving instructions do not make verdict against law.**

Errors in refusing and giving instructions do not make the verdict one against law, under Code Civ Proc. § 657, subd. 6, making that one of the grounds for new trial specified in the act, but are "errors of law occurring at the trial" referred to in subdivision 7

**3. Appeal and error ⊜856(5)—Order granting new trial on only ground alleged in motion not upheld unless sustainable on such ground.**

An order granting a new trial on a particular ground will not be upheld if not sustainable on such ground, though sustainable on other grounds, where the motion was made on that ground only.

**4. Appeal and error ⊜662(1)—Record cannot be contradicted by matter in brief.**

The appellate court is bound by the record on appeal, and cannot permit it to be contradicted by matter in the brief.

**5. Attorney and client ⊜92—Counsel's statement that motion was based on one ground only held waiver of other grounds where record showed no dissent by other counsel.**

Where counsel presenting a motion for new trial stated in open court that the only ground on which the motion was based was that the verdict was against law, all other grounds enumerated in the motion were waived, though there were other counsel for movant, where the record contained nothing indicating dissent on their part.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Mary J. O'Malley against James Carrick and another, as administrator and administratrix of the estate of Catherine Ross, deceased. Verdict for plaintiff, and from an order granting a new trial, she appeals. Reversed.

George D. Collins, Jr., of San Francisco, for appellant.

T. G. Crothers, Wm. M. Abbott, K. W. Cannon, Wm. M. Cannon, and I. M. Golden, all of San Francisco, for respondents.

KERRIGAN, J. The plaintiff having recovered a verdict against the defendants as administrator and administratrix of the estate of Catherine Ross, deceased, the defendant James Carrick served and filed a notice of intention to move for a new trial. His codefendant, being satisfied with the verdict, did not join in the motion. The motion was granted, and the plaintiff appeals from the trial court's order thereon.

[1] The first ground urged in support of the appeal is that the trial court was without jurisdiction to entertain the motion for a new trial for the reason that the moving party's codefendant was not served with the notice thereof. In making this point it is admitted by the appellant that it is only those parties to the action or proceeding whose interest would be adversely affected by the granting of the motion for a new trial who need be served with the notice thereof; but he argues that the interest of said Catherine Nicholson would be so adversely affected, for the reason that she, being an

administratrix of the estate of the deceased, had the right, if she were satisfied with the correctness of the verdict, to insist that it be not disturbed, and that if the verdict were set aside and a new trial granted it might result in incurring further expenses against the estate. We think it obvious, however, that this possible expense to the estate is not sufficient upon which to predicate injury to Catherine Nicholson, as administratrix, should the motion be granted. The interest, to be injuriously affected, must be an interest which is concerned in the litigation. Her interest in this action was as administratrix of an estate against which a verdict had been rendered. If as the result of the motion the verdict should be set aside, the immediate result would be beneficial to her interest as administratrix rather than adverse, and this without regard to the fact that she might personally entertain the opinion that the verdict was just. She was not in this litigation actively supporting the plaintiff, or opposing her codefendant. She was simply quiescent, allowing her codefendant to bear the brunt of the plaintiff's attack. While in her answer she admitted the allegations of the complaint to be true, she did not join with the plaintiff in asking for the relief claimed. Under these circumstances her interest in the litigation would not have been injuriously affected by the granting of a new trial. Sprague v. Walton, 145 Cal. 228, 78 Pac. 645; Ex parte Young, 149 Cal. 173, 85 Pac. 145.

[2] The next ground urged in support of the appeal is that the order granting the motion for a new trial cannot be supported by the ground upon which it was made, namely, that the verdict is against law, and we think that this contention must be sustained. The notice of intention to move for a new trial specified 14 grounds upon which it would be made, the thirteenth being that the verdict is against law, and the fourteenth being "errors in law occurring at the trial and excepted to by the defendants." On the hearing of the motion the court, probably being a little skeptical of the defendant's charge that at the trial it had fallen into error 14 times, according to the bill of exceptions, "asked counsel for the defendant to state the specific ground upon which the motion was based, whereupon, and in response to said request by the court, one of the counsel for the defendant stated that the motion was made upon the ground that the verdict is against law, and that he knew of no other ground on which to base it." And the order granting the motion contains the following:

"The court is satisfied that the verdict is justified by the evidence, and is not for excessive damages. Therefore the motion for a new trial is not granted upon the ground of insufficiency of the evidence to justify the verdict, nor upon the ground of excessive damages, nor upon any other ground than the one upon which the motion was made and submitted, to wit, that the verdict is against law."

In suppprt of the order the respondent points out no particular in which the verdict is against law, but attempts to sustain the order by showing that the court erred in refusing to give certain instructions to the jury, and in giving an incorrect instruction to them. Such matters, however, do not have for their effect to make a verdict "against law" under the sixth subdivision of section 657 of the Code of Civil Procedure, but are "errors of law occurring at the trial" referred to in the seventh subdivision thereof. In the case of Brumagin v. Bradshaw, 39 Cal. 24, 35, this matter was considered, and it is there said:

"The statute, in authorizing a new trial on the ground that the verdict 'is against law,' evidently does not intend to include in that phrase all or any of the other several distinct and separate grounds of the motion, which are specified in the act. Whatever may be the class of cases to which that phrase was intended to apply, it is clear that it has no application to cases falling within either of the other subdivisions, into which the grounds for a new trial are divided by the statute."

Mr. Hayne, in his work on New Trial and Appeal, at section 99, at the conclusion of his discussion of this question, says:

"The result of the foregoing examination is that the phrase 'against law' applies only to cases where it can be seen that the verdict of the jury was against the instructions."

And the same author, at section 100 states:

"Errors in law include errors in giving or refusing instructions to the jury."

And again, at section 127:

"Errors in instructions are 'errors in law' occurring at the trial."

It is thus seen that the alleged errors of the trial court in refusing to give certain instructions to the jury, or in incorrectly instructing them, are not matters which render the verdict one "against law," which is the specific ground upon which the order granting the new trial was made.

[3] Cases are cited by the respondent to the effect that the appellate court is not bound by the particular ground upon which the order purports to be granted, but that it is our duty to uphold it if sustainable upon any ground upon which the motion was based. These cases have no application to the present situation, for the reason that, according to the record, the motion was made upon no other ground than the one upon which it was granted.

[4, 5] It is strenuously urged by the respondent that the motion was in fact made upon other grounds, including that of er-

rors of law occurring at the trial; and in their brief they quote passages from a brief filed in the trial court upon the submission of the motion, which show that they did in fact argue other grounds for the granting of the motion. But this court is bound by the record upon appeal, and cannot permit it to be contradicted by matter contained in the brief filed. The respondent also points out that the statement in open court that the only ground upon which the motion was based was that the verdict is against law, was made by only one of the counsel in the case, and that the other several grounds enumerated in the notice of intention were not thereby waived. The record shows, however, that the statement was made by the particular counsel presenting the motion, and it contains nothing to indicate any dissent on the part of the other counsel. If they did not acquiesce in their associate's statement made in open court they should have taken means of bringing that dissent to the attention of the trial court. As the situation stands, the record shows that the motion was made upon one ground only, and granted upon that ground. The order, as we have seen, is not sustainable upon that ground.

In view of this conclusion it is not necessary to consider other points urged by the appellant in support of his appeal.

The order is reversed.

We concur: TYLER, P. J.; ST. SURE, Justice pro tem.

---

59 Cal. App. 788

## LINDEMANN v. CORYELL. (Civ. 4214.)

(District Court of Appeal, First District, Division 1, California. Nov. 28, 1922. Hearing Denied by Supreme Court Jan. 25, 1923.)

**1. Evidence ⟸444(6)—Assignee of note not estopped to object to parol evidence as to agreement of payee not to negotiate note.**

Where a landowner gave a note payable in six months for dredging on his property, and relied on a promise of the payee not to negotiate the note, his borrowing money by giving mortgages on other property to pay interest on other notes secured by mortgages on the land was for his own benefit, and neither this nor the giving of the note for the dredging operated to estop an assignee of the note in a suit against the landowner from objecting to parol evidence that by agreement between the landowner and the payee the note was not to be paid or negotiated until the landowner could sell some of his land, since the note was for a debt the landowner was bound to pay, and the property surrendered in giving it was of no greater value than the chose in action for which it was surrendered.

**2. Evidence ⟸441(11)—Parol evidence cannot be used to contradict note complete on its face by showing time of maturity contingent.**

Under Civ. Code, §§ 1625, 1698, relating to the effect and the modification of written contracts, a parol agreement made at the time of the execution of a note, which upon its face is complete, cannot be introduced to contradict its terms by showing an agreement not to assign it, and that it should not be payable until the maker sold certain land.

**3. Evidence ⟸434(1)—Particular evidence is admissible to vary a writing where fraud is alleged.**

Particular evidence is admissible to vary a writing where fraud is alleged, but not when the statements relate to rights depending upon contracts yet to be made, to which the person complaining is a party.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by I. Lindemann against J. B. Coryell. From judgment for plaintiff, defendant appeals. Affirmed.

McWilliams & Hatfield and Heller, Ehrman, White & McAuliffe, all of San Francisco, for appellant.

Thomas G. Crothers and George E. Crothers, both of San Francisco, for respondent.

TYLER, P. J. [1] This action was brought to recover upon a certain promissory note executed by defendant in favor of the American Dredging Company for the sum of $18,235.21. The note was assigned to plaintiff after maturity. Judgment was recovered for the full amount prayed for, and this is an appeal from such judgment.

Defendant, by his pleading, admits the execution of the note; but as an affirmative defense he sets up certain facts which he claims estops the plaintiff from maintaining the action.

In substance, his answer alleges that prior to the execution of the note, and in the year 1915, defendant desired to have some dredging work done upon certain real property owned by him in San Francisco, and he thereupon entered into a contract with the American Dredging Company, the assignor of plaintiff herein, to do the work upon the verbal understanding and agreement that the dredging company was not to be paid therefor until such time as defendant might dispose of sufficient of the property to enable him to make payment.

That pursuant to this agreement the company did the work contracted for, and thereafter defendant made certain payments on account thereof, after which time the company requested defendant to execute and deliver to it his promissory note for the balance due.

That in conformity with this request defendant agreed to and did execute the note

in question upon the condition and with the express understanding, so it is alleged, that the company would not sell or assign or hypothecate the same or enforce payment thereof until such time as defendant had sold sufficient of said real property to enable him to pay the note. It is then recited that, in reliance upon this agreement, defendant thereafter borrowed various sums of money for the purpose of protecting said real property by paying interest on mortgages which were liens thereon, and that he executed promissory notes for the sums so borrowed which were secured by a mortgage on other real property owned by him.

Further recitals are to the effect that defendant would not have incurred such indebtedness but for the reliance that he placed upon the alleged promise on the part of plaintiff's assignor, and that he had used his best efforts to dispose of sufficient of the dredged lands to enable him to pay off the note in question, but that owing to the condition of the real estate market he has been unable to do so.

Upon the trial, and in order to prove the facts as set forth in his answer, defendant was asked to state the circumstances surrounding the execution of the note. To this question plaintiff interposed an objection upon the ground that the defense attempted to be set up would contradict and impair the terms of a written instrument, and that the evidence sought to be elicited was therefore violative of the so-called parol evidence rule. The court below sustained the objection, and appellant assigns such ruling as error.

The instrument sued upon was a plain, unambiguous promissory note unconditioned in terms, and its execution and delivery, the consideration, and amount due are duly admitted, as is also the fact that the note was transferred after maturity, so that the rights of bona fide purchasers are not here involved. It further appears that the note was given some four years after the work was performed, and at a time when the statute of limitations was about to run against the claim, and it was made payable six months after date thereof. It may be further stated that plaintiff denies that either at the time of the execution of the note or at any other time was the alleged promise of forbearance or any promise ever made, and that the only assumption that they were so made is solely for the purpose of this appeal.

[2, 3] As above indicated, no questions of fraud, deceit, or mistake are raised; nor is the validity or explicitness of the note called into question or reformation asked for; the sale contention being that the note was transferred and sued upon contrary to the alleged agreement. The rule is elementary that a parol agreement made at the time of the execution of a written instrument, which upon its face is a complete expression of the agreement of the parties, cannot be introduced for the purpose of modifying or contradicting the terms of such instrument. The rule is one of wide application and requires no citation of authority for its support. Where parties have deliberately put their agreement in writing in such language as imports a legal obligation, it is conclusively presumed that the whole engagement and the extent and manner of their undertaking is there expressed. This rule has found expression in our Code (Civ. Code, §§ 1625, 1698) and, according to modern authority, has been held to be not one of evidence merely but also one of positive substantive law. Harding v. Robinson, 175 Cal. 534, 166 Pac. 808. The reason for the rule has been frequently announced. It is to the effect that it is founded on long experience and usage, and is so much more certain and accurate than that which rests in fleeting memory, and that it would be unsafe to admit weaker evidence to control or vary the stronger for the purpose of showing that the parties intended a different contract from that stated in their writing. It has been said that the rule is necessary because of the obvious fact that written instruments would soon be of little value if their explicit terms could be varied or controlled by parol evidence, and courts have expressed regret that in their anxiety to avoid possible injustice in particular cases that they have gradually modified a principle which has always been considered one of the greatest barriers against fraud and perjury. 20 Corpus Juris, § 1380. While generally there are exceptions to all rules, the nonobservance of this particular one in certain cases has caused legal chaos, for the different construction given to it at times has resulted in great confusion and conflict in the authorities, and it would be an idle task to review in detail the various departures. There is no question that particular evidence is admissible to vary a writing when fraud is alleged. In discussing this subject, however, Wigmore, in his work on Evidence, states that the term "fraud" must be understood in its legitimate narrow sense, and that failure knowingly to perform an extrinsic agreement not embodied in the writing cannot in strictness be legally included in the term "fraud." 4 Wigmore on Ev. § 2439. The rule that parol evidence is admissible where there is fraud on the part of the payee at the inception of the instrument is recognized, and the doctrine of estoppel has been applied with respect to representations of a party to prevent their operating as a fraud upon one who has been led to rely upon them. This doctrine, however, has been held to have no place for application when the statements relate to rights depending upon contracts yet to be made, to which the person complaining is a party as under such circumstances he has it in his

power to guard in advance against any and all consequences of a subsequent change of conduct by the person with whom he is dealing, and to admit evidence of extrinsic agreements would be to open the door to all evils that the parol evidence rule was designed to prevent. Gandy v. Weckerly, 220 Pa. 285, 69 Atl. 858, 18 L. R. A. (N. S.) 434, 123 Am. St. Rep. 691, 18 L. R. A. (N. S.) 434. Closely allied to the question of fraud, the equitable doctrine of estoppel in pais has been extended in later years to a variety of cases, including the question of the right of one to invoke the power of equity against a party pleading the statute of limitations, or of setting up the statute of frauds in defense of an action. Counsel for appellant contends that these cases are analogous in principle, and he relies upon the reasoning thereof in support of his contention that plaintiff is estopped from invoking the parol evidence rule to prevent him from offering to prove the alleged agreements which he claims constitutes a defense.

Whether or not the reasoning in those cases is persuasive in support of the contention that, under the equitable doctrine of estoppel in pais, one may be estopped from invoking the parol evidence rule or under what circumstances the object of the parol evidence rule might be frustrated, are questions that we do not deem it necessary to consider or discuss, for it is conceded that an objection based upon the rule would be good were it not for the fact relied upon as constituting an estoppel, and we do not think that the facts alleged, evidence of which was rejected, contain the essential elements of an estoppel, or that they in any manner changed the position of defendant in the slightest degree or extent. His act in placing the incumbrance upon his property was not at the request of or for the benefit of plaintiff or his assignor, for, so far as the record shows, the company knew nothing about it. It was one for the benefit of defendant himself to protect his property. Nor can the giving of the note be said to have constituted an act upon which an estoppel can be predicated, for it secured to defendant six months further time on an obligation of four years' standing. The giving of the note was not obligatory upon him, but was an arrangement purely and exclusively for his benefit, for he was bound to pay the indebtedness for which the note was given.

To the suggestion that by this act defendant surrendered property, it may be said that the property surrendered was of no greater character than the chose in action for which it was given.

We are of the opinion, therefore, that the doctrine of estoppel in pais cannot here be invoked as a defense, as that doctrine has no application to the facts alleged, and the question becomes one purely academic, so far as the case is concerned. Defendant's obligation is entirely controlled by the terms of his written contract. Rottman v. Hevener (Cal. App.) 202 Pac. 329, 334.

This being so, it follows that the judgment must be and it is hereby affirmed.

We concur: KERRIGAN, J.; ST. SURE, Justice pro tem.

---

60 Cal. App. 103

## REINDERS v. OLSEN. (Civ. 3702.)

(District Court of Appeal, Second District, Division 2, California. Dec. 8, 1922.)

**1. Municipal corporations ⟸705(10)—Motorcyclist seeing automobile approaching on opposite side of street held not negligent in crossing intersecting street into which it turned.**

A motorcyclist struck by an automobile which lunged forward when he was nearly across an intersecting street into which it turned before reaching the center thereof, without slowing down, turning, or stopping to allow him to proceed, *held* not contributorily negligent because he saw it approaching 100 feet away on the opposite side of the street on which he was riding.

**2. Appeal and error ⟸1011(1)—Trial court's decision on conflicting evidence not disturbed.**

The trial court's decision on conflicting evidence will not be disturbed on appeal.

Appeal from Superior Court, Los Angeles County; Charles C. Crail, Judge.

Action by Anna Reinders against William Olsen. Judgment for plaintiff, and defendant appeals. Affirmed.

E. B. Drake and B. P. Gibbs, both of Los Angeles, for appellant.

D. A. Stuart, of Los Angeles, for respondent.

CRAIG, J. This is a personal action in which the plaintiff sued to recover $1,312.40 as damages for the injury sustained by her minor son, Robert Reinders. Upon a trial judgment was rendered for plaintiff for $826.15 and for her costs and disbursements therein.

[1] Defendant's contention that Reinders was guilty of negligence contributing to the accident which was the proximate cause of his injury cannot be sustained. The facts alleged by plaintiff are uncontradicted in regard to directions, speed and actual collision.

The following facts are undisputed: Robert Reinders, the minor son of plaintiff, was riding a motorcycle in an easterly direction along the south side of Third street; that at a point where Third street intersects Ban-

dine street Olsen approached the intersection driving an automobile westerly on the north side of Third street, turning south, or to the left, on Bandine street before he reached the center of the intersection; that the point of collision occurred near the southeast corner of the intersection; that Reinders and Olsen were going about the same rate of speed, to wit, 10 or 12 miles an hour; that Reinders saw the automobile when he was 100 feet away from it and as it started to make the turn; that the automobile's left fender collided with the rear end of the motorcycle; Reinders continued straight ahead until the two vehicles were nearly together, when the defendant's automobile lunged forward and struck Reinders' motorcycle.

The only question of fact which is disputed is the truthfulness of Reinders' statement that the automobile lunged forward. Reinders himself testified as to what happened before the impact: "Like he had put in his clutch, his car gave a lunge and hit me." There is no evidence which contradicts this statement, yet defendant bases his entire claim to contributory negligence on the bald claim that automobiles do not lunge, and that Reinders saw Olsen 100 feet away. The last-named fact would not suggest to any one that Olsen would not slow down, or turn, or stop to allow the motorcycle to proceed in the course where it had a right to go.

[2] The evidence fully justified the conclusion that, except for the fact that defendant's car went forward suddenly just before it struck the motorcycle the motorcycle would have been unharmed. The court found that Reinders was not guilty of contributory negligence. The rule familiar to all lawyers that the decision of the trial court will not be disturbed where the evidence is conflicting is determinative of this appeal.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

---

60 Cal. App. 29

## PEOPLE v. AMORT. (Cr. 641.)

(District Court of Appeal, Third District, California. Nov. 29, 1922. Hearing Denied by Supreme Court Jan. 25, 1923.)

**1. Intoxicating liquors ⟸236(11)—Evidence held to support conviction of illegal liquor selling.**

In prosecution for selling liquor in no-license territory, evidence *held* to support conviction.

**2. Intoxicating liquors ⟸236(11)—Evidence held not to support conviction of illegal liquor selling.**

In prosecution for selling liquor in no-license territory, testimony, by one to whom the accused was charged to have sold, that he made arrangements to buy liquor from accused, but that he did not know whether liquors taken by the officers from his premises and used on the trial as evidence against accused were the liquors sold him by another or those sold him by accused, *held* insufficient to support conviction.

**3. Witnesses ⟸380(5) — Prior inconsistent statements of one's own witness admissible only in case of surprise.**

The right, under Code Civ. Proc. §§ 2049, 2052, to show prior inconsistent statements of one's own witness is dependent upon showing surprise by his testimony.

**4. Criminal law ⟸369(6)—Testimony held not necessarily to relate to other offenses.**

In liquor selling prosecution, testimony that after the transaction charged in the indictment accused, on being asked by the district attorney why he was bootlegging, replied that he had a mortgage on his place to pay off, but had not sold much as yet, was not objectionable as evidence of other offenses, as the implied admission in accused's answer did not necessarily involve an admission that he sold liquor to other persons than those named in the indictment.

**5. Intoxicating liquors ⟸223(5)—Proof of selling on exact date charged not necessary.**

In liquor selling prosecution, proof of the commission of the offense on the exact date charged in the indictment is not necessary, so long as the occasion on which the offense was committed may otherwise be identified and the occasion on which or the time at which the offense was committed be within the period prescribed by the statute of limitations.

**6. Criminal law ⟸37—Conviction held not invalid as result of intrapment.**

Where officers, learning that accused was selling intoxicating liquor in no-license territory, proceeded to his home, and one of them stated to accused that a friend of accused told him (the officer) that he could procure liquor from accused, and then accused sold him some liquor, conviction based on testimony of such facts was not opposed to public policy on the ground that the sale was procured by intrapment.

Appeal from Superior Court, Glenn County; H. C. Bell, Judge.

Frank Amort was convicted of selling liquor in no-license territory, and from the judgment of conviction and an order denying him a new trial he appeals. Affirmed in part and reversed in part.

W. T. Belieu, of Willows, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was convicted in the superior court of Glenn county under an indictment charging him with selling intoxicating liquor in no-license territory, in said county of Glenn, contrary to the provisions of the so-called Wylie Local Option Law. Stats.

1911, p. 599. The indictment charges the defendant, in five different counts, with selling intoxicating liquor to three different persons.

In the first count it is charged that the defendant, on November 11, 1921, sold intoxicating liquor to one Frank Mursa. In the second, third, and fourth counts it is alleged that the defendant on the 1st, 10th and 14th days of November, respectively, sold intoxicating liquor to one Ladine and in the fifth count it is charged that he sold such liquor to one Frank Howard on the 15th day of November, 1921. In each of the counts it is alleged that the liquor so charged to have been sold by said defendant was "spirituous, intoxicating liquor containing more than 1 per cent. in volume of alcohol." He was convicted under the first, second, third, and fifth counts of the indictment. A motion for a new trial by him was denied, and thereupon he was fined the sum of $600, being $150 on each of the four counts, with the alternative of imprisonment for one day for every $3 of said fine. The defendant prosecutes this appeal from the judgment of conviction and the order denying him a new trial.

The objections to the result reached below are, generally stating them, that the evidence is insufficient to support the verdict as to any of the counts upon which the defendant was convicted, and that the court committed prejudicial error in allowing, over the objections of defendant, certain alleged incompetent testimony. It is further objected that the district attorney, in his address to the jury in behalf of the people, used language not justified by the record, and which therefore involved highly prejudicial misconduct. These points will be considered in the order in which they are thus stated.

The alleged sales of intoxicating liquor by the defendant took place on the ranch of the defendant's father, near the town of Orland, in Glenn county. The first count of the indictment, in which it is charged that the defendant sold intoxicating liquor to the said Maggart or Mursa, will first be considered.

[1] It appears that three employees of the so-called State Law Enforcement League, Dale W. Maggart, also known as Frank Mursa, J. E. Jerome, and G. L. Budd, were operating in Glenn county, and that they received information on the 11th day of November, 1921, that the defendant was engaged in the illicit liquor traffic at the ranch above referred to; that on the night of said day, at about the hour of half past 9 o'clock, they went in an automobile to the defendant's home, and while Jerome and Budd remained in the automobile, Maggart went into the house of the defendant, through the rear entrance thereof, and said to him that one Clifton, who was formerly a barkeeper in the town of Orland, and who at the time of this alleged sale resided in said town and was a personal acquaintance of the defendant, had told him (Mursa, as we shall hereafter refer to Maggart) that he could procure intoxicating liquor from the defendant; and after some conversation the defendant sold to Mursa a bottle of liquor, for which the latter paid the defendant $3. Mursa then left the defendant's home, taking the bottle of liquor with him. Budd, Jerome, and Mursa each testified that he tasted the liquor and pronounced it intoxicating. Prof. Talbot, professor of science and mechanics in the Willows High School, testified that he had studied and made experiments in chemistry, and in pursuing the investigations incident to that line of learning had had occasion to make analyses of various kinds of liquor for the purpose of determining their alcoholic content, that in his capacity as a chemist he was called upon to make an analysis of the particular liquor in question, and that upon such analysis he found that the alcoholic content of said liquor was 31 per cent. by volume.

Section 21 of the Wylie Local Option Law provides that the term "alcoholic liquors" as used in said act—

"shall include spirituous, vinous and malt liquors, and any other liquor or mixture of liquors which contains one per cent., by volume, or more, of alcohol, and which is not so mixed with other drugs as to prevent its use as a beverage."

It is clear that as to the first count of the indictment the above testimony sufficiently supports the verdict. It is true that the defendant introduced testimony tending to show that he was not at home on the night of the 11th of November, 1921, when the enforcement officers claimed to have called there and Mursa claimed to have purchased the liquor in question from the defendant. But it was for the jury to determine the conflict thus created in the testimony, and the verdict implies that the testimony presented by the defendant in support of his alibi was rejected, and that presented by the people in support of the allegations of the first count of the indictment was accepted by the jury. The verdict is therefore conclusive upon this court.

The second and third counts of the indictment charge that the defendant, on the 1st day of November, 1921, and the 10th day of November, 1921, sold intoxicating liquors to one Roy R. Ladine. The latter, testifying on behalf of the people, stated that on two different occasions in the month of November, 1921, he purchased intoxicating liquor from the defendant, and paid him for the liquor obtained the sum of $1.50 on each occasion. Ladine testified that he drank the liquor so obtained, and that it was intoxicating. On cross-examination he was made to admit that he was in more or less of a state of inebriety when he purchased the liquors from the defendant, and from this circumstance the jury were entitled to draw the inference that he was

fully capable of determining, upon sampling the liquors obtained from the defendant on the two occasions referred to in the second and third counts of the indictment, whether they were of an intoxicating character. At any rate, we conclude that the testimony by Ladine was sufficient to show that the liquors he procured from the defendant were intoxicating, and that, the jury having accepted said testimony as verity, the verdict, as to the second and third counts, is amply supported.

[2] As to the fifth count, an examination of the record has convinced us that the defendant's conviction thereunder cannot be sustained. As seen, it is charged in said count that the defendant, on the 15th day of November, 1921, sold intoxicating liquor to one Frank Howard. The testimony of said Howard constituted all the proof offered to support this count of the indictment. Howard testified that some time in November, 1921, he made an arrangement with the defendant, whereby the latter was to leave a jug of brandy for him (Howard) in the back yard of the premises occupied by the witness. He further testified that, near the same time, he purchased a large quantity of liquor from a man by the name of Cupps, and also had requested him to leave the liquor at some particular spot in the rear of his premises. He stated that the defendant left the liquor he had arranged to purchase from him at the place designated on the witness' premises, and that Cupps did likewise; that he transferred said liquor from the jugs in which they were delivered to him to bottles, and that he placed the bottles on a shelf in a room in the building occupied by him. He testified and repeatedly declared that he did not know whether the two bottles of liquor which had been taken by the officers from his premises, and which were used at the trial as evidence against the defendant, were the liquors sold to him by Cupps or those sold to him by the defendant. Thus stood the case so far as the evidence is concerned against the defendant on the fifth count, until Howard was thereafter recalled by the prosecution, and asked by the district attorney the following question:

"I show you two bottles here again; and ask you if that night, the 21st of November, at your house, Charley Harelson (city marshal of Orland), and Sheriff Newt Power being present, did you say to them, pointing to those two bottles, that that was the Amort liquor?"

The question was objected to by defendant's counsel on the ground that the evidence thus sought to be elicited was incompetent in that it was hearsay. After considerable argument the court asked the district attorney if the purpose of the question was to impeach Howard, to which the district attorney replied in the affirmative; and, after further argument between counsel, the court overruled the objection upon the theory that, although the witness was produced by the people, his impeachment was proper as being within the contemplation of sections 2049 and 2052 of the Code of Civil Procedure. Upon the record as it is presented here upon the question in hand, the ruling was clearly erroneous. Section 2049 of the Code of Civil Procedure provides:

"The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in section two thousand and fifty-two."

Section 2052 reads:

"A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them."

[3] It is well settled that before a party will be permitted to impeach a witness produced by him in support of his side of the controversy, it must be made to appear that the witness' testimony is unexpectedly different from that which the party producing him believed he would give, and that the same is prejudicial to the rights of such party. As was said in the recent case of People v. Spencer (Cal. App.) 208 Pac. 380, 392:

"The purpose of the above section [section 2049, Code Civ. Proc.] is to permit a party who has, in good faith, placed a witness upon the stand, with the distinct understanding that he will give testimony in support of his side of the issue, but, instead of so doing, and to the surprise of the party presenting him as such witness, has given damaging testimony against said party, to show that, prior to giving his testimony, he made a statement which, if testified to, would be favorable to the party so making him his witness. * * * Zipperlen v. Southern Pac. Co., 7 Cal. App. 206, 214, 217, 93 Pac. 1049. But, to entitle the party to contradict such a witness, it must appear that he was taken by surprise by the testimony of the witness and that said testimony, as stated, was prejudicial to his case. A party has no right to invoke the aid of that section merely for the purpose of getting into the record testimony which otherwise could not be brought thereinto because of its incompetency. 'The mere failure of a witness to give favorable testimony for the party producing him does not entitle such party to prove that he has made contrary statements elsewhere.' People v. Creeks, 141 Cal. 532, 75 Pac. 103; People v. Cook, 148 Cal. 334, 345, 83 Pac. 43; Zipperlen v. Southern Pacific Co., supra."

There is no showing in this case that the district attorney was surprised by the tes-

timony of Howard to the effect that he was not able to say whether the liquor offered and received in evidence in the case against the defendant was from the jug of liquor purchased from the defendant or the jug of liquor bought from said Cupps. Indeed, if there may be said to be any showing at all in the case upon this proposition, it was the result of a colloquy between the district attorney and the attorney for the defendant during the course of the argument between them upon the question of the admissibility of the impeaching testimony, the attorney for the defendant saying that the same testimony was received at the former trial of this case and was stricken out, to which the district attorney replied that "it was not stricken out," but this would seem to justify the inference that the district attorney was very well aware of the fact, when he called Howard to the stand as a witness for the people at the trial of which this appeal is the outgrowth, that he would not testify that the liquor used at the trial as evidence to support the fifth count of the indictment was the liquor purchased from the defendant. Obviously, the importance of testimony showing that the liquor in question was purchased from the defendant lay in the fact that there was proof of the alcoholic content or the intoxicating nature of said liquor. If said liquor was furnished to Howard by said Cupps, then, of course, no case would be made against the defendant upon that count; or, to state the case as it here appears, there being no competent testimony showing that the defendant sold the liquor in question to Howard, the verdict, in so far as the fifth count is concerned, is without support, notwithstanding the liquor was shown to be of an intoxicating character.

[4] The court, against objection by counsel for the defendant, permitted the sheriff of Glenn county and one Roy Markham to testify that the defendant, at his home, on the 21st day of November, 1921, and after the alleged commission of the offenses charged in the indictment, practically admitted to said parties and to the district attorney that he had been engaged in bootlegging, as the illicit traffic in alcoholic liquors is now colloquially called. The objection to this testimony was placed upon the ground that its effect was to introduce into the case, to the prejudice of the rights of the accused, evidence of "other offenses" than those for which the defendant was upon trial. The sheriff testified that upon the occasion mentioned the district attorney asked the defendant "why he was selling liquor, or why he did this, and he said that he had a mortgage on the place he had to pay off, but that he had not sold much as yet." Markham's testimony was in substantial corroboration of the testimony of the sheriff. He said:

"We were going out to the barn—Mr. Powers and Mr. McGowan and myself—and the question was asked by Mr. McGowan why he had been peddling this stuff, bootlegging, to which the defendant replied, 'Well, I have got a big mortgage on the place, and I am trying to get out of debt, although I haven't sold a great deal.'"

Undoubtedly, testimony of the commission by the defendant of other specific offenses—that is, testimony that he had sold on other occasions to other people than the defendant intoxicating liquor—would be wholly incompetent. People v. Clark, 28 Cal. App. 670, 153 Pac. 719. We are not prepared to say, though, that evidence that a person on trial for selling liquor to a particular individual, tending to show that such defendant had been habitually engaged in the unlawful sale of intoxicating liquors, would not be competent and proper as a circumstance tending to establish the particular charge in the indictment or information. It certainly would tend to prove that the defendant was under no misapprehension as to the character of the article he sold to the party named in the accusatory pleading as the one to whom he had sold intoxicating liquor. But we are not required to decide this proposition herein. The declaration of the defendant to which the sheriff and Markham testified in this case did not necessarily involve an admission that he had sold liquor to any particular persons other than those named in the indictment. In other words, what he said in reply to the question propounded to him by the district attorney may be assumed to have referred, at least in part, to the transactions upon which the indictment was founded, and, therefore, even if it might be construed to extend to other transactions, it was, nevertheless, admissible in its bearing upon the several charges set forth in the accusatory pleading in this case. It would seem to be clear that, when the district attorney asked the questions, he could have had in mind no other transactions involving the sale of liquor by the defendant than those mentioned in the indictment, since it does not appear that he knew of any other such transaction having been carried out by the defendant.

[5] It is contended that the evidence fails to show that the defendant sold liquor to Ladine on the days designated in the indictment, and that, therefore, the charges contained in the two counts as to the sales to Ladine are not evidentially supported. It is true that while the precise time at which each of the sales charged in the indictment as having been made by the defendant to Ladine is not shown by the evidence, it is so shown that those sales took place on two different occasions in the month of November, 1921. Under the general rule, proof of

the commission of the offense on the exact date charged in the indictment is not necessary so long as the occasion on which the offense was committed may otherwise be identified, and that the occasion on which or the time at which the offense was committed be within the period prescribed by the statute of limitations. State v. Rogers, 31 Mont. 4, 77 Pac. 294; People v. Lafuente, 6 Cal. 202. No other sales were shown to have been made to Ladine during said month but those mentioned in the first and second counts, and this is sufficient to identify the particular crimes alleged in counts 2 and 3 of the indictment.

It is contended that the district attorney was guilty of misconduct during the course of his argument to the jury. Consideration of what was said by that official in his argument with respect to count 5 charging the defendant with selling liquor to Howard, and which is assigned as misconduct on the part of the district attorney, may be waived, since the judgment and the order as to said count must be reversed. We have examined the other assignments under this head, and have thus become convinced that there is no merit in the claim upon which they are founded. Some of the alleged objectionable remarks by the district attorney were not excepted to at the time they were uttered, while others we hold to have been within the bounds of legitimate argument upon the issues as presented by the indictment and developed by the evidence.

[6] Lastly, we may briefly notice the suggestion by the appellant that his conviction is opposed to public policy for the asserted reason that the sales of intoxicating liquor by him, as alleged in the indictment, were the result of his intrapment into the commission of the alleged criminal acts by the officers, with no design on his part originally to commit said acts. In other words, the suggestion is that the officers themselves originated the design to have the crimes charged in the indictment committed and by some artful means induced the defendant, who until then had no intention of doing the wrongful acts, to carry out said design. There is no ground afforded by the record for the support of this suggestion. As shown, the officers had obtained information that the defendant was engaged in selling intoxicating liquor and upon acquiring such information proceeded to his home to investigate the matter, with the result as above explained. The officers in so proceeding did nothing more than their official duties required them to do. What is said regarding precisely the same proposition in People v. Tomasovich (Cal. App.) 206 Pac. 119, is pertinent to the suggestion here made, and is, indeed, a full answer thereto.

As to counts Nos. 1, 2, and 3, the judgment and the order are affirmed, and as to count No. 5 the judgment and the order are reversed.

We concur: FINCH, P. J.; BURNETT, J.

---

60 Cal. App. 39

## Ex parte MILLER. (Cr. 943.)

(District Court of Appeal, Second District, Division 2, California. Nov. 29, 1922.)

**1. Arrest ⟸29—Conclusions of law, stated in affidavit for arrest, not considered as support for order.**

Conclusions of law, stated in the affidavit for arrest, may not be considered as a support for the order.

**2. Arrest ⟸29—Hearsay in affidavit for arrest not looked to in determining whether sufficient ground shown for order.**

Matters of hearsay in an affidavit for arrest may not be looked to in determining whether sufficient ground has been shown for an order of arrest.

**3. Arrest ⟸29—Affidavit for arrest on ground that defendant was guilty of fraud in contracting debt insufficient.**

Where affidavit for arrest, under Code Civ. Proc. § 481, showed that defendant contracted with plaintiffs for the purchase of hay at a named price per ton, payment to be made 30 days after delivery to defendant of receipt for total weights delivered to him; that 440 tons were delivered between June 26 and August 29; that about September 30 plaintiff asked defendant what he had done with the money he had received from the sale of the hay, and defendant said he had "spent it for expenses," the remainder of the affidavit being to the effect that defendant had hurriedly sold the hay purchased at a sacrifice in order to convert it into cash, and showing insolvency—it was insufficient to warrant an arrest under Code Civ. Proc. § 479, subd. 4, authorizing arrest where defendant has been guilty of fraud in contracting the debt, or incurring the obligation for which action was brought.

**4. Arrest ⟸29—Averment of insolvency in affidavit for arrest available on showing existence at the time debt was contracted.**

An averment of insolvency in an affidavit for arrest, under Code Civ. Proc. § 479, when defendant has been guilty of fraud in contracting the debt or incurring the obligation for which action is brought, is a factor only where it is shown that defendant sought to be arrested concealed or omitted to disclose his insolvency at the time the obligation was incurred, and available only when accompanied with a showing that defendant cannot reasonably expect to pay the debt incurred, or that there was a fraudulent intent on his part not to pay.

Original application by J. Miller for a writ of habeas corpus against the sheriff of Los Angeles County. Petitioner discharged.

---

Jesse R. Shafer, of Los Angeles, for petitioner.

Newby & Palmer, of Los Angeles, for respondent.

WORKS, J. Petitioner is in the custody of the sheriff of Los Angeles county pursuant to proceedings taken under sections 479 and 481 of the Code of Civil Procedure. The former section provides for the cases in which defendants in civil actions may be arrested. Section 481 is to the effect that an order for such an arrest may be made "whenever it appears to the judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section four hundred and seventy-nine. The affidavit must be either positive or upon information and belief; and when upon information and belief, it must state the facts upon which the information and belief are founded."

The "Affidavit for Order of Arrest," so entitled, pursuant to which petitioner was arrested, sets forth facts tending to show that the "case" was "one of those mentioned in section" 479. It is also stated in the affidavit "that a cause of action exists in favor of the plaintiffs against the said defendant," petitioner here, "* * * as fully appears from the verified amended complaint herein, a copy of which is hereunto annexed and made a part of this affidavit." There were two plaintiffs in the action in which petitioner was defendant, and one of them made oath to the affidavit. The amended complaint referred to in the affidavit was verified by the other plaintiff, the verification being in the form required by section 446, Code of Civil Procedure, and therefore containing the statement "that the same is true of his own knowledge, except as to the matters which are [t]herein stated upon his information and belief, and as to those matters that he believes it to be true."

Petitioner contends that the affidavit for order of arrest, so entitled, contains no statement that the allegations of the amended complaint are true, and that therefore there is no showing by affidavit, as required by section 481, that "a sufficient cause of action exists" against the defendant, there being in the affidavit no statement of the facts constituting the alleged cause of action. We find it unnecessary to decide whether the amended complaint, verified by one of the plaintiffs as it was, may be considered as an affidavit under section 481, although the point naturally arises. We do not decide that question, but concede to respondent for the sake of argument that the amended complaint may be so considered, for the reason that the showing made by the "affidavit," so called, and by the amended complaint as an affidavit, when taken together, was in our opinion insufficient to support the order of arrest. The question whether a complaint may be considered as an affidavit for an order of arrest was before the Supreme Court in Ex parte Fkumoto, 120 Cal. 316, 52 Pac. 726, but was not decided. The point was decided, in effect, in Peterson v. Nesbitt, 11 Cal. App. 370, 105 Pac. 135, but we express neither an assent to nor a dissent from the doctrine of the opinion in that case.

[1, 2] Petitioner contends that there was no sufficient showing of fact to justify the making of the order of arrest under which the sheriff detains him. It is insisted, first, that conclusions of law stated in the affidavits may not be considered as a support for the order. This contention is upheld in Ex parte Gillett, 47 Cal. App. 107, 190 Pac. 209. It is also said that matters of hearsay in an affidavit may not be looked to in determining whether sufficient ground has been shown for an order of arrest. This contention is also supported by well-reasoned authority. It was determined in Neves v. Costa, 5 Cal. App. 111, 89 Pac. 860, that where a plaintiff states facts in his affidavit in support of statements made therein upon his information and belief, the supporting matters so stated must be facts within his own knowledge. It is there said:

"In order that a party who has not sufficient knowledge of his own to make the required showing may avail himself of this provisional remedy in a proper case, the Code permits him to supplement his own affidavit with that of some one else who knows some fact or facts."

[3] We therefore proceed to state the facts shown by the two affidavits, treating the amended complaint as one, omitting from our recital all conclusions of law and statements of hearsay, and bearing in mind that petitioner's arrest was sought under the terms of subdivision 4 of section 479, to the effect that a defendant may be arrested when he "has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought." It is shown by the affidavits that petitioner entered into a written agreement with plaintiffs in the action, the contract being for the purchase by him from them of 500 tons of hay, "approximately, more or less," at $15 the ton, payment to be made 30 days after delivery to petitioner of receipt for total weights of hay delivered to him. It is further shown that 440 tons of hay were delivered to petitioner between June 26 and August 29, 1922; that petitioner stated to one of the plaintiffs that the weights of hay were delivered to him prior to August 29th, the complaint having been filed on or after October 11th and the order for petitioner's arrest having been made on November 6th; and that on or about September 30th one of the plaintiffs asked petitioner "what he had done with the money he had received from the sale of the hay purchased by him from the plaintiffs in this action and from other persons, and the defendant gave

no satisfactory response, saying only that he had 'spent it for expenses.'" In explanation of this quoted matter it should be said that it follows hearsay statements in the "affidavit" to the effect that petitioner had hurriedly sold the hay he had purchased from the plaintiffs and from others at a sacrifice in order to convert it into cash.

[4] It is further shown by the affidavits that petitioner was insolvent at all the times mentioned therein. A mere perusal of this recital serves to convince that there was no showing sufficient to support the order of arrest. The only matter tending even slightly in that direction was the allegation of insolvency, but even that averment is insufficient, for the reason that there was no showing that the plaintiffs did not know of petitioner's insolvency at the time the contract between them was made. An averment of insolvency in such cases is a factor only where it is shown that the defendant sought to be arrested conceals or omits to disclose his insolvency at the time the obligation is incurred, and it is available even then only when accompanied with a showing that the person cannot reasonably expect to pay the indebtedness incurred, or that there is a fraudulent intent on his part not to pay. 5 C. J. 458, 459. The affidavits here are barren of any allegations in these respects.

Petitioner is discharged from custody.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

(60 Cal. App. 14)

## FREEMAN v. CREELMAN. (Civ. 2520.)

(District Court of Appeal, Third District, California. Nov. 28, 1922.)

**1. Vendor and purchaser ⇐21 — Land sale contract not indefinite as to payment.**

In view of Civ. Code, § 3538, providing "that is certain which can be made certain," where land sale contract contained two alternative propositions as to the first cash payment, that, if 40 acres of bare land were set out to trees by purchaser in the spring of 1921, it would pay a named price, but if the trees were not put out at that time it was to pay a greater amount, payment depended on a contingency readily determinable by the fact itself.

**2. Vendor and purchaser ⇐21—Term of land sale contract as to whether owner had contracted for fruit trees capable of determination.**

A land sale contract which provided that, if vendor had contracted for fruit trees, purchaser should have advantage of that contract at the sale price agreed on by vendor, was capable of determination by an ascertainable fact.

**3. Vendor and purchaser ⇐21 — Land sale contract held not indefinite as to obligation of purchaser to pay taxes.**

A land sale contract was not indefinite in that it did not appear by purchaser's offer by whom taxes were to be paid during the time that a deed remained in escrow, when the offer stipulated that the deed should so remain until a definite cash payment was made, when it was to be delivered to purchaser, who was to give vendor mortgage for the unpaid balance, at which time purchaser would have imposed on him the duty of paying taxes assessed.

**4. Appeal and error ⇐1011(1) — Finding of trial court on conflicting evidence conclusive on appeal.**

In action for broker's commissions, where there was a conflict in the evidence between vendor and purchaser as to carrying out the terms of the contract procured by broker, the finding of the trial court is conclusive on appeal.

**5. Brokers ⇐86(3)—Evidence held to show failure of vendor and purchaser procured by broker to consummate deal was not due to fault of broker.**

In action for commissions, evidence *held* to show that failure of defendant and purchaser procured by plaintiff for defendant's land to consummate the deal was not due to fault of plaintiff.

**6. Brokers ⇐63(1) — Commissions earned when customer produced ready, able, and willing to purchase on terms prescribed.**

If within the time limited a broker produces a purchaser who is ready, willing, and able to purchase on the terms prescribed, the owner cannot evade payment of commissions by refusing or neglecting to consummate the sale, or by selling the property to another, or by so negligently dealing with the purchaser as to lose the benefit of the sale.

**7. Brokers ⇐63(3)—Owner cannot change terms after broker produced customer on terms prescribed.**

If a broker is the procuring cause of bringing to the owner of property a person who is ready, willing, and able to purchase on the terms prescribed, and the owner thereafter changes the terms or conditions on which he authorized the broker to make the sale, the broker is entitled to compensation which the owner agreed to pay.

**8. Brokers ⇐54 — Owner accepting customer produced by broker, estopped to deny latter's ability or willingness to complete contract.**

Once the customer produced by the broker is accepted, the employer is thereafter estopped from denying the purchaser's ability or willingness to complete the contract, and his acceptance estops him from alleging anything against the broker's claim for commissions except fraud on the part of the broker inducing acceptance.

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by L. L. Freeman against Irvine M. Creelman. From a judgment for plaintiff, defendant appeals. Affirmed.

---

W. H. Carlin, of Marysville, for appellant.
Richard Belcher, of Marysville, and Lawrence Schillig, of Yuba City, for respondent.

HART, J. The plaintiff, a licensed real estate broker, and the defendant, on the 12th day of October, 1920, entered into a written agreement whereby the first named was employed and authorized by the latter to sell for him (defendant) 110 acres of land, situated in the county of Sutter, for the sum of $450 per acre, the plaintiff to have the exclusive right to negotiate such sale for the term of 60 days from the date of the execution of the agreement, and was to receive as compensation for his services so performed a commission of 5 per cent. of the aggregate indicated purchase price of said land. On November 10, 1920, the plaintiff having previously conducted negotiations leading thereto, the following offer or proposal to purchase said land was addressed to the plaintiff by Ritz-Fasig Company, a copartnership:

"Marysville, Calif., Nov. 10, 1920.

"Mr. L. L. Freeman, Marysville, Calif.—Dear Mr. Freeman: In reference to the Creelman place situated 5½ miles northwest of Yuba City, Calif., and consisting of about 110 acres, we wish to make the following offer:

"First—We offer the sum of $450 dollars per acre which is to be paid in the following manner: If the forty acres of bare land is set out to trees by us in the spring of 1921, we will pay ten thousand ($10,000) cash, but if the trees are not put out the spring of 1921 by us we are to pay twelve thousand ($12,000) dollars. It is understood, however, that if Mr. Creelman has placed an order for the peach trees he is to turn his contract over with the land with the understanding that we are to receive the trees for the same price named in the contract.

"Second—At the time either of the above amounts are paid a contract is to be furnished; also a deed is to be placed in escrow at the Rideout Bank with the instructions that said deed is to be turned over to us after the cash payment of twenty thousand ($20,000) dollars has been made, we to furnish a first mortgage covering the remainder of the purchase price. It is understood that the proceeds of one-half of the gross of the 1921 crop is to be applied as a cash payment on the purchase price. If this amount is more than the amount required to make up the twenty thousand dollar cash payment it is also to be applied to the purchase price, the rate of interest on all deferred payments is to be six per cent. An abstract is to be furnished with the contract, and we are to have said abstract for a long enough time (not to exceed thirty days) in which to examine said abstract and title.

"In making this offer we agree to take charge of the property and to till same in the same manner as other property in the same locality is handled.

"It is understood that we are to place upon the property such buildings or improvements as is necessary in our judgment.

"Third—It is understood that the remainder of the purchase price is to be paid on or before five years after the date of the contract, but we reserve the right to make any cash payment we wish to make on any interest paying date or six months thereafter.

"This offer is to be accepted or rejected by Mr. Creelman within a period of ten days from date hereof.

"Yours very truly, Ritz-Fasig Co.,
"By Lester H. Fasig."

On the day that the foregoing offer was delivered to plaintiff the sum of $500 was paid to him by the Ritz-Fasig Company as an earnest for the fulfillment of the obligations or terms contained in said letter, and the following instrument thereupon executed by the said plaintiff, and which, as will be observed, was approved by the defendant:

"Marysville, Calif., Nov. 10, 1921.

"Received from Ritz-Fasig Company the sum of five hundred ($500) dollars as part payment on the purchase price of forty-nine thousand five hundred ($49,500) dollars for the holding of Irvine M. Creelman consisting of about 110 acres and located 5½ miles northwest of Yuba City, Sutter county, California.

"It is agreed and understood that this receipt is to be attached to the offer submitted to me by Ritz-Fasig Company on this date, and is to cover all the conditions named in said offer.

"It is agreed and understood that if the offer is not accepted by Irvine M. Creelman the sum of five hundred dollars is to be returned to Ritz-Fasig Company.

"It is agreed and understood that if the offer is accepted and a safe, merchantable title cannot be furnished them the deposit is also to be returned.

"This receipt is given subject to the approval of the owner, Irvine M. Creelman.

"L. L. Freeman.

"Approved—Irvine M. Creelman."

The plaintiff, claiming that he had produced within the time to which his authority to sell the land was limited a purchaser willing, ready, and able to purchase the land upon the terms and conditions prescribed by the owner of said land, and further claiming that he was entitled to the stipulated commissions for the service so performed, and the defendant, having refused to pay the plaintiff said commissions, brought this action to recover the sum of $2,475, alleged to be due him under his contract with the defendant to negotiate the sale of the said property.

The complaint sufficiently states a cause of action for the relief prayed for by the plaintiff. The answer specifically denies the material averments of the complaint, and alleges that the defendant was at all times after signing the above documents ready, willing, and able to comply with the terms thereof, and to "perform all acts and conditions on his part to be performed as therein set forth," but that neither plaintiff nor Ritz-Fasig Company "was either ready, willing, or able to perform the covenants and conditions on their part to be performed as therein set forth, and because thereof, and

for that reason only the lands, and premises therein referred to were not purchased from this defendant."

The parties waived a trial by jury, and the cause was tried by the court, whose findings of fact and conclusions of law were favorable to the plaintiff, to whom, accordingly, judgment was awarded for the sum prayed for in the complaint. A motion for a new trial by the defendant was denied, and the appeal from the judgment, supported by a record prepared according to the alternative method, is prosecuted by the defendant.

The defendant contends that the writings above presented herein are so indefinite and uncertain as to the terms thereof that they are, as constituting the contract between the owner of the land and the proposed purchaser, incapable of specific enforcement; that therefore the agreement is not binding upon the parties, and consequently the plaintiff failed to produce a purchaser "ready, willing, and able" to purchase the land. We perceive no ground upon which the contention can be maintained that the contract, as to the terms and conditions thereof, is ambiguous or uncertain or indefinite in any respect. The purchase price of the land, the times at which the payments thereof are to be made, the interest on deferred payments, the condition upon which a deed in escrow to be placed in the hands of a bank by the owner was to be delivered to the proposed vendee, and the disposition of the proceeds of a named proportion of the crops of the year 1921 are all set forth in language so clear that the meaning thereof cannot possibly be misunderstood or misapprehended; and that the defendant must have thoroughly understood the terms of the offer which constitutes a part of the agreement is evidenced by the fact that he approved the same upon the presentation to him by the plaintiff of the document acknowledging the receipt of the $500 cash payment upon the making of the offer, which document, it will be noted, expressly makes itself a part of the offer to purchase the premises by Ritz-Fasig Company.

[1] A point is sought to be made out of the fact that the agreement contains two alternative propositions as to the first cash payment, to wit, that, if the 40 acres of bare land are set out to trees by Ritz-Fasig Company in the spring of 1921, it will pay $10,000 cash, but if the trees are not put out in the spring of 1921 by said offerer it is to pay $12,000 cash, and that, if the owner has placed an order for the peach trees, he is to turn his contract over with the land with the understanding that the vendee is to receive the trees for the price named in the contract. There is nothing indefinite or uncertain about these provisions. Whether the sum of $10,000 or that of $12,000 should be paid upon the execution of the agreement of sale depended upon a contingency which is readily determinable by the fact itself—that is, whether the 40 acres of bare land are or are not set out in trees by the proposed vendee in the spring of 1921.

[2] Likewise the proposition whether the owner had placed an order for peach trees to be planted in said 40 acres is readily capable of determination by a readily ascertainable fact—that is, whether the owner has made any such contract. If he has he must turn it over to the vendee in precisely the same terms and conditions as he (the owner) made it. Of course, it will not be doubted that these matters may be shown—indeed, the offer in these respects in its very nature contemplates that they shall so be shown—by evidence aliunde, and thus, even though it might be said that the offer upon its face was uncertain in those particulars, the uncertainty would be removed when a particular one of the two alternatives is adopted. Such an agreement, in fact, comes within the letter as well as the spirit of the maxim declared in section 3538 of the Civil Code, "That is certain which can be made certain." There are other particulars in which it is claimed that the offer is indefinite and uncertain, and which renders the agreement to sell and purchase unenforceable.

[3] Only one or two of these objections need be taken notice of herein, since the writings constituting the offer and acceptance are herein reproduced in hæc verba, and themselves we think, plainly negative any contention that said writings have no binding force upon the parties thereto. One of the objections here referred to is that it is not made to appear by the offer by whom taxes upon the land are to be paid during the time that the deed remains in escrow. There is no merit to this proposition. The offer plainly stipulates that the deed shall remain in escrow until the cash payment of $20,000 on the purchase price shall have been made, when it was to be delivered to the purchaser, the latter to give the seller a mortgage on the premises to secure the unpaid balance of the purchase price, and thereupon to take "charge," or, what amounts to the same thing, possession, of the property. In other words, the proposition is that a sale of the premises to the Ritz-Fasig Company should be effected by the payment of the $20,000 and the giving of the mortgage by said firm to the seller to secure the balance of the purchase price. Upon the performance of these acts, the title would, of course, immediately vest in the purchaser, and, necessarily, the latter would thus have imposed upon it the duty of paying all taxes assessed against the premises, failure to do which would entail upon it the usual consequences of such a default.

Another objection is that the agreement upon its face is unreasonable. We do not think so. To the contrary, it thus appears to be fair and just as to both parties. Nor,

as we shall later perceive, does the evidence show that the agreement is unreasonable or unfair. Counsel for the defendant cites a large number of cases which he claims sustain the view that the contract here is too uncertain and indefinite to render it capable of specific enforcement. Many of these cases involve actions for the specific performance of contracts. In none of them, however, do we find the facts to be analogous to the facts of this case. In other words, the contracts dealt with in the cases relied upon by defendant are entirely different from the contract with which we are here dealing.

It follows from the foregoing views that, if the evidence does not show that the failure to consummate the sale according to the terms of the agreement above considered was due to the fault of the plaintiff, then the latter, having caused the minds of the defendant and the Ritz-Fasig Company to meet and agree upon the terms and the conditions set forth in said agreement of sale, has earned the compensation which the defendant agreed to pay him for negotiating such sale. This brings us to a consideration of the evidence.

It appears that the firm of Ritz-Fasig Company was composed of H. S. Fasig, his son, Lester H. Fasig, and his son-in-law, George Ritz. It will be observed that the offer was executed and delivered to the plaintiff for and in the name of the firm by Lester H. Fasig. H. S. Fasig testified that the offer was thus executed and delivered to the plaintiff with the consent of all the members of the firm. After the offer was delivered to the plaintiff and accepted by the defendant, the Fasigs visited Yuba City on three different occasions for the purpose of consummating the deal. To this end an abstract of the property was demanded by said parties, and by the defendant delivered to them or their attorney, A. C. McLaughlin, Esq., of Yuba City. An examination of the abstract disclosed that there was a mortgage upon the land of the defendant in Sutter county, embracing also the premises in question. Of the existence of this mortgage lien upon the premises in question Fasig stated that neither he nor his partners had any knowledge until the fact was revealed to him through the examination of the abstract. H. S. Fasig and the defendant had several meetings, and said Fasig declared to him on all occasions that he was willing, able, and ready to purchase the premises according to the terms of his offer, provided the defendant would relieve the premises of the lien of the mortgage. Fasig, on the occasion of his first meeting with the defendant, stated that he had no objection to a mortgage being on the premises, but that he did not desire that the land which he proposed to purchase should be subject to a mortgage lien which covered other lands of the defendant. He insisted that the lien of the mortgage should be removed from the property before he would carry out the transaction. Fasig testified that the defendant "was not willing to give us a deed of clear title." Transcript, p. 29. Another point of difference arose between them on the same occasion in this: That the defendant insisted that after the sale, and the Ritz-Fasig Company took possession of the property, he (defendant) should have control of the crops then growing upon the premises so he could be certain that he would receive the one-half gross profits thereof as prescribed in the offer. To this the Fasigs objected, claiming that such an arrangement would not be in accord with the terms of his offer. The parties separated without carrying out the option agreement. But subsequently the Fasigs returned to Yuba City, and held further negotiations with the defendant, and again offered to purchase the premises upon the terms and conditions prescribed in the offer. The defendant still insisted upon having control of the fruit crops, and, after another meeting, with the same result, the transaction was called off.

The facts above stated were testified to not only by H. S. Fasig, but also by his son and other witnesses who were present at one of the meetings held in the plaintiff's office in the city of Marysville.

[4, 5] It is true that the defendant contradicted the testimony so given. In fact, he testified that at the meeting at plaintiff's office in Marysville he explicitly offered to sell the property to the Ritz-Fasig Company upon the terms and conditions of its offer, but that it flatly refused to make the purchase. This testimony by the defendant was positively contradicted in rebuttal by several witnesses who were present in said office on the occasion of the meeting referred to. Thus a conflict in the evidence arose, and it was for the court to determine that conflict. The implied finding upon that proposition is conclusive upon this court. But, however this all may be, it is clear from the testimony presented by the plaintiff and the findings of the court that their failure to consummate the deal was not due to any fault of the plaintiff.

[6] The law relating to contracts by which real estate brokers are authorized to sell property for others on commission is well settled. Mechem on Agency, § 967, states the general rule as follows:

"If, within the time limited, the broker has produced a purchaser who is ready, willing, and able to purchase upon the terms prescribed, the principal cannot evade the payment of the broker's commission by then refusing or neglecting to consummate the sale, * * * or by selling the property to another, or by so negligently dealing with the proposed purchaser as to lose the benefit of the sale."

And:

"In consonance with the rule as thus stated, it has been held that if the broker has fulfilled upon his part, 'he will be entitled to his commissions, although the sale is not consummated because the principal's title proves defective (Hamlin v. Schulte, 34 Minn. 534, 27 N. W. 301; Goodridge v. Holladay, 18 Ill. App. 363; Gonzales v. Broad, 57 Cal. 224; Knapp v. Wallace, 41 N. Y. 477; Doty v. Miller, 43 Barb. [N. Y.] 529; Sibbald v. Bethelhem Iron Works, 83 N. Y. 378, 38 Am. Rep. 441), or because the principal's wife refuses to join in the conveyance (Clapp v. Hughes, 1 Phila. [Pa.] 382), or because the purchaser refuses to complete the sale on account of false representations made by the principal.'"

See Glentworth v. Luther, 21 Barb. (N. Y.) 145; Justy v. Erro, 16 Cal. App. 519, 522, 117 Pac. 575.

[7] To the foregoing it may be added that, if the broker is the procuring cause of bringing to the owner of the property, a person who is ready, willing, and able to purchase such property upon the terms prescribed by the owner, and the latter thereafter changes the terms or conditions upon which he authorized the broker to make the sale, thereby frustrating the sale to the purchaser so procured, the broker is, nevertheless, entitled to the compensation which the principal agreed to pay him for negotiating the sale. In other words, if the broker negotiates the sale with a party, and the latter has consented to buy, and is ready, willing, and able to do so, upon the terms upon which the broker was authorized to negotiate the sale of the property, the right of the latter to the agreed compensation for negotiating such sale cannot be defeated by the act of the owner of the property in so changing the terms and conditions upon which the sale was to be made as to cause a failure of the consummation thereof.

[8] But the defendant having accepted a purchaser procured by the plaintiff, and no fraud on the part of the plaintiff in inducing the acceptance of the proposition to sell being shown, the ground upon which or the reason for which the sale was not consummated—whether through the fault of the defendant or the proposed purchaser—is immaterial, for the case clearly falls within the rule stated as follows in 4 Ruling Case Law, 49:

"Once the customer procured by the broker is accepted by the employer, the latter is thereafter estopped from denying the purchaser's ability or willingness to complete the contract, inasmuch as he is not bound to accept the offer of such person without a reasonable opportunity to inquire and satisfy himself in relation to it. Consequently his acceptance should estop him from alleging anything against the claim except fraud on the part of the broker in inducing the acceptance."

The said rule has been approved by a number of California cases, among which are Carrington v. Smithers, 26 Cal. App. 460, 461, 147 Pac. 225, and Wood & Tatum Co. v. Basler, 37 Cal. App. 381, 384, 173 Pac. 1109, an application for a hearing in the Supreme Court in the latter case having been denied.

It should be suggested that, in view of the last-mentioned rule, within the doctrine of which we think the case here falls, the attorney for the plaintiff objected in the court below to the evidence regarding the circumstances under which the failure to complete the sale was brought about. Without deciding whether the evidence was wholly immaterial for any purpose, we may say that we regarded it as proper to consider herein the evidence, and also the contention of the defendant as to the asserted ambiguity of the agreement between the defendant and Ritz-Fasig Company for the sale of the property, thus showing that in any view of the case the judgment cannot be disturbed.

The judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

---

60 Cal. App. 8

## MARTIN et ux. v. SUTTER. (Civ. 2512.)

(District Court of Appeal, Third District, California. Nov. 28, 1922.)

**1. Trial ⊂⊃350(3)—Special questions as to damages not asked may be submitted to jury.**

Under Code Civ. Proc. § 625, special issues calling for answers affecting punitive damages may be submitted to the jury, though such damages were not asked or awarded by the jury.

**2. Libel and slander ⊂⊃6(1), 7(16)—"Bitch" or "son of a bitch" not actionable per se.**

The word "bitch" or "son of a bitch" is not actionable per se, and when the former word is applied to a female it does not impute unchastity.

**3. Libel and slander ⊂⊃22—Words must be understood by those hearing them uttered in a slanderous sense.**

Words spoken must be understood by those who heard them uttered in a slanderous sense.

**4. Libel and slander ⊂⊃100(7)—Rule of allegation and proof where libel in language of covert meaning stated.**

When a slander or libel is couched in language having a covert meaning not apparent on its face or in words or phrases not used otherwise than as slang or cant, plaintiff must not only allege and prove the slanderous or libelous sense in which they were used by defendant but also that they were understood in the same sense by those to whom they were addressed.

**5. Libel and slander ⊂=2, 22—Elements to be established where words not slanderous on their face or per se stated.**

To establish a case for libel or slander, where the words are not on their face or per se slanderous or libelous, it is essential to show that the publisher of the words intended they should be understood as imputing wrongdoing or wrong conduct to plaintiff, and that they were so understood by those who heard or read them.

**6. Libel and slander ⊂=125—Special finding that defendant did not use words with evil purpose of slandering plaintiff controls general verdict for plaintiff.**

In action for slander for calling plaintiff a bitch, where the jury made special findings that witness who heard the words uttered by defendant understood him to mean by their use that plaintiff was an unchaste woman and also found that defendant did not use the words with evil purpose of slandering plaintiff, the special findings, though inconsistent with each other, were inconsistent with a general verdict for plaintiff, and under Code Civ. Proc. § 625, control the general verdict, and a directed judgment for defendant was proper.

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by W. H. Martin and wife against Joseph Sutter. Verdict for plaintiffs, and, from a judgment n. o. v. for defendant, plaintiffs appeal. Affirmed.

W. H. Slade and Marshall Z. Lowell, both of Auburn, for appellants.

Meredith, Landis & Chester, of Sacramento, for respondent.

HART, J. The plaintiffs are husband and wife. The action is for damages claimed to have been suffered by the plaintiffs for slanderous language alleged to have been used by the defendant of, to, and concerning the plaintiff Mrs. Floretta Martin. The action is based on subdivision 4 of section 46 of the Civil Code, which defines slander as "a false and unprivileged publication other than libel, which * * * imputes to [a person] * * * a want of chastity." The amended complaint alleges:

"That on the 29th day of May, 1919, while the plaintiff herein Floretta Martin was on her premises in the said city of Auburn, said county and state, the said defendant, Joseph Sutter, spoke of, to, and concerning said plaintiff Floretta Martin, the following language: 'You bitch,' 'you old hag,' thereby meaning by the use of the language aforesaid 'you bitch' that the said plaintiff Floretta Martin was and is a woman of unchaste character.

"That at the time the said words aforesaid were spoken of, to and concerning said plaintiff Floretta Martin, by defendant, Joseph Sutter, there were other and divers persons near and present who heard said defendant, Joseph Sutter, utter and address the language and expressions aforesaid of, to and concerning said plaintiff Floretta Martin, and that said persons so hearing said language and expressions so spoken and used as aforesaid by the said defendant understood and believed that defendant was imputing that said plaintiff Floretta Martin was a woman of unchaste character.

"That the usual and common meaning of the word 'bitch' when used of, to, and concerning a woman and person of the female sex by any other person in speaking of a woman and person of the female sex, in certain portions of the United States and particularly within the state of California, imputes to that woman or person of the female sex, of and concerning whom the said word 'bitch' is used and spoken, a want of chastity and that such woman or person of the female sex, of and concerning whom the said word 'bitch' is used and spoken, is a woman of unchaste character.

"That the said language aforesaid to wit: 'You bitch,' spoken of, to, and concerning said plaintiff Floretta Martin, by the defendant, Joseph Sutter, is false and untrue, and the imputation contained therein is false and untrue."

The defendant demurred to the complaint upon general and special grounds, and the demurrer was overruled. Thereupon he filed an answer specifically denying the allegations of the complaint. The cause was tried by a jury, to whom the following special issues were submitted upon the conclusion of the taking of testimony:

"1. Did the defendant call the plaintiff a bitch as charged in the complaint? Yes.
"W. F. Durfee, Foreman.

"2. Does the word 'bitch' have, within the state of California, the peculiar and local meaning of imputing a want of chastity to a woman when applied to her? Yes.
"W. F. Durfee, Foreman.

"3. If you find that the defendant used the language charged, then answer this question: Did the defendant by use of the language charged intend to imply that the plaintiff Mrs. Martin was an unchaste woman? No.
"W. R. Durfee, Foreman.

"4. If you find that the defendant used the language charged, then answer this question: Did the defendant, by the use of the language charged, intend only to apply to the plaintiff Mrs. Martin some coarse or offensive epithet without imputing to her a want of chastity? Yes. W. F. Durfee, Foreman.

"5. Did the witness W. W. White understand the language used by the defendant? Yes. W. F. Durfee, Foreman.

"6. Did the witness W. W. White understand the defendant to mean that the plaintiff Mrs. Martin was a woman of unchaste character? Yes. W. F. Durfee, Foreman.

"7. If you find that the defendant used the language charged, did he use such language with the evil purpose of slandering the plaintiff Mrs. Martin? No.
"W. F. Durfee, Foreman."

In addition to the special verdicts rendered in response to the foregoing interrogatories or special issues, the jury rendered its general verdict in favor of the plaintiffs for

the sum of $750 "for the actual damages to the reputation of the plaintiff Mrs. Martin."

On motion the court rendered judgment in favor of the defendant non obstante veredicto upon the ground that the same was inconsistent with the findings of the jury upon certain of the special issues and directed judgment to be entered against the plaintiffs that they "take nothing herein and that the defendant do have and recover from the plaintiffs his costs herein," etc. The appeal is by the plaintiffs from said judgment, upon the judgment roll alone.

The ground upon which the court set aside the verdict, as indicated in its judgment, was that the "special verdicts of the jury are inconsistent with the general verdict of the jury * * * and that the special verdicts are consistent only with the judgment in favor of the defendant," etc.

[1] Preliminarily, we may dispose of the contention of the plaintiff that the special issues, Nos. 3, 4, and 7, "were superfluous and not pertinent to this case, because punitive or exemplary damages were neither asked of nor awarded by the jury," for which reason, so it is asserted, said issues should not have been submitted to the jury. We can see no merit in the contention. Section 625 of the Code of Civil Procedure provides that in all cases other than in actions for the recovery of money only, or specific real property, "the court may direct the jury to find a special verdict in writing, upon all, or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon." Said section further provides "where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly." The purpose to be subserved by submitting to the jury special issues or particular questions of fact is to test the validity of the general verdict—"that is to say, of determining whether all the facts essential to the support of the general verdict were established to the satisfaction of the jury by the evidence." O'Connell v. United Railroads, 19 Cal. App. 36, 46, 124 Pac. 1022, 1027; Plyler v. Pac., etc., Cement Co., 152 Cal. 125, 92 Pac. 56; Stein v. United Railroads, 159 Cal. 379, 113 Pac. 663; Clementson on Special Verdicts, p. 107. It is thus manifest that special issues, or particular questions of fact, calling for answers as to facts without the proof of which the plaintiff could not support his action, may be submitted to a jury regardless of whether, as in cases of tort, exemplary or punitive damages may or may not properly be allowed or are within the calls of the complaint.

[2] The point first made by respondent is that the complaint does not state a cause of action for this reason: That the alleged slanderous language used to and concerning Mrs. Floretta Martin is not in and of itself actionable, or slanderous per se, and that there is an absence from the complaint of a statement, by way of an inducement, showing extrinsic facts or circumstances in connection with which the alleged slanderous words were used and which is necessary to show that the interpretation placed on said words by the innuendo is justified. There is force to this point; but it is not necessary to consider or pass definitely upon it herein, since the judgment must be affirmed upon the ground upon which the court below substituted it for the verdict returned by the jury. So far as we are advised, it has uniformly been held that the word "bitch" or "son of a bitch" is not actionable per se, and that when the former word is applied to a female it does not impute unchastity. Craig v. Pyles (Ky.) 39 S. W. 33; Jacobs v. Cater, 87 Minn. 448, 92 N. W. 397; Warren v. Ray, 155 Mich. 91, 118 N. W. 741, 130 Am. St. Rep. 566, 16 Ann. Cas. 513; Kerone v. Block, 144 Mo. App. 575, 129 S. W. 43; Sturdivant v. Duke, 155 Ky. 100, 159 S. W. 621, 48 L. R. A. (N. S.) 615, 25 Cyc. 322; Peters v. Garth, 50 S. W. 682, 20 Ky. Law Rep. 1934; Nealon v. Frisbie, 11 Misc. Rep. 12, 31 N. Y. Supp. 856; Blake v. Smith, 19 R. I. 476, 34 Atl. 995; Robertson v. Edelstein, 104 Wis. 440, 80 N. W. 724; K——— v. H———, 20 Wis. 289, 91 Am. Dec. 397; Newell, Slander and Libel, § 168, p. 187.

[3, 4] It is also established by the foregoing cases that the words spoken must be understood by those who heard them uttered in a slanderous sense. It is also the rule that when a slander or libel—

"is couched in language having a covert meaning not apparent upon its face, or in words or phrases not used otherwise than as slang, or cant terms, it is necessary for a plaintiff not only to allege and prove the slanderous or libelous sense in which the words were used by the defendant, but also that they were understood in the same sense by those to whom they were addressed." Edwards v. San Jose Printing & Publishing Society et al., 99 Cal. 431, 435, 34 Pac. 128, 129 (37 Am. St. Rep. 70).

In other words, as is said in Maynard v. Firemen's Fund Ins. Co., 47 Cal. 207, quoting from the syllabi:

"When words which are not libelous per se contain a covert meaning which makes them libelous, it is necessary for the plaintiff to aver in his complaint that the words were intended by the defendant to be understood as imputing wrongdoing to the plaintiff, and that they were, in fact, so understood by those who read them."

See, also, Ingraham v. Lyon, 105 Cal. 254, 257, 38 Pac. 892.

[5, 6] It will be observed from the authorities just named that there are two elements essential to the establishment of a case for slander or libel where the alleged slanderous or libelous words used are not on their face or

per se slanderous or libelous, viz.: First, that the utterer or publisher of the alleged slanderous or libelous words intended that they should be understood as imputing wrongdoing or wrong conduct to the plaintiff; second, that they were so understood by those who heard or read them. In this case, while the jury, in response to the special issues or particular questions of fact submitted to them, found that a witness who heard the words alleged to be slanderous uttered by the defendant, understood the defendant to mean by the use of said words that the plaintiff Mrs. Martin was a woman of unchaste character, likewise found that the defendant did not use the language charged with the evil purpose of slandering said plaintiff. In fact, the jury expressly found that the defendant did not intend by the use of the language charged to imply that Mrs. Martin was an unchaste woman.

Manifestly, these special findings are themselves inconsistent, and, as the court below found and adjudged, are palpably inconsistent with the general verdict. In such case, as section 625 of the Code of Civil Procedure provides, the special findings of facts control the general verdict, and necessarily it was the duty of the court to give judgment accordingly.

The judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

190 Cal. 326

## Ex parte BURKE. (Cr. 2534.)

(Supreme Court of California. Jan. 9, 1923. Rehearing Denied Feb. 8, 1923.)

1. Statutes ⟸51—Federal statute or one of another state may be declared law of the state.

In the absence of any constitutional prohibition, it is proper to declare that the law of the United States or of a sister state shall be the law of the state, and Const. art. 4, § 24, providing no law shall be revised or amended by reference to its title, is not such a prohibition.

2. Statutes ⟸51—Adoption of laws of another state may be done by reference as well as by setting out.

The adoption of a statute by the Legislature or Congress may be done by reference as well as by setting out at length, and this even where the statute adopted is the statute of another state or territory.

3. Statutes ⟸64(9) — Possible invalidity of clause adopting future enactments of Congress held not to invalidate adoption of present law.

The validity of an enactment adopting the provisions of the Volstead Act, enacted by Congress pursuant to the Eighteenth Amendment of the federal Constitution, is not affected by a clause purporting to adopt also the future provisions which may hereafter be enacted by Congress, though the invalidity of such clause be conceded, since it is not such a component part as would necessitate the holding that the entire act was invalid.

In Bank.

Application by Frank Burke for a writ of habeas corpus against the Chief of Police of the City and County of San Francisco. Prisoner remanded.

Wm. B. Hornblower and Fabian D. Brown, both of San Francisco, for petitioner.

Maurice E. Harrison, P. F. Dunne, Thos. B. Dozier, R. P. Henshall, Lewis F. Byington, J. J. Lermen, Chauncey F. Tramutolo, J. A. Mackenzie, J. W. Dorsey, Cushing & Cushing, and W. H. Metson, all of San Francisco, amici curiæ.

PER CURIAM. The petitioner asks for his discharge on habeas corpus from an imprisonment under a charge of a violation of the Wright Act, so called, being an act of the Legislature submitted to a referendum at the last election and carried by the people. His principal point is that the act is void because it purports to enact into the law in this state all the penal provisions of the so-called Volstead Act (41 Stat. 305) being an act of Congress passed pursuant to the Eighteenth Amendment of the federal Constitution, and to enforce its provisions.

[1] The question whether a state may enact a law in that manner is not a new one in the jurisprudence of the United States. Wherever there is no constitutional provision which forbids it, it is proper to declare that any law of the United States, or of another state, shall be the law of this state. We find no constitutional provision in this state which forbids such action. That portion of section 24 of article 4 of the Constitution which reads as follows, to wit:

"No law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended,"

does not prohibit that mode of legislation. It refers only to the revision or amendment of some law already enacted by our state Legislature, and has no reference to the enactment of a new provision. The principal that laws may be enacted in that fashion is well established. In People v. Whipple, 47 Cal. 592, it was held that it was proper for the Legislature, in creating an office, to define the duties of the incumbent by reference to an existing statute, and to provide that those duties shall be the same as those required by the act referred to. The principle is that such legislation may consist in readopting by its title the provisions of another act adopted by another state or by the United States. In Ex parte Lemon, 143 Cal. 558, 77 Pac. 455, 65 L. R. A. 946, it was held that the adoption of a particular title of the Political Code by reference only was legal. That case involved a special act adopted prior to the Constitution of 1879. The decision held that the Constitution of 1849 was the same as that of 1879 in this respect, and the act adopted as a part of the charter all the provisions of the title of the Political Code referred to without setting them out at length. In Vallejo, etc., R. R. Co. v. Reed Orchard Co., 177 Cal. 254, 170 Pac. 426, it was held that, where a statute by adoption designates and adopts an entire provision contained in a section of the Code by reference to its descriptive number, the statute so adopted by reference is the same as though the provision adopted has been bodily incorporated in the adopting statute.

[2] It is a general principle of law that in adopting a statute the Legislature or Congress may do so by reference, as well as by setting out the statute at length, and even where the statute adopted is the statute of another state or territory the principle is the same. Cathcart v. Robinson, 5 Pet. (30 U. S.) 264, 279, 8 L. Ed. 120; Robinson v. Belt, 187 U. S. 41, 47, 23 Sup. Ct. 16, 47 L. Ed. 65; Robinson v. Long Gas Co., 221 Fed. 398, 136 C. C. A. 642; State ex rel. Linthicum v. Board of Commissioners, 175 Ind. 400, 403, 94 N. E. 716; People v. Crossley, 261 Ill. 78, 83, 103 N. E. 537; Evans v. Illinois Surety Co., 298 Ill. 101, 106, 131 N.

E. 262; Hunt v. Tausick, 64 Wash. 69, 82, 116 Pac. 651, 35 L. R. A. (N. S.) 802.

[3] The second point which the petitioner urges is that the act is made void by reason of the fact that it adopts not only the existing provisions of the Volstead Act, but purports to adopt also the future provisions which may be hereafter enacted by Congress. It may be conceded that this provision is not valid, although we do not decide it, since it is not involved. The only effect of putting that provision into the statute would be, at most, that the provision itself would be void, leaving the remainder of the act valid. It is not such a component part of the act itself as would be necessary to require us to hold that it invalidated the entire act. In re Kinney (Cal. App.) 200 Pac. 966. We find nothing in the act which makes the law invalid so far as it adopts the existing provisions of the Volstead Act.

The question whether the fines which are imposed under the penal provision of the act are payable to the United States or to the state may be a matter of dispute but it is not a question with which the petitioner is concerned. As soon as he pays the money he will be exonerated, and the disposition thereof is a matter to be determined hereafter.

The prisoner is remanded.

SHAW, C. J., and WILBUR, WASTE, LAWLOR, LENNON, SEAWELL, and KERRIGAN, JJ., concur.

---

190 Cal. 316

## FLINN et al. v. SHAFTER REALTY CO.

(S. F. 9936.)

(Supreme Court of California. Jan. 6, 1923. Rehearing Denied Feb. 5, 1923.)

**Municipal corporations ⊂=446, 488, 489(7)—Failure to complete improvement within time fixed cannot be waived or cured by extension of time.**

Under a provision of a street improvement ordinance adopted under the authority of San Francisco Charter, c. 2, art. 6, § 33, that the failure of the contractor to complete the contract within the time fixed or within such extension as was therein provided rendered the contract void, and that no assessment should be made for the work done under the contract, the failure to complete the contract within the time fixed, which expired before any extension was granted, was not a mere error or informality in the proceedings, and the defect could not be cured by failure of the property owners to appeal or by a subsequent extension of the time.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by James J. Flinn and another against the Shafter Realty Company to foreclose a street assessment lien. Judgment for defendant, and plaintiffs appeal. Affirmed.

Fabius T. Finch and Paul F. Fratessa, both of San Francisco, for appellants.

F. W. Sawyer, of San Francisco, for respondent.

LAWLOR, J. Plaintiffs commenced this action to recover the amount of an assessment levied for street work done under a public contract in the city and county of San Francisco. The trial court found, and it is not questioned here, that the proceedings preliminary to the awarding of the contract were regular. The contract was awarded to plaintiffs by the said city and county on June 4, 1914, and required that the work be commenced within 15 days and completed within 90 days thereafter. On August 31, 1914, the board of public works passed a resolution recommending that the board of supervisors grant plaintiffs an extension of time of 60 days from September 2, 1914, for the completion of the work. Acting upon such recommendation, the board of supervisors passed a resolution extending the time for 60 days from September 2, 1914, but did not pass it until September 10, 1914, 8 days after the original 90-day period had expired. Various extensions of time were subsequently granted, and the work was completed on June 19, 1915, within the period of the last extension. On September 14, 1915, the work having been done in accordance with the specifications of the contract, an assessment was levied by the board of public works; among the lots assessed being one owned by defendant. No appeal was taken to the board of supervisors to have the assessment set aside, and it has never been set aside or altered.

Upon the trial it was found the assessment for street improvement was void because the work was not completed within the time specified in the contract or any legal extension thereof, and because the assessment was for more than one-half the assessed value of the property and did not provide for its payment in annual installments as provided by the charter of the city and county of San Francisco. Judgment was entered for defendant, from which plaintiffs appeal.

It is now conceded by respondent that, under the decision of this court in Federal Construction Co. v. Wolfson, 186 Cal. 267, 199 Pac. 512, the assessment was not void because in excess of one-half the assessed valuation of the property, inasmuch as the board of public works in its notice of intention to make the improvements provided that the amount of the assessment might be paid

in six annual installments; the deferred payments to bear interest at the rate of 7 per centum per annum. Respondent claims, however, that the assessment was void because the resolution of September 10, 1914, extending appellants' time, was passed after the original period allowed for the completion of the work had expired, and at a time when, it is asserted, the contract was void and jurisdiction to make an extension had lapsed.

Section 33, art. 6, c. 2, of the Charter, empowers the board of supervisors to enact an ordinance providing a procedure for street work or street improvements and for the payment of the cost by assessments. Under this supervision the street improvement ordinance was adopted, section 14 of which is in part as follows:

"In case of failure on the part of the contractor or said contracting owners to complete his or their contract within the time fixed in the contract or within such extension of said time as is herein provided, his or their contract shall be void and no assessment shall be made for the work done under said contract."

Section 21 of the same ordinance provides that the owners of the assessed property,

"feeling aggrieved by any act or determination of the board of public works in relation thereto, or who claim that the work has not been performed according to the contract in a good and substantial manner, or having or making any objection to the correctness or legality of the assessment or other act, determination or proceeding of the said board, shall, within thirty days after the date of the warrant, appeal to the supervisors by briefly stating their objections in writing and filing the same with the clerk of said supervisors. * * *

"All the decisions and determinations of the supervisors, upon notice and hearing as aforesaid, shall be final and conclusive upon all persons entitled to appeal under the provisions of this section as to all errors, informalities and irregularities which the supervisors might have avoided or have remedied during the progress of the proceedings, or which they can at that time remedy."

It is further provided in the same section that no assessment shall be held invalid by any court for any error, informality, or other defect, where the resolution of intention of the board of public works to recommend the improvement has been published and posted and the notice of improvement posted.

Many cases have been considered by this court which involved a failure to secure a renewal of a contract for street work under the Vrooman Act (Stats. 1885, p. 147) and the Improvement Act of 1911 (Stats. 1911, p. 730) before the expiration of the time allowed for completion of the work, but this is the first time it has been necessary to decide the effect of such a procedure under the street improvement ordinance of the city and county of San Francisco.

Respondent's contention is that by virtue of section 14 of the street improvement ordinance the contract appellants had with the city and county became void immediately upon the expiration of the time allowed for completing the work, that the board of supervisors had no power to restore it after that time, and that no curative clause could validate the extension. Many of the earlier cases decided under the Vrooman Act are cited in support of this contention, and reliance is placed on the statement contained in Federal Construction Co. v. Newhouse, 186 Cal. 284, 199 Pac. 519, that—

"In this connection it should be observed that while the curative clause of the statute therein considered (Stats. 1911, p. 730, § 26) is the same as in the street improvement ordinance of San Francisco, section 14 of the ordinance expressly provides that 'in case of failure on the part of the contractor * * * to complete * * * his contract within the time fixed in the contract, or within such extension of said time, * * * his * * * contract shall be void, and no assessment shall be made for the work done under said contract.' Whether in the light of this legislative declaration a failure to complete the work within the time indicated could be declared an error, irregularity, or informality, is a question we need not determine, but one which may well command the attention of the board of supervisors of the city and county of San Francisco."

Appellants' contention is that under the curative provision of section 21 of the street improvement ordinance all objections that the work was not completed within the contract time were waived by a failure to appeal to the board of supervisors, and that the extension of the time was an informality for which the assessment may not be set aside. It is insisted section 14 of the street improvement ordinance is a legislative as distinguished from a constitutional provision, and that therefore a failure to comply with it can be cured by section 21 under the rule laid down in Watkinson v. Vaughn, 182 Cal. 55, 186 Pac. 753.

But in our opinion it is plain from the language of section 14 that a failure of the board of supervisors to grant an extension of time within the original period is not an error or informality within the meaning of the street improvement ordinance which can be cured under section 21. In the absence of such a curative clause or through a failure to apply it, it has been held a contract becomes void, and jurisdiction to extend it lost, upon the expiration of the time originally allowed. Beveridge v. Livingstone, 54 Cal. 54; Mahoney v. Braverman, 54 Cal. 565; Fanning v. Schammel, 68 Cal. 428, 9 Pac. 427; Dougherty v. Coffin, 69 Cal. 454, 10 Pac. 672; Raisch v. San Francisco, 80 Cal. 1, 22 Pac. 22; Dougherty v. Nevada Bank, 81 Cal. 162, 22 Pac. 513; Kelso v. Cole, 121 Cal. 121, 53

Pac. 353. In Oakland Paving Co. v. Whittell Realty Co., 185 Cal. 113, 195 Pac. 1058, it was held that under the Improvement Act of 1911, which contained a curative clause (section 26) similar to that of the street improvement ordinance, such a failure was an error or informality which could be cured under the provisions of the said section and on account of which a court could not set aside an assessment.

In addition to a curative clause, however, the street improvement ordinance has added the provision that the contract shall become void if the work is not completed within the time prescribed and that no assessment shall be made for any work done under it. Considering the earlier cases cited above holding that a contract became void upon the expiration of the time limit and the conclusion that under the Improvement Act of 1911 a failure to secure a renewal until after the original time had elapsed did not invalidate an assessment, it must be held that in adopting section 14 it was not intended such an irregularity should come within the "errors" and "informalities" which might be cured. This was in effect to adopt the rule followed in the earlier cases, under which rule the board of supervisors would be without jurisdiction to extend a contract upon the expiration of the time allowed; the contract would expire and be beyond the reach of a curative clause.

As the board was without authority to extend the contract after the original time allowed had passed, the work was not done within the time fixed in the contract or an extension thereof, the contract became void under section 14 of the street improvement ordinance, and the assessment must be held to be invalid.

The judgment is affirmed.

We concur: SHAW, C. J.; WILBUR, J.; WASTE, J.; LENNON, J.; WARD, J.

---

190 Cal. 329

## ATLAS DEVELOPMENT CO. v. NATIONAL SURETY CO. (S. F. 10094.)

(Supreme Court of California. Jan. 9, 1923. Rehearing Denied Feb. 8, 1923.)

**1. Attachment ⊂=360—Upon rendition of judgment for defendant and discharge of attachment, defendant entitled to recover costs and damages.**

Where, in action in which property was attached, judgment was rendered for defendant discharging the attachment on ground that plaintiff was not entitled thereto under Code Civ. Proc. § 537, defendant thereupon became entitled to recover from plaintiff its costs and damages from the attachment.

**2. Attachment ⊂=375(3)—Reasonable value of use of property is proper measure of damages.**

A proper and recognized measure of damages for the wrongful taking or detention of personal property, as by attachment, is the reasonable value of the use of the property during the period of detention.

**3. Attachment ⊂=351—Damage from inability to carry out contract of sale of attached property too speculative and uncertain.**

Where oil-drilling machinery and equipment which were attached had been sold by the owner to a corporation organized for oil development, for 50,000 shares of its stock, the damages from inability to carry out and realize on the contract were too remote, speculative, and uncertain, particularly when not within the contemplation of the surety on the attachment bond.

**4. Attachment ⊂=350—That oil rig could not be used in particular locality not conclusive that right to use had no value.**

That an attached oil rig could not be used further in the county where it was when attached did not show that the right to possess and use it had no value, if there was any locality within practical shipping distance where it was in demand, and would command an ascertainable price.

**5. Attachment ⊂=351—That owner of attached property was planning speculative sale or gratuitous loan does not prevent recovery of value of use.**

That the owner of an attached oil rig had plans for its disposal involving a speculative sale, or even a gratuitous loan, did not prevent recovery of the reasonable market value of its use on the attachment bond.

**6. Evidence ⊂=10(1), 18—Judicial notice taken of location of oil fields and that cost of transportation of oil rig would not reduce damage below amount of judgment.**

The court may take judicial notice of the location of the various and numerous oil fields of California, and, on the basis of common knowledge, may conclude that, where an oil rig detained by attachment for 78 days had a usable value of $50 a day, the cost of transporting it from Contra Costa county to an oil field would not reduce the aggregate value of the use below the amount of a judgment for $1,000.

**7. Attachment ⊂=351—Usable value of property held rental value less cost of transportation to place of demand.**

The usable value of an attached oil rig in a county where it could not be used would be its rental value where needed, less the reasonable cost of removing it to the place of use.

**8. Evidence ⊂=320—Testimony as to rental value of oil rig based on information obtained by talking with others held not hearsay.**

The testimony of the president and active manager of a corporation owning an oil rig as to the loss per day by reason of its attachment when based on talks had with various oil men *held* not inadmissible as hearsay.

---

**9. Attachment ⊜349—Complaint on bond not alleging nonpayment of damages and costs by principal insufficient.**

In an action on an attachment bond conditioned that the principal would pay all costs awarded to defendant, and all damages sustained by reason of the attachment, the complaint stated no cause of action where it did not allege that the principal had not made such payment.

**10. Appeal and error ⊜1170(3)—Error in overruling demurrer to complaint not alleging essential fact held not miscarriage of justice.**

Though complaint in action on attachment bond failed to allege that the principal had not paid the damages and costs, where it definitely alleged damage from the attachment, and defendant, after overruling of the demurrer, answered and specifically denied any damage, and at the trial devoted its efforts to showing that the attached property had no usable value, and that plaintiff was not damaged, error in overruling the demurrer *held* not a miscarriage of justice requiring a reversal under Const. art. 6, § 4½, and Code Civ. Proc. § 475, defendant not having been deceived or misled by the imperfection of the pleading.

In Bank.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by the Atlas Development Company against the National Surety Company. From a judgment on a directed verdict for plaintiff, defendant appeals. Affirmed.

Henry C. McPike, of Oakland, for appellant.

Dunn, White & Aiken, of Oakland, for respondent.

WASTE, J. This appeal is by the defendant from a directed verdict and judgment in favor of plaintiff in a suit on an attachment bond.

The facts leading up to the present action are that for some time prior to November 12, 1919, the plaintiff had been engaged in drilling for oil in Contra Costa county and owned and used for the purpose certain oil drilling machinery and equipment. It was about to abandon this enterprise and was starting to dismantle the rig and outfit preparatory to placing it on board the cars at Antioch, in said county, for delivery in the state of Texas to one Charles L. Morrill under a contract of sale. On the date above stated one Nellie Wheelock, an assignee, commenced an action against the plaintiff here for work and labor performed by her assignor, and caused an attachment to be levied on the rig and outfit at the oil well. The defendant became surety upon the attachment bond for $1,000. Subsequently the action of Wheelock v. Atlas Development Company was tried and decided in defendant's favor, and it was therein adjudged that plaintiff take nothing by her complaint, and that the defendant have judgment for its costs, and that the attachment theretofore filed upon the property be, and the same was, discharged, for the reason that plaintiff was not entitled thereto under the provisions of section 537 of the Code of Civil Procedure.

[1] Under this state of facts the defendant became entitled to recover from the plaintiff its costs and damages sustained by reason of the attachment.

The present action was thereafter begun against the surety company upon the obligation of the attachment bond.

The complaint alleges as damages arising from the attachment suit that plaintiff was deprived of the use and possession of said rig and outfit for a period of 78 days, and that the reasonable usable value of the same was $50 per day during said period. Other claims by way of special damages were alleged, but these were subsequently waived, and the directed verdict for $1,000, the full penalty of the attachment undertaking, was based solely upon the value of the use of the property while detained under the writ.

[2] We are of the opinion that this point was correctly decided. There is no ground to question that a proper and recognized measure of damages for the wrongful taking or detention of personal property is the reasonable value of the use of the property during the period of detention. Hurd v. Barnhart, 53 Cal. 97; McGill v. W. P. Fuller & Co., 45 Wash. 615, 88 Pac. 1038; McCarthy v. Boothe, 2 Cal. App. 170, 83 Pac. 175; 6 Corp. Jur. 539; Sutherland on Damages (4th Ed.) §§ 512, 513.

[3, 4] It is contended under the facts in this case that the property taken under attachment had no rental value as it was then situated. It had been in use by the plaintiff in unsuccessfully exploring for oil in a field where no oil has been found. The work had been abandoned and the oil rig was being taken down for removal. The plaintiff had entered into a contract to sell the outfit to a corporation to be organized in Texas for oil development in that state and was to be paid with 50,000 shares of the corporation stock. It is urged on behalf of defendant that the plaintiff could make no further use of this property in Contra Costa county, but was bound by its contract to ship it to Texas, and that its damages, if any, were through being prevented from carrying out and realizing on its contract. It is clear at once that such a measure of damages, particularly when not shown to have been within the contemplation of the surety corporation, would be remote, speculative, and uncertain. If the fact of the location of this property in an unproductive field and the existence of

a contract to remove it to Texas could be considered for any purpose, it would be to admit the evidence of the rental value of such an oil rig in Texas. On the other hand, the fact that the oil rig could not be used further in Contra Costa county does not indicate that its adaptability and commercial requirements for use elsewhere would not give value to the right to possess and use it. One might own a snowplow in the Imperial Valley or a sawmill in the Mojave Desert, yet their possession could not be said to be without value if there was any locality within practical shipping distance where such machinery was in demand and would command an ascertainable price.

[5] Neither would the fact that the owner had other plans for its disposal which involved a speculative sale, or even the gratuitous loan of his property, prevent his recovery of the reasonable market value of its use.

In this case the undisputed testimony is to the effect that in the oil fields of California, as well as those of Texas, such an oil rig outfit has the rental value of from $100 to $125 per day. The plaintiff, for the purposes of this case, placed the value at $50 per day for the 78 days, showing at this rate an aggregate amount over three times as great as the judgment.

[6] It is true that no deduction was made from the values testified to for cost of transporting the outfit to oil fields where it would be in demand. But the courts may take judicial notice of the location of the various and numerous oil fields of California, and it may be safely concluded on the basis of common knowledge that the cost of transportation would not reduce the aggregate of the values testified to below the $1,000 of the judgment.

[7] We cannot assent to the doctrine advanced that, because there was no rental market for such an oil rig in Contra Costa county, it must be held to have been without such value, when the evidence showed that there was a demand for such property in available parts of the state at a minimum rate of $50 per day. The value of such an outfit in Contra Costa county would be such rental value where needed, less the reasonable cost of removing it to the place of use.

[8] The witness Moberry, who testified as to the value of the use of the oil rig in California, was the president of the plaintiff, the owner of the outfit, and appears to have been its active manager. He ascertained by talking to various oil men from Texas and California that the usable value of the rig during the time it was under attachment was $100 a day, and that that was the customary price per day for such an outfit. Basing his acknowledge on these inquiries, he estimated the loss to the plaintiff by reason of the attachment as $50 per day. Appellant contends that this testimony was hearsay, and that its motion to strike it out should have been granted. We do not agree with this contention. The witness Cardwell, who testified as to the rental value of such an outfit in Texas, appears to have been well acquainted with what the reasonable daily market value of such a rig would be in that state.

[9, 10] Defendant demurred to the complaint on the ground that it did not state a cause of action, and the overruling of such demurrer is assigned as error. The complaint contains no allegation of the breach of the condition on which the surety company was to become liable on its undertaking. The condition of the bond is that the plaintiff in the attachment suit will pay all costs that may be awarded to the defendant and all damages sustained by reason of the attachment. There is no averment in the complaint that such plaintiff had not made the payment. Without an allegation of default on the part of the principal in the condition on which the obligation of the bond was to accrue no cause of action is stated. It was so held in Morgan v. Menzies, 60 Cal. 341, which was an action brought upon attachment bond, and involved the precise question we are now considering. The demurrer to the complaint should have been sustained. An examination of the record, however, convinces us that the case should not be reversed for that reason. The complaint contains sufficient averments of the execution of the undertaking here sued upon, the subsequent seizure and levy of the attachment by the sheriff in the attachment suit, and of the fact that on the trial of the action the plaintiff here recovered a judgment dismissing the attachment on the ground that the plaintiff in the attachment suit was not entitled thereto. Then follows succinct and definite allegations of the damage suffered by the plaintiff by reason of the wrongful attachment, through being deprived of the use of the oil rig and outfit, the reasonable usable value of which is alleged to be the sum of $50 per day during the 78 days the same was unlawfully held under the attachment proceedings. Its general demurrer being overruled, the defendant answered and denied generally and specifically that the plaintiff was damaged by reason of the attachment in any of the particulars mentioned in the complaint. At the trial the efforts of the defendant appear to have been devoted to showing that the rig and outfit had no usable value at the place where it was resting at the time the attachment was placed upon it, and consequently the plaintiff was not damaged by its detention. Having acted upon the theory that the issue as to its liability by reason of the alleged damage suffered by the plaintiff was sufficiently raised by the complaint, the defendant was not deceived or misled by the imper-

fection of the pleading, and under the oft-cited sections of the Code and Constitution, no miscarriage of justice having resulted, the error should be disregarded. Code Civ. Proc. § 475; Const. art. 6, § 4½.

The judgment is affirmed.

We concur: SHAW, C. J.; LENNON, J.; LAWLOR, J.; WILBUR, J.

---

190 Cal. 336

## HONEY v. PACIFIC AUTOMOBILE INDEMNITY EXCH. et al. (L. A. 7281.)

(Supreme Court of California. Jan. 11, 1923. Rehearing Denied Feb. 8, 1923.)

**1. Insurance ⟸508—Auto fire insurance held not limited until completion of all repairs.**

In a policy insuring an automobile against damage by collision or loss or damage by fire, a provision that the liability of the insurer shall be reduced by the amount of any property loss or damage until repairs have been completed or parts replaced, when it shall attach for the amounts originally written, does not reduce the amount of insurance against loss by fire after a collision by the total amount paid as loss resulting from the collision until all repairs have been completed and all parts replaced, but, in the event of a fire occurring after some of the repairs had been completed and liability incurred therefor, insured can recover the full loss less the cost of completing the repairs.

**2. Livery stable and garage keepers ⟸8(1)—Repairs to automobile entitle workers to possessory lien.**

Those performing the work and furnishing the parts necessary for repair of an automobile have a possessory lien thereon for the cost of the repairs.

In Bank.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by A. H. Honey against the Pacific Automobile Indemnity Exchange and another, upon a policy of fire insurance. Judgment for plaintiff, and defendants appeal. Affirmed.

H. T. Morrow and David D. Stuart, both of Los Angeles, for appellants.

C. Hughes Jordan, Goudge, Robinson & Hughes, and F. Walton Brown, all of Los Angeles, for respondent.

WASTE, J. In this action, to recover on a policy of insurance on an automobile issued by the defendants, the plaintiff recovered judgment for $903.50 for loss occasioned by fire. Defendants appeal, claiming that their liability does not exceed the sum of $500.

Among other provisions the policy indemnified against loss or damage by collision, and covered loss or damage by fire. The maximum fire risk assumed by the insurer was limited to $1,500 in excess of $1,000 insurance permitted to be carried elsewhere. Soon after its purchase the automobile was badly damaged by collision, and the defendant paid plaintiff $1,000 for the loss occasioned thereby. Plaintiff then took the automobile to a repair shop for the purpose of having the car repaired. All of the repairs were completed and all parts replaced. Mechanically the car was as good as new, according to competent testimony, and it "fell short of being equal to new in condition" only because whatever painting of the car was required had not been done. After being tested, the car was taken to a paint shop, where the fire occurred. It was partially destroyed, and was eventually sold for $300. The plaintiff received $1,000 from the excess insurance carrier, and seeks in this action to recover from the defendants the balance of the loss sustained.

The plaintiff paid $2,575 for the automobile. He added to its equipment certain accessories, the total cost being $2,845. After the purchase the selling price advanced, and the cost of a car of like type and model, with the same equipment, was $2,950 at the time of the fire. Certain of the accessories, amounting in value to $147.50, were not with the car when the fire occurred. The painting job would cost $54. The court found the value of the car, with the repairs which had been completed, and the parts which had been replaced, after deducting $54 for the painting which had not been done, and the sum of $147.50 for the equipment which had been removed, to be the sum of $2,203.50. Deducting from that sum the $300 received by plaintiff as the salvage of the car after the fire, and the further sum of $1,000 paid on the loss by the carrier of the excess insurance, the court entered judgment against defendants for $903.50.

A stipulation of the policy provides that the liability of the insurer "shall be reduced by the amount of any property loss or damage until repairs have been completed or parts replaced, when it shall attach for amounts originally written." Appellants take the position that, having paid the plaintiff the sum of $1,000 for the property loss and damage caused by the collision, the $1,500 liability under the policy for loss by fire was thereby reduced by that amount until all repairs to the automobile were completed, and all parts replaced. The painting not being done, and certain parts of the equipment not having been put back in place pending the painting job, they refuse to pay any sum over $500 in satisfaction of plaintiff's claim.

[1] We do not construe the quoted provision of the policy as appellants would have us do. If, immediately following the adjust-

ment of the loss and damage suffered by reason of the collision, and the payment of the $1,000 by defendants, and before any repairs had been completed or any parts had been replaced, the fire had occurred, the contention of the appellants would be sound. Under such contingency the plaintiff would suffer a loss for which he had, to the extent of the payment of the $1,000, been already indemnified. The plaintiff contracted a liability to pay for the repairs actually made, and parts furnished. The record indicates that bills for such repairs and parts were furnished to him, and that he paid or settled therefor. By assuming the position they have, appellants admit that the exact moment all repairs were completed and parts furnished full liability under the policy would attach. But the provision of the policy is not that all repairs must be made, and all parts replaced.

[2] We are of the opinion that, from the moment progressive repairs to the car were finally completed, and various needed parts were actually replaced, the value of the car was to that extent increased, and the liability of the insurer correspondingly extended until such time as the car was fully restored to the condition in which it was before the collision, at which time the liability would attach for the full amount originally written in the policy. What actually occurred in this case emphasizes the point. The necessary repairs to the body of the car and its fenders were made at one garage. Other repairs were done and needed parts furnished at a second. Each job was a completed transaction, for the cost of which the plaintiff became liable, and to secure payment for which those performing the work and furnishing the parts had a possessory lien on the automobile, had they chosen to exercise it. Mortgage Securities Co. v. Pfaffmann, 177 Cal. 109, 169 Pac. 1033, L. R. A. 1918D, 118; Union Machine Co. v. Chicago Bonding Co., 36 Cal. App. 585, 172 Pac. 1113. When, as in this case, all repairs have been made, and all damaged parts of the car have been replaced, and nothing remains to be done but a small part of the work of restoring the car to its former perfect condition, the position of appellants becomes untenable. The fire loss suffered by plaintiff was less than the actual value of the car with repairs actually made and parts replaced. Under these circumstances the most appellants can claim is a pro tanto reduction of liability to the extent of the value of any repairs yet to be made, and of parts still to be replaced. The trial court was of that view. It gave appellants the benefit of such reduction, and allowed the value of the accessories and equipment not destroyed by the fire. Its ruling was correct. Such construction is reasonable and just to both parties to the contract. It is not necessary, in laying down such rule of law in a case of first instance in this court, to seek to justify its assertion by recourse to the well-established principles that policies of insurance are to be construed liberally in favor of the assured, and that any uncertainty or ambiguity in such contracts must be construed most strongly against the insurer. The plain reading of the provision in the policy, in the light of the purposes for which the separable contracts of indemnity against loss are intended, justifies the construction placed thereon by the lower court.

The judgment is affirmed.

We concur: SHAW, C. J.; WILBUR, J.; KERRIGAN, J.; SEAWELL, J.; LAWLOR, J.

---

190 Cal. 321

## KING et al. v. RAILROAD COMMISSION OF CALIFORNIA. (S. F. 10291.)

(Supreme Court of California. Jan. 8, 1923.)

1. **Waters and water courses ⇐257(1)—Contract rates for water delivered by public utility can be changed by Commission.**

The rates fixed by contract for the delivery of water by a company engaged in furnishing water to lands in the vicinity as a public utility can be changed by the Railroad Commission under its power of regulation and control.

2. **Waters and water courses ⇐257(1)—Riparian rights of landowners held not to affect right to change contract rates for delivery of water.**

That some of the landowners who contracted with a public utility for the delivery of water to their lands were riparian owners does not affect the right of the Commission to change the rates fixed by the contracts, where no mention was made in the contract that those landowners were riparian owners, and their riparian rights in the stream were not affected thereby.

In Bank.

Petition for certiorari by J. R. King and others against the Railroad Commission of the State of California, to review an order of the Commission increasing rates for furnishing water to be paid by petitioners to the Sutter-Butte Canal Company. Application denied.

King & King, of Gridley, Devlin & Brookman, of San Francisco, and Henry Ingram, of Gridley, for Sutter-Butte Canal Co.

F. S. Brittain, of San Francisco, for petitioners.

Hugh Gordon, William W. Clary, and Carl I. Wheat, all of San Francisco, for respondent.

PER CURIAM. This is an application by way of writ of review to this court for an

order reviewing and annulling an order of the Railroad Commission, made and entered on April 26, 1922, increasing the rates for water to be paid by these petitioners to Sutter-Butte Canal Company, for the service of water for irrigation supplied to the lands of these petitioners by said canal company.

The petitioners herein are the holders of contracts with the said Sutter-Butte Canal Company or its predecessors in the appropriation and supply of water for purposes of irrigation to the region in which the respective holdings of these petitioners are located. The petitioners King and Room set forth, in substance, in their said application that in the year 1905 they became the purchasers, respectively, from a certain corporation known as the California Irrigated Land Company, of certain described tracts of land in a certain colony known as Gridley Colony No. 2, in Butte county, which corporation was then the holder, as a subsidiary corporation, of the Butte County Canal Company, of a contract with said Butte County Canal Company, which provided that the Butte County Land Company would furnish water for irrigation to the lands in said colony in an amount to be required, not exceeding one cubic foot per second for each 160 acres, for which said land company agreed to pay to said water company annually at the rate of $1 per acre; that said water right thus created was to be appurtenant to the land upon which the water furnished thereunder was delivered, and that the said water charges, if unpaid, were to be a lien upon such land.

As to the applicants J. P. Hopkins and Hazel S. Hopkins, the application herein shows that in the year 1905 they were, and have since been, the owners of certain lots and parcels of land in certain other larger tracts in Butte county, which tracts were entitled, by virtue of location, to certain riparian rights in the waters of the Feather river, to a portion or share in which these particular applicants had a vested interest. They then allege and show that in that year they entered into a certain contract with the said Butte County Canal Company by which, for a consideration of $2,610 in money paid by them to the said canal company and of the grant of a right of way for a main canal across their said lands, they received from said canal company a contract for the delivery of water on their said lands at the annual rate of $1 per acre, which said contract was otherwise in substantially the same form as that in which the applicants King and Room had acquired a beneficial interest by virtue of their purchases of their holdings in the Gridley Colony No. 2.

The applicant Gibson herein was a purchaser of a certain portion of their said holdings from Hopkins, and claims to have succeeded thereby to an interest in the latter's riparian rights in said river, and also to the interest in his said water rights contract appurtenant to the lands he had acquired.

The petitioners further allege that the Sutter-Butte Canal Company, as the successor of the Butte County Canal Company, presented an application before the Railroad Commission in the early part of the year 1922 for a general increase in their water rates applicable to all of their consumers; that the petitioners herein were parties to said proceeding, and appeared therein protesting against such increase in water rates and setting forth in their pleadings filed before the Commission in furtherance of such protests that they and each of them were the holders of vested contract rights by virtue of their said contract with the Butte County Canal Company, which the Railroad Commission had no jurisdiction to change or modify by any increase in the water rates provided for in such contracts. The protestants Hopkins and Gibson further protested against any such increase in water rates upon the ground that their particular contracts with the Butte County Canal Company related to the delivery to their lands of the waters of the Feather river, in which they had riparian rights, and that by said contracts the said canal company had agreed to divert and deliver to them from said river the water in which they had such riparian rights, at rates which the Railroad Commission had no jurisdiction to alter or increase. The Railroad Commission, upon the hearing upon the said application of the Sutter-Butte Canal Company and the opposition thereto filed by these petitioners, overruled their said objections and proceeded by its order made and entered on April 26, 1922, to grant the application of said canal company for a general increase in its water rates. After the denial of a petition for a rehearing on the part of these petitioners, the present application for a writ of review was presented by them to this court.

[1] Upon the hearing upon said application and in the briefs of the applicants filed in support thereof, these petitioners as a whole contend that at the time their respective water rights contracts were entered into the Butte County Canal Company was not a public utility in so far as their water rights were concerned, and, hence, that their respective contract rights, and particularly the specific water rates provided for therein, were not subject to the regulation and control of the Railroad Commission. This contention presents the first question for review. In dealing with this question we do not regard it as necessary to repeat or rehearse in this opinion what was said by this court upon an almost identical state of facts in the case of Butte County Water Users' Ass'n v. Railroad Commission, 185 Cal. 218, 196 Pac. 265. It may be true that

the petitioners herein were not parties to that proceeding, but practically every fact attending the history of the Butte County Canal Company, from the inception of its project to supply water to the region wherein the lands of these petitioners lie, was presented to this court in that proceeding, and this court upon those facts as thus presented held that said canal company was organized as, and has always been, a public utility supplying water for irrigation in the counties of Butte and Sutter. Furthermore, the same facts which were embraced in the record before this court in that proceeding were presented in evidence before the Railroad Commission in the proceeding before that body, to which these petitioners were parties, and which they now seek to have reviewed, and the Commission, upon such presentation and on the authority of the decision of this court above referred to, held that the Butte County Canal Company had been from its inception a public utility, and that these petitioners, in receiving their respective contracts for the service of water upon their respective parcels of land had dealt with the said Butte County Canal Company in its already acquired capacity of a public utility, and hence that the water rates of the contract holders of said canal company, including those of these petitioners, were subject, as to the rates for water provided for therein, to the control and regulation of the Railroad Commission. In our opinion, therefore, this question is conclusively determined, in so far as these petitioners are concerned, adversely to their present contention. These petitioners have relied, in making said contention, upon an alleged identity in the facts surrounding their acquisition of whatever rights they claim under these said contracts with those considered by this court in deciding the case of Allen v. Railroad Commission, 179 Cal. 68, 175 Pac. 466, 3 A. L. R. 249, but the facts as found by the Railroad Commission in the proceeding now under review do not in certain essential particulars sustain their said contention, since in the Allen Case the contracts which the petitioners therein asserted were made while that company was a private concern as to the water they disposed of. That company was not a public utility at all, except as to a small quantity of water devoted to the use of a small village. The water it dealt in with the other users had never been dedicated to public use.

[2] The conclusion we thus arrive at disposes of every contention of the petitioners in this proceeding except the claim urged by the petitioners Hopkins and Gibson that their contracts were peculiar in the respect that, at the time they were entered into, Hopkins was owner of riparian rights in the Feather river, from which the Butte County Land Company derived, by appropriation, the water which it proposed to distribute, and, hence, that contracting with Hopkins to serve his lands with water the said canal company was engaging to furnish him with his own water through its system upon terms which the Railroad Commission had no authority to change. There is no merit in this contention. The contract of Hopkins with the Butte County Canal Company makes no reference to any riparian water rights owned or held by Hopkins and does not purport to deliver to him any of the waters of said river covered by his alleged riparian rights. It is in the usual form of the other contracts which said public utility entered into with its customers at or about the same time, and only purports to deliver to him a certain annual supply of the water which said canal company had acquired by appropriation, which in no wise interfered with whatever riparian rights Hopkins had in the waters of said river. Whatever rights he thus had he and his successor in interest, Gibson, still have, unaffected by said contracts or by the action of the Railroad Commission in attempting an increase in the water rates provided for therein.

We do not deem it necessary to deal with the other question presented by the respondents herein as to the effect of an earlier order of the Commission increasing the water rates of these petitioners, in which they are asserted to have concurred by the payment of the rates provided therein so as to estop them from asserting in the present proceeding that the canal company dealt with them, in entering into said contracts, otherwise than as a public utility.

The application is denied.

SHAW, C. J., and LAWLOR, WILBUR, LENNON, and WASTE, J., concur.

(190 Cal. 341)

## CHARLTON SILK CO. v. JONES et al. (S. F. 6523.)

(Supreme Court of California. Jan. 18, 1923.)

1. Commerce ⟸40(2)—Sales through traveling salesman from another state held "interstate commerce."

Sale of goods through traveling salesman of a manufacturer whose principal place of business was in another state, where it was engaged in the manufacture, such solicitors receiving the orders and sending them to the other states when the goods so ordered were shipped, constituted "interstate commerce."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. Commerce ⟸8(1) — Federal law controls collection of proceeds of interstate commerce.

Civ. Code, § 405, does not apply to the right to collect proceeds on sale of goods constituting interstate commerce; such right being incidental to the commerce, and the federal law controlling.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the Charlton Silk Company against John R. Jones, administrator, and another. From judgment for defendants, plaintiff appeals. Reversed.

Nowlin, Fassett & Little and Ernest K. Little, all of San Francisco, for appellant.

C. M. Jennings, of San Francisco, for respondents.

Henry G. W. Dinkelspiel and John R. Jones, both of San Francisco, William T. Craig and John E. Carson, both of Los Angeles, and W. P. Smith, of San Francisco, amici curiæ.

WILBUR, C. J. [1, 2] This is an action to recover the purchase price of goods, wares, and merchandise. The action was begun June 27, 1910, before the enactment of the Statutes of 1917 (Stats. 1917, p. 381) repealing sections 405, 406, 408, 409, and 410 of the Civil Code. The court found that the plaintiff's principal place of business was the city of Chicago, state of Illinois, where it was engaged in the manufacture and sale of drygoods at wholesale.

"That the plaintiff sent out traveling salesmen to California and said traveling salesmen solicited and received orders for merchandise and sent said orders to the plaintiff in Chicago, and the goods so ordered were then shipped by the plaintiff to its customers in California."

This finding establishes the fact that the business done was in interstate commerce, and that therefore the provisions of sections 405 et seq., Civil Code, do not apply because the right to collect the proceeds of interstate commerce was incidental thereto and cannot be prevented by state legislation. Sioux Remedy Co. v. Cope, 235 U. S. 197, 35 Sup. Ct. 57, 59 L. Ed. 193; W. W. Kimball Co. v. Read, 43 Cal. App. 342, 185 Pac. 192; Moon v. Martin, 185 Cal. 361, 197 Pac. 77.

Judgment reversed.

We concur: LAWLOR, J.; KERRIGAN, J.; SEAWELL, J.; MYERS, J.; WASTE, J.

(190 Cal. 340)

## DABNEY v. WILHELM et al. (L. A. 7259.)

(Supreme Court of California. Jan. 12, 1923.)

1. Appeal and error ⟸939—Assumed no judgment entered when clerk's certificate mentions none, and appeal purports to have been taken from order.

Where the clerk's certificate to the purported judgment roll makes no mention of any judgment, and the appeal purports to have been taken from a judgment and order sustaining defendant's objection to the taking of any testimony, it may be assumed that no judgment was entered.

2. Appeal and error ⟸70(½)—Order sustaining objections to taking of testimony for insufficiency of complaint not appealable.

No appeal lies from an order sustaining an objection to the taking of any testimony on the ground that the complaint does not state a cause of action, as such an order is not mentioned among the interlocutory orders which Code Civ. Proc. § 963, makes the subject of appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Joseph B. Dabney against Henry Wilhelm and others. From an order, plaintiff appeals. Appeal dismissed.

Robert M. Pease, of Los Angeles, for appellant.

Claud B. Andrews, Carnahan & Clark, and John C. Gillham, all of Los Angeles, for respondents.

WASTE, J. The plaintiff brought an action seeking to compel specific preformance of an alleged agreement made by certain of the defendants to enter into an oil lease. A general demurrer to the amended complaint was overruled, and the defendants answered. The case came on for trial, and stipulations as to further amendments to the complaint and as to certain facts were filed. Defendants thereupon objected to the taking of any testimony, on the ground that the amended complaint did not state a cause of action, and the court sustained the objection. The plaintiff is here seeking a reversal of that order.

"The appeal, of course," he says, "is taken on the judgment roll."

[1, 2] An examination of the record brought here in the transcript discloses that apparently no judgment was ever entered in the case. We may well assume that to be the fact, for the clerk's certificate to the purported judgment roll makes no mention of such judgment and, according to the notice, the appeal is taken "from the judgment and order sustaining the objection to the taking of any testimony in said cause, and from the whole thereof"; further reference being made to the minute order of the court sustaining the objection to the taking of testimony. No appeal lies from such order. Code Civ. Proc. § 963. It is not one mentioned among the interlocutory orders which the statute makes the subject of appeal. It may be reviewed upon appeal from the judgment as an intermediate order which necessarily affects the judgment. Clifford v. Allman, 84 Cal. 528, 533, 24 Pac. 292; Swain v. Burnette, 76 Cal. 299, 302, 18 Pac. 394.

The appeal is dismissed.

We concur: SHAW, C. J.; WILBUR, J.; LAWLOR, J.; SEAWELL, J.; KERRIGAN, J.

---

190 Cal. 348

## McCLURE v. ALBERTI et al. (L. A. 7214.)

(Supreme Court of California. Jan. 23, 1923. Rehearing Denied Feb. 16, 1923.)

**1. Sales ⟸93—Evidence held to sustain finding contract was mutually abandoned.**

Evidence that, after a contract for the sale of grapes had been partly performed, the remaining grapes in the seller's vineyard were damaged by rain, and the buyer directed the seller to fill the boxes of the buyer he had on hand, and that would terminate the deal, sustains a finding that the contract was abandoned by mutual agreement; it not showing merely an alteration of the terms thereof.

**2. Appeal and error ⟸1041(4)—Amendment of complaint to conform to proof held not prejudicial to defendants.**

An amendment to the complaint to conform to the proof was not prejudicial to defendants assuming that an additional issue was tendered thereby, where all the facts were before the court, and its findings established the liability of defendants under either the original or amended issues, so that the judgment will not be reversed because of error in striking out the demurrer and answer to the amended complaint.

In Bank.

Appeal from Superior Court Los Angeles County; J. L. Fleming, Judge pro tem.

Action by Nellie M. McClure against Robert Alberti and another, copartners. Judgment for plaintiff, and defendants appeal. Affirmed.

H. A. Massey, John L. Richardson, and Geo. S. Hupp, all of Los Angeles, for appellants.

Charles Robert McCarty and William C. Jensen, both of Los Angeles, for respondent.

WASTE, J. Plaintiff recovered judgment, and defendants have appealed. The plaintiff, as executrix of the estate of John McClure, deceased, entered into a written contract with the defendants, whereby plaintiff sold and the defendants bought 400 tons of grapes at the agreed price of $15 per ton, delivered and packed on board the cars. About 79 tons of grapes had been delivered and accepted, when the rain damaged those remaining in the vineyard. Thereupon John Q. McClure, the manager of the estate, who had full authority in the matter, had a conversation with Robert Alberti, one of the appellants, the result of which was an abandonment of the contract by mutual consent of the parties. An oral agreement was entered into, to the effect that appellants would select various portions of the vineyard from which sufficient grapes might be picked to fill the boxes of the appellants then on the place. This arrangement was carried out, appellants made their selection, and 25 tons of grapes were delivered by respondent to appellants at the railroad station.

Appellants never made any further demand on respondent for grapes. The respondent delivered to appellants, in all, 104.17 tons of grapes at the agreed purchase price of $15 a ton, making the total price of $1,562.55. Appellants paid on account all but the sum of $365.74. Respondent made demand for the payment of this amount, and the appellants sought to surcharge the account with the value of a large number of boxes claimed by the appellants to have been delivered to the respondent and lost by her. The parties were unable to reach a settlement, whereupon respondent commenced this action to collect the balance due for the grapes delivered. The appellants answered, and thereafter filed a cross-complaint, alleging damages for the failure of respondent to deliver the balance of the grapes specified in the written agreement, placing their loss of profits at $1,479.15, and alleging an additional loss of $46.80 for boxes lost or destroyed by the respondent. The respondent answered the cross-complaint, denying its allegations, and as special defenses to the claim for damages for the alleged nondelivery of grapes asserted an alteration of the contract, that further performance had been prevented by the appellants, and that other grapes were available in the open market, equally accessible and at an equal or less price than that agreed to be paid by the terms of the contract.

---

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

The trial court found that the agreement was in fact abandoned. It, in effect, upheld all of the special defenses of the respondent, and found that respondent had suffered a few boxes belonging to the appellants to be lost or destroyed, amounting in value to $4.20. After crediting this amount, it rendered judgment in favor of respondent and against the appellants for $361.54, together with costs of suit, and adjudged that appellants take nothing by reason of their cross-complaint. From this judgment the appeal is taken.

[1] The evidence fully sustains the finding of the trial court that the written agreement for the sale and purchase of the grapes was mutually abandoned by the parties, and that each of them was thereby released from any further obligation by reason of its terms; the new oral agreement abrogating the former contract. This finding we think is correct. The oral agreement, found by the court, was not a modification or alteration of the written agreement, but was a new agreement superseding that then existing. The idea conveyed by the evidence and the finding is that the written agreement was abrogated. Pearsall v. Henry, 153 Cal. 314–325, 95 Pac. 154, 159. The record shows at the time John Q. McClure, on behalf of the respondent, and Robert Alberti, acting for the appellants, were considering the damage caused to the grapes by the rain, and the new oral agreement was entered into, Alberti said: "That concludes our proposition for this year." McClure told Alberti "to go ahead and fill up the balance of his boxes and send them down, and then we would quit. He [Alberti] was the one that said, 'Then we will quit,' and I [McClure] agreed with him. He said, 'Fill up the balance of the boxes; that will conclude the proposition,' or something—'our proposition,' or 'deal for this year.'"

The claim of the respondent and the finding of the court that the written agreement was abandoned is further borne out by the fact that appellants made no demand on the respondent for further deliveries during the grape season of that year. Aside from the damage done to respondent's grapes by the rain, which is the reason assigned by appellants for the abandonment of the contract, there is the further significant fact, found by the court from the evidence in the record, that appellants were able to purchase in the open market the same kind of grapes as those bought from the respondent at a lower price per ton. An easy computation discloses that the grapes received by the appellants under the original contract have been fully paid for. The present action is, in effect, one in assumpsit for the agreed value of the grapes delivered under the oral agreement. Castagnino v. Balletta, 82 Cal. 250, 258, 23 Pac. 127. The evidence fully supports the findings of the trial court, which in turn uphold the judgment.

[2] After the evidence was closed, but before decision, the trial court permitted the respondent to amend her third amended complaint and her amended answer to the second amended cross-complaint of the appellants, by setting up the mutual abandonment of the written agreement by the parties—the allegation theretofore having been merely that the parties "entered into an oral agreement in alteration of said written agreement." Appellants sought to demur and to answer to respondent's pleadings as amended, claiming that a new cause of action and a new defense were set up. The demurrers and the answer were struck from the files. Appellants were not prejudiced by this action. As we read the record, the amendment, in effect, was merely one to conform to the proofs. Assuming that an additional issue was tendered by the amendment, we cannot see how the testimony in the case could have been different from that already introduced. All the facts were before the court, and its findings conclusively establish the liability of the appellants, irrespective of whether the issue was one of an alteration of the written contract or its entire abandonment, and the substitution of the oral agreement.

The judgment is affirmed.

We concur: WILBUR, C. J.; MYERS, J.; SEAWELL, J.; KERRIGAN, J.; LAWLOR, J.; LENNON, J.

---

190 Cal. 345

## HAYES v. BREEDEN et al. (S. F. 10211.)

(Supreme Court of California. Jan. 23, 1923.)

**1. Deeds ⟸208(5)—Finding of delivery of trust deed with intention to pass title held warranted.**

A grantor's direction to the attorney drawing a trust deed in the presence of the grantees to keep the deed for the grantees, and a certificate subsequently executed by him reciting the making of such deed and showing an intention that it should be effective, in connection with other testimony, *held* to justify a finding of delivery with intention to vest title.

**2. Appeal and error ⟸1073(1)—Judgment in suit to quiet title not reversed because ignoring trust, where appellant had no interest in that question.**

In action to quiet title against persons claiming as trustees, judgment for defendants will not be reversed because decreeing that defendants owned the land in fee and ignoring the trust, where plaintiff was not a beneficiary and had no interest in the trust.

---

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

In Bank.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Action to quiet title by Viola Hayes, as administratrix of Laura J. Craycroft, deceased, against H. O. Breeden and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Everts, Ewing & Wild and J. R. Fitch, all of Fresno, for appellant.

Strother P. Walton and Ray C. Wakefield, both of Fresno, for respondents.

WILBUR, C. J. This is an action by the administratrix of the estate of Laura J. Craycroft, deceased, to quiet title against the defendants, who claim under a lost and unrecorded deed by the deceased to the defendants. The court rendered judgment for the defendants, and the plaintiff appeals.

[1] The question raised on appeal is whether or not this deed was delivered. The deed reserved the income of the property to the grantor for life and provided that upon her death the property should be sold by the defendants and the proceeds distributed to certain charitable and religious institutions and to certain private beneficiaries. The deed was prepared by M. K. Harris, an attorney at law, at the instance of the deceased; was executed and acknowledged June 11, 1917, in the presence of the grantees, whereupon the deceased said to M. K. Harris, in their presence, "Judge Harris, you keep the deed for the trustees and put it in your safe," to which Judge Harris replied, "All right." Thereafter, on February 13, 1918, the decedent signed a certificate promising to pay $10,000 to the Men and Millions Movement. This certificate contains the following statement:

"This certifies that I have provided in a deed of trust under H. O. Breeden and W. W. Congdon, as trustees, that at my death $5,000 is to be paid to the Christian Woman's Board of Missions at Indianapolis and $5,000 to be paid to the Board of Church Extension of Kansas City. It is my desire that the provision of $10,000 as assigned above and in the deed of trust be counted as a part of the fund of $6,300,000 under the Men and Millions Movement of the Christian Church."

The direction of the grantor to keep the deed for the grantees, made in their presence, with the subsequent declaration contained in the certificate showing the grantor's intention that the deed should be effective in connection with other testimony which need not be set forth in detail, was amply sufficient to justify the finding of the trial court that the deed was delivered with the intention of vesting title.

[2] But one other point need be noted. The defendants were trustees and were required under the terms of the deed to dispose of the property and to distribute the proceeds to the beneficiaries therein named. The court decreed that the defendants owned the land in fee. Appellant claims that this decree ignored the trust features of the deed. As the plaintiff is not a beneficiary under the trust deed and has no interest in that question, the judgment will not be reversed for that reason. The beneficiaries of the trust will, of course, be entitled to enforce that trust as against the defendants who hold the legal title.

Judgment affirmed.

We concur: WASTE, J.; MYERS, J.; KERRIGAN, J.; LENNON, J.; LAWLOR, J.; SEAWELL, J.

---

190 Cal. 343

## In re DORN'S ESTATE. (S. F. 10075.)

(Supreme Court of California. Jan. 22, 1923.)

**1. Wills ⇐423—Decision of contest before probate is conclusive only as to right to admit to probate.**

The decision of a will contest before the will is admitted to probate is conclusive only as to the question therein determined, which is the right to admit the will to probate.

**2. Wills ⇐423—Will admitted after contest may be contested by another heir.**

Under Code Civ. Proc. §§ 1327, 1333, giving a right to contest a will within one year after it is admitted to probate, a will which had been admitted to probate after contest by one heir may be thereafter contested by other heirs.

In Bank.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

In the matter of the estate of Gustavus W. Dorn, deceased. Proceeding by Johanna F. Ahlborn and others against Sadie P. Dorn, as executrix and as sole devisee, to contest the will. From an order dismissing the petition for revocation of probate, contestants appeal. Reversed.

Wm. H. Chapman, Edwin L. Forster and Franklin T. Poore, all of San Francisco, for appellants.

Welles Whitmore, of Oakland, for respondent.

MYERS, J. In this case a will had been offered for probate, and a contest thereto before probate, had been filed by two children of the testator, alleging various grounds of contest. This contest was tried, resulted adversely to the contestants, and the will was thereupon admitted to probate. Within a year thereafter another child of the testator filed a petition for revocation of the

probate, upon substantially the same grounds which had been alleged in the contest before probate. The trial court dismissed this petition on motion, on the ground that the judgment in the contest before probate, being a proceeding in rem, was conclusive upon all persons interested in the estate, whether they participated in that contest or not.

[1] Respondents rely upon the authority of Estate of Allen, 176 Cal. 632, 169 Pac. 364, but that case is not in point here. In that case a contest had been filed before probate by one of the heirs, and determined adversely to the contestant. The trial court was about to enter a judgment upon the verdict admitting the will to probate when a second contest was filed by another heir, alleging the same grounds. The trial court dismissed the second contest, upon motion, upon the ground that all of the heirs were concluded by the contest already determined. This court affirmed that order, saying:

"The probate of a will is a proceeding in rem, binding on all persons interested in the will who, being constructively notified to appear at the probate, might have come in, and who, had they come in, would have been heard for or against the will."

What is there said must be read in the light of the questions then before the court. The proceeding there referred to was a proceeding for the admission of the will to probate. The notice there referred to was, in effect, a notice to the heirs to appear and show cause why the will should not be admitted to probate. The judgment admitting the will to probate would have been equally binding upon all persons interested in the estate if no contest had been filed. But it is binding, in either case, only with respect to the question involved in that proceeding, which is the question of the admission of the will to probate.

The effect of that decision is merely this: That where a contest is filed at the time of the hearing of an application for probate of a will, and is determined adversely to the contestant, other heirs cannot then come in and file a new contest before probate and have a hearing thereon; they have had their day in court, an opportunity to join forces with the original contestant, or to file other grounds of contest; the time fixed in the notice for the filing of contests had expired; and they are concluded by the decision already made. But they are concluded only as to the question there pending, which is the question of the admission of the will to probate.

[2] But the admission of a will to probate is not a final adjudication of the validity thereof. Our statute expressly provides that "When a will has been admitted to probate, any person interested may, at any time within one year after such probate, contest the same or the validity of the will" (Code Civ. Proc. § 1327), and, "If no person, within one year after the probate of a will, contest the same or the validity thereof, the probate of the will is conclusive; saving to infants and persons of unsound mind, a like period of one year after their respective disabilities are removed" (Id., § 1333). The right to contest a will after its admission to probate is thus expressly reserved to all the heirs. To uphold the soundness of respondent's position would be to hold that the provisions above quoted and all the remaining provisions of that article of the Code are wholly inoperative, because the probate of a will is as binding in the absence of a contest as it is when a contest has been filed and tried.

It may well be that an heir who has actually contested the will before probate is thereby estopped to contest it again after probate, but that is not the situation here involved. Certain it is that one who has not done so is accorded that right for the period of one year after probate.

The order dismissing the petition for revocation of probate is reversed.

We concur: WILBUR, C. J.; WASTE, J.; KERRIGAN, J.; LAWLOR, J.; LENNON, J.; SEAWELL, J.

---

60 Cal. App. 112

## KOHN v. NATIONAL FILM CORPORATION OF AMERICA. (Civ. 3967.)

(District Court of Appeal, Second District, Division 1. California. Dec. 11, 1922. Hearing Denied by Supreme Court Feb. 8, 1923.)

**1. Trial ⊜143—Verdict not directed when there is substantial conflict, but scintilla of evidence does not create substantial conflict.**

Motion for directed verdict is governed by the same rule as motion for nonsuit, and should not be granted when there is a conflict in the evidence of a substantial kind, but a bare conflict created by a "scintilla" of evidence is not substantial within this rule.

**2. Trial ⊜170—Motion for directed verdict may be made by party having burden when case uncontroverted.**

A motion for a directed verdict may be made by plaintiff where on the whole evidence the cause of action alleged is supported, and no support is given the defense alleged, or by defendant, though having the burden, whenever a complete defense has been made out by uncontradicted evidence.

**3. Compromise and settlement ⊜24—Evidence held insufficient to create conflict so as to make question for jury.**

In action for breach of contract to manufacture films, evidence *held* to show without conflict that, when plaintiff accepted nega-

tives which he had theretofore refused, and returned other negatives not covered by the contract in satisfaction of defendant's claim for payment of expenses of production, it was intended to settle all matters of difference between the parties, and hence a verdict for defendant was properly directed.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Marion H. Kohn against the National Film Corporation of America. From a judgment on a directed verdict for defendant, plaintiff appeals. Affirmed.

J. D. Lederman, of San Francisco, and Loeb, Walker & Loeb, of Los Angeles, for appellant.

Janeway, Beach & Pratt and Frank M. Gunter, all of Los Angeles, for respondent.

JAMES, J. Plaintiff commenced this action to recover a large amount of damages—a sum in excess of $100,000—which he alleged he had suffered by reason of breach of contract committed by the defendant. The contract was set out in full in the complaint. The defendant's answer denied the material allegations as to plaintiff having been damaged, and especially alleged that the entire controversy had, on a date prior to the commencement of the action, been settled by agreement between the parties. At the conclusion of all the evidence the trial judge directed the jury to bring in a verdict in favor of the defendant, which verdict was returned, and judgment entered accordingly. From that judgment plaintiff has appealed.

The defendant corporation was engaged in the business of manufacturing films for exhibition purposes. The plaintiff dealt in films as a producer. The contract between defendant and plaintiff was made on the 12th of January, 1920, and required the defendant to manufacture 26 one-reel comedies featuring "Smiling Bill Jones" and 26 one-reel comedies featuring "Polly Moran." The contract provided that the films should be "first class, salable, standard comedies," and that each comedy should be a "finished product." The latter requirement was further defined as follows:

"It is understood and agreed that the term 'finished product' means a positive film properly cut, titled and assembled and the negative cut in accordance therewith."

The defendant, as the contract terms stated, was required to "deliver one negative and one positive print of each picture, together with a continuity sheet of same, a synopsis, two dozen still photographs and one dozen plates for each production made under this contract." The first delivery was to be made on the 1st day of March, 1920, and succeeding deliveries each week thereafter, the Jones pictures and Moran pictures to be delivered in alternate weeks. On his part plaintiff agreed to pay not to exceed $2,250 for each comedy. It was further provided that a statement of the actual cost of each picture was to be furnished to the plaintiff, and that the plaintiff should sell the pictures and after deducting publicity and sale expenses should return to the defendant 40 per cent. of the remaining profits. This contract was modified early in March so as to provide that as to the Moran pictures there should be manufactured 26 two-reel instead of 26 one-reel comedies. Under the modification plaintiff was required to advance the sum of $6,000 toward the production of each of the two-reel comedies. By May, 1920, several comedy films had been manufactured under the contract, and various payments on account of advanced cost had been made by the plaintiff to the defendant. Plaintiff had received several positive prints of these films, and had endeavored to dispose of them on the market. His evidence, as furnished by himself and several witnesses engaged in the trade, was that the films were faulty in several particulars, which were enumerated, and that they were not salable. Prior to the meeting of June 12th, which is referred to hereinafter, he had notified the defendant that the films were not salable and that he would not accept them and that defendant should not proceed to manufacture any more. At that time he was in arrears on advanced production cost required to be paid under the terms of the contract in an amount of about $9,000. Defendant was demanding that he pay this money. Plaintiff advised the defendant that he was having trouble securing money because of the poor quality of the films. As a result of the insistent demand made by the defendant that he pay to it the money claimed, a meeting was arranged, which meeting was held on June 12, 1920, at the office of the defendant in Hollywood. The meeting was attended by plaintiff and an associate named Chatkin, and on the part of the defendant by some of its officers. The discussion lasted for several hours and, as the witnesses seemed to agree, it took the form of a heated controversy during a great deal of that time. The outcome of it all was that the defendant agreed to accept in settlement of the expense account, which, upon being then checked up, was found to be somewhat in excess of $9,000, the negative films of three pictures, which it had previously, under a different contract, manufactured for plaintiff, and sell those pictures, returning to plaintiff any excess received over the amount of the indebtedness. Plaintiff accepted the seven Jones negatives and three of the Morans, and gave his receipt therefor, which receipt expressed no reservation. The receipt of these negatives occurred several days after the meeting of June 12th, and immediately after the three negatives last before referred to were delivered to defendant.

Up to this point there is absolutely no controversy between the parties as to the facts. The main question argued by appellant is that it was not shown clear of conflict in the evidence that, through the arrangement made at the meeting of June the 12th, and the receipt of the Jones and Moran negatives by plaintiff several days later, a final adjustment was made of all accounts, including any claims for damages which plaintiff might have had as attributable to the defective quality of the films which were manufactured. It should be remembered that there is no controversy but that plaintiff had previously notified the defendant that he would not accept the pictures, the negatives of which were later receipted for by him as stated, nor is there any controversy but that further production of pictures under the contract was mutually abandoned at that time. And notwithstanding this latter indisputable fact, the plaintiff here included in his complaint not only claim for damages arising because of the defects in the films manufactured, but also for profits which he might have made upon the full number agreed to be produced. Before proceeding, as we will next do, to analyze briefly the evidence as to what occurred at the meeting of June 12th, it may be well to recapitulate the condition of the controversy as it stood without suggestion of any dispute: Defendant had manufactured a portion of the films agreed to be furnished under its contract, and had possession of the most material part of the merchandise, to wit, the negatives; plaintiff, after having viewed, examined, and attempted to market copies or prints from those negatives, notified the defendant that he would refuse to accept the films, and that the defendant should not proceed further in the execution of its contract. The defendant demanded that it be paid money which the plaintiff had agreed to pay on account of production costs, and the plaintiff insisted that the quality of the films was not such as the contract required the defendant to manufacture, and, still insisting upon his refusal to accept the same, entered into a conference with the defendant. In addition to the circumstances shown, the defendant at the trial produced witnesses who were present at that conference who gave testimony amply supporting the defense that, as a result of that meeting, it was expressly agreed that defendant, in lieu of money would accept from the plaintiff three negatives of a "Cunard" picture, and that the plaintiff took from the hands of the defendant the three Moran and seven Jones negatives (which he had theretofore declined to accept), and that the entire transaction was thus agreed to be adjusted and closed. That such was the condition brought about through the arrangement made at that time the trial judge held was shown without material dispute in the evidence.

[1, 2] The situation of a case which will authorize a trial judge to direct that a verdict be returned for the plaintiff or defendant has been defined many times in decisions of the Supreme Court of this and other states, for the rule is practically the same throughout the country. Briefly stated, such a direction is not authorized where there is a conflict in the evidence of a substantial kind. A bare conflict, created by what is sometimes termed a "scintilla" of evidence, is not substantial within the interpretation of the decisions. The rule is precisely the same as that applied where a motion for judgment of nonsuit is under consideration. On such a motion it must appear that the evidence utterly fails as to essentials necessary to be proved before an order granting the same will be allowed to stand. In Estate of Baldwin, 162 Cal. 471, 123 Pac. 267, the rule is declared in accordance with the announcement made in many earlier cases which are there cited, and we may add a reference to subsequent decisions: Estate of Casper, 172 Cal. 147, 155 Pac. 631; Jacobson v. Northwestern Pac. R. R. Co., 175 Cal. 468, 166 Pac. 3; Diamond v. Weyerhaeuser, 178 Cal. 540, 174 Pac. 38; Estate of Sharon, 179 Cal. 447, 177 Pac. 283; Finkle v. Tait (Cal. App.) 203 Pac. 1031. The motion for a directed verdict may be made either by the plaintiff, where, upon the whole evidence, the cause of action alleged in the complaint is supported, and no support is given to the defense alleged by defendant, or it may be made by the defendant, whenever a complete defense has been made out by uncontradicted evidence. The latter statement is called forth because of the insistence of appellant's counsel that the motion for a directed verdict is never proper as coming from a party who has the burden of proof, and, applying his statement to this case, he argues that because the defense of payment was affirmative on the part of the defendant, a verdict could not be directed by the court under any state of the evidence. This position is illogical. To illustrate: Let us suppose that, after plaintiff had introduced testimony sufficient to establish a prima facie case, the defendant had proposed to prove payment of the obligation; assume that the plaintiff, in order to obviate the necessity of such proof of payment to be made, stipulated in lieu thereof that payment had been made as alleged by the defendant. In that state of the case, but one verdict would be legally possible, to wit, a verdict for the defendant.

[3] Looking now to the evidence, which appellant insists was of substance as furnishing a conflict on the proposition: The plaintiff testified that he did not agree that his claim for damages became settled by the arrangement made at the meeting; that the Jones and Moran pictures were not specially considered. He testified that the "reason" why he accepted the negatives was that he

feared bankruptcy or an attachment against the property of defendant. A man named Brandt occupied the position of being a professed friend to both sides. He was produced as a witness for the plaintiff, and testified first on the question as to damages, giving his experience in attempting to make a sale of the film prints. He admitted that he assisted in bringing the parties together at the meeting of June 12th. Plaintiff called him in rebuttal in the attempt to disprove the case that had been made under the defendant's plea of an accord and satisfaction. This witness admitted that the quality of the films was discussed, and that plaintiff at first refused to make any settlement of the $9,000 bill. He was asked the question among others:

"Now, Mr. Brandt, was there in substance and effect anything said by anybody at that meeting that Marion Kohn would take back the 'Smiling' Bill Jones picture and the Polly Moran pictures, and that he would settle his claim in full against the National Film Company by that arrangement? A. Well, now, I cannot recall the entire incident. After the matter of the $9,000 was settled, it practically was agreed, and that is all there was to it. And then there was some discussion about turning back the negatives of the Cunards—I mean of the Jones and the Morans. The Court: What was said about that? A. Well, there was a lot of talk at that meeting. It is quite difficult to recall it. If I had thought it was coming up, I would probably have made a mental note of it. But, as far as I remember it, the whole thing was based on the settlement of $9,000. The Jones and Moran matter was not really an issue. It was the settlement of the $9,000 in cash that Captain Rubey wanted, and I don't recall whether they decided to give them the negatives, or whether they stayed with the National, on the Jones and Moran. Q. By Mr. Lederman: Well, Mr. Brandt, did you yourself make the proposition that Mr. Kohn should take the 'Smiling' Bill Jones and the Polly Moran pictures, and that he should go out and sell those and end up everybody's claim? A. I did; I made a lot of propositions, including that one. I said the best way to settle the whole matter—they seemed to be at loggerheads about the whole proposition—I said, 'The best thing to do is to turn back the two Cunards to the National, and Mr. Kohn take the Moran and the Jones and try to sell them and try to get out of his'— Q. Did he agree to that, Mr. Kohn? A. There was not any agreement on it. They busted up in a row. I think Captain Rubey left the room about that time. * * * Q. Well, will you add anything else, Mr. Brandt? Will you please state anything else you can recollect that happened at that meeting, any statements made by anybody? A. I cannot recall any specific statements made at the meeting. There was an attempt to get a settlement, particularly of the $9,000; that was the thing Mr. Kohn was asked to come down there for. The whole matter was touched on at several times, with regard to an entire settlement of the whole thing. The Court: Was anything said at that time about the fact that Mr. Kohn had already said he would not take any more of the Moran and the Jones pictures? A. That was practically all wound up at that time. They had all decided there was not going to be any more producing. The Court: What do you mean? A. Well, there would not be any more Jones produced and there would not be any more Morans produced."

Plaintiff's associate, Chatkin, in the course of his testimony on behalf of the plaintiff in rebuttal, was asked the following question, to which he replied in the terms stated:

"The Court: In that connection, what was said about the rest of the pictures under the contract? A. Well, the Jones and the Moran pictures were discussed, as to their quality, as to the amount of money Captain Rubey claimed, the amount of money they had spent over the cost of production on those pictures, and Mr. Kohn kept insisting he was not interested in that particular phase of it; all that he wanted was pictures that could be sold, and now he was up against a loss of all of it; and there was really nothing discussed about Polly Moran and Smiling Bill Jones outside of that."

We are of the opinion that the conflict contended for was one of words only. Creighton v. Gregory, 142 Cal. 34, 75 Pac. 569. Under the undisputed conditions which surrounded the parties at the time, the conclusion seems irresistible that the intent was, by the acceptance by the defendant of the "Cunard" negatives and the acceptance by the plaintiff of the negatives which he had theretofore refused to receive, and the putting an end to further prosecution of any work under the contract, to finally settle all matters of difference between the parties. Had the jury been allowed to determine the issue, and had it returned a verdict in favor of the plaintiff, we think it would have been the imperative duty of the court to set it aside and order a new trial. Under such a state of the case the direction as given to the jury, requiring a verdict for the defendant, was justified.

Other answering contentions made by respondent need not be given any special consideration, for the reason that the conclusion expressed herein on the main proposition concerned in this case will not permit of a new trial being had in the action.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

60 Cal. App. 53

## LOS ANGELES INV. CO. v. WILSON et al.
(Civ. 3968.)

(District Court of Appeal, Second District, Division 1, California. Dec. 4, 1922. Hearing Denied by Supreme Court Feb. 1, 1923.)

**1. Vendor and purchaser ⊂⊃186—Pendency of premature action to enforce forfeiture held not to excuse purchaser for failing to make payments under contract.**

Where vendor under an installment contract for the sale of realty prematurely gave notice of default and sued to forfeit the purchaser's rights under the contract, the premature notice of default and pendency of the action brought thereunder did not constitute a valid excuse whereby the purchaser was entitled to retain possession of the property without making further payments until after the final determination of the litigation.

**2. Tender ⊂⊃28—Finding that, if purchaser had made tender of installments due under land contract, they would not have been accepted, not sustained.**

In a suit by a vendor of realty under an installment contract to enforce forfeiture after default, evidence *held* insufficient to show that, even if the purchaser had made tender of installments due, it would not have been accepted.

**3. Vendor and purchaser ⊂⊃95(2), 101—Notice of default and demand of payment held unnecessary where vendor in possession after default.**

Where a vendor under an installment contract for the sale of realty was in possession after default by the vendee, it was not necessary to serve notice and demand of payment upon the purchaser, and the vendor might have held possession lawfully without any affirmative action, and an unnecessary notice did not constitute a waiver of default unless accepted.

**4. Vendor and purchaser ⊂⊃350—Conveyance by vendor to third person held not presumptively injurious to purchaser under unmatured right to deed.**

In absence of pleading and proof that the rights of a purchaser under an installment contract have not been reserved by the vendor in making a sale or conveyance to a third person, the fact that such contract or deed has been made is not presumed to be adverse or injurious to the purchaser whose right to a deed has not yet matured.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action to quiet title by the Los Angeles Investment Company against Jennie B. Wilson and another. Judgment for defendants, and plaintiff appeals. Reversed.

Flint & Mackay, of Los Angeles, for appellant.

Ford & Bodkin, of Los Angeles, and H. L. Watt, of Colton, for respondents.

CONREY, P. J. This is an action to quiet the title of plaintiff in and to certain real property against adverse claims of the defendants. In addition to their answer, the defendants filed a cross-complaint, seeking to enforce the rights of defendant Jennie B. Wilson as purchaser of the same property from the plaintiff under a contract entered into on or about the 22d day of March, 1913.

On the 3d day of April, 1916, the plaintiff, claiming that Mrs. Wilson was in default by reason of nonpayment of installments due under the agreement, served upon her notice that it exercised its option to declare the agreement terminated and all her rights to the property forfeited, and demanded that she forthwith deliver possession of the property to said investment company. The defendants having continued in possession, notwithstanding said notice and demand, the company, on the 18th day of May, 1916, commenced an action to terminate the agreement. In that action the superior court entered judgment canceling the agreement and quieting plaintiff's title to the premises. On appeal to the Supreme Court that judgment was reversed. For a further statement of the facts showing the terms of the agreement, as well as the court's construction thereof, we refer to the decision on appeal in said former action. L. A. Investment Co. v. Wilson, 181 Cal. 616, 185 Pac. 853.

The first controversy grew out of the fact that although the contract provided for payment of a stated sum in monthly installments of $36, there was an initial payment of $300. The purchaser paid the monthly payments of $36 for about three years, during which time no contention was made that the initial payment was included in that part of the purchase price payable in monthly installments. Then, when the vendee did not make certain monthly installment payments and the vendor gave notice and commenced action as above stated, the defendants claimed that said initial payment was a payment entitled to credit on the obligation to pay at the rate of $36 per month, and that therefore they were not in default. The Supreme Court, having decided this question in favor of the defendants, held that the finding that Mrs. Wilson was in default at the commencement of that action was without support, and that the action was prematurely commenced. It was upon that ground alone that the judgment was reversed. The judgment of reversal was filed on December 1, 1919.

The present action, commenced by complaint filed on the 3d day of June, 1920, is an action to quiet title. In addition to their answer, the defendants filed a cross-complaint seeking to have it declared that they are the owners of an equity in the described real property pursuant to the terms of said contract; demanding that an accounting be made of certain rentals received by the plain-

tiff, and generally for relief in equity under the facts alleged. To this cross-complaint an answer was filed, raising material issues of fact. The parties are agreed concerning the amount of money actually paid by the vendee under said contract, and that the last of such payments was the sum of $30 paid on February 5, 1916. It is undisputed that, in accordance with the contract as interpreted by the Supreme Court, the payments made by the vendee were sufficient to pay the agreed sum of $36 per month to and including the month of August, 1916, together with a balance of $6 to be credited on the September installment. The former action was tried on the 19th day of January, 1917. By the court's findings, filed on the 30th day of that month, it was determined that possession should be restored to the plaintiff and the agreement be canceled unless, within 30 days from the entry of judgment therein, the defendants pay to the plaintiff a stated sum. No further payment having been made, the judgment in that action was entered on the 8th day of March, 1917. In the case at bar the superior court has construed the former judgment of the superior court as a judgment of eviction against the defendants, which, in view of the reversal, should now be treated as an unlawful eviction. On that theory the court has taken testimony concerning the rental value of the premises from March 8, 1917, to December 7, 1920 (date of the trial of this action), and has found the reasonable rental value of the premises during that period to be the total sum of $2,142, and has credited that amount on the contract. The vendee therefore is required, as a condition of restoration to all her rights under the contract, to pay only the balance remaining due after allowance of that credit.

The evidence shows that, prior to the commencement of this action, plaintiff never made any attempt to eject the defendants from the premises other than by notice and by prosecuting the former action, as before stated, and except that the plaintiff entered into possession under the circumstances hereinafter stated. Without having paid the installment of September, 1916, or any subsequent installment, defendants remained in possession and actual occupancy until January 13, 1917, which was six days before the trial of the former action. On that day the defendants removed their furniture from the dwelling house on said premises and ceased to reside there, but kept the key of the house. From that time until September 10, 1917, it is stipulated that no one was living in the premises and that the defendants had no personal property thereon. The manager of plaintiff's collection department testified (and his statement was not contradicted) that a day or two after the trial of the former action he visited the premises in question and found both the front and back doors standing open, but that neither locks nor doors were broken in any way. There is no evidence that the defendants were present there again except that in March, 1917, Mrs. Wilson took some plants out of the yard, at which time she says that the house was vacant and locked. In August, 1917, the assistant manager of the plaintiff visited and examined the premises. Thereupon the plaintiff took physical possession of the property, made some repairs, and on September 10th executed a contract of sale to one Bachman, on which he had made sundry payments to the plaintiff and continues in actual possession of the premises.

On May 11, 1920, the plaintiff gave notice to the defendants "that Jennie B. Wilson is now, and ever since the 1st day of September, 1916, has been in default in the payment of the monthly installment due on said 1st day of September, 1916, under that certain lease agreement with privilege of purchase, made and executed on or about the 22d day of March, 1913," between the plaintiff and Mrs. Wilson (with further identification of the contract and further specification of amounts of installments unpaid). The defendants were thereby further notified that—

> The company "hereby demands from you and each of you payment of all of the said installments due under said contract, as hereinabove stated, to and including the installment of thirty-six ($36.00) dollars due under said agreement on the 1st day of May, 1920, amounting to the sum of one thousand six hundred fourteen ($1,614.00) dollars, on or before the 22d day of May, 1920; and that thereafter and commencing with the service on you of this notice the said Los Angeles Investment Company, a corporation, will insist on your strict compliance with the terms and requirements of said agreement as to the payment of the said monthly installments as called for in said contract at the times therein stated," and that in case of failure of defendants to comply with said requirements, the company "will exercise the right and privilege in said agreement to treat any default in the payment of the monthly installments therein called for as a forfeiture of all your right, title and interest in and to the said contract and the real property therein described, and that the said Los Angeles Investment Company will exercise all authority, rights and privileges given to it under the terms of said agreement in case of a breach of the conditions of the said contract on the part of the said Jennie B. Wilson, the second party thereto. You are hereby further notified, that the total amount due at this date under said contract from you, to wit, the sum of one thousand six hundred fourteen ($1,614.00) dollars, must be paid on or before said 22d day of May, 1920, or you and each of you will forfeit all of your right, title and interest in and to the said agreement and the real property therein described, and that the said agreement shall thereby and upon such failure to make such payment be terminated in accordance with the terms and conditions thereof."

The defendants having made no further payment, this action was commenced on the 3d day of June, 1920, and resulted in the judgment from which the plaintiff now appeals.

According to the terms of the contract, the vendee made default thereon when she failed to pay the unpaid part of the $36 due September 1, 1916, and was further in default by failure to make the payments thereafter falling due, unless it can be maintained that such nonpayment was excused by some act of the vendor. The real question in this case is not one concerning nonpayment. It rather is a question concerning excuse for nonpayment. Down to September 1, 1916, the vendee was in rightful possession of the property. From that time until August, 1917, she was in actual possession, in the manner above stated, and this possession had not been disturbed by re-entry of the vendor. It was provided in the contract that upon failure to make any of the payments then the vendee "agrees to and hereby does relinquish all rights and interests created or conferred by or under this indenture and in all sums paid on said lease and the property above described"; and that time is of the essence of the agreement.

[1] During the period last mentioned, the vendee was in default, unless the premature notice of default and the pendency of the action brought under that notice constituted a valid excuse whereby the vendee was entitled to retain possession of the property without paying anything more on the contract until after final determination of that litigation. But we think that the assertion of such an excuse and of such rights on the part of a vendee under such a contract is wholly contrary to equity.

In Empire Investment Co. v. Mort, 171 Cal. 336, 153 Pac. 236, the plaintiff brought ejectment against the defendant, who was holding possession while claiming under a contract of purchase of land from the plaintiff. The defendant having failed to pay an installment of money due under the contract, the plaintiff made demand therefor, and in such demand claimed an amount of interest which the defendant contended was excessive. Defendant called attention to the excess, but did not offer to pay the balance at that time. The plaintiff elected to terminate the contract and demanded possession of the property. Discussing these facts, and the effect thereof, the court said:

"The notice by plaintiff that it elected to terminate the agreement and to retake the property could have no force if defendants were not in default. The position assumed by the vendor was not like that of a party to an agreement who declines to perform some condition precedent to payment of the purchase price. In such case the vendees would be excused from acting until the vendor was ready to perform. But in the transaction between the Empire Investment Company and the defendants, the former had performed its part of the agreement when possession of the property had been given to Messrs. Mort and Wagy."

Referring to former appeals in another action between the same parties, relating to the same contract (Empire Investment Co. v. Mort, 169 Cal. 732, 147 Pac. 960), the court further said:

"As we said in the decision of the appeals in the other case: 'Defendants may not hold the premises and withhold the purchase price. Undoubtedly that is the rule.' Gervaise v. Brookins, 156 Cal. 104, 103 Pac. 329; Champion Gold Mining Co. v. Champion Mines, 164 Cal. 205, 128 Pac. 315. * * * The contract provided for money payments at specified times. There were no precedent duties to be performed by plaintiff before defendants upon the dates indicated in the agreement should be bound to make payments.' The plaintiff's notice of forfeiture and demand for the restitution of the property were not (as was said in the opinion in Oursler v. Thacher, 152 Cal. 745, 93 Pac. 1007) 'a repudiation or abandonment of the contract or a consent to a rescission thereof, any more than was the refusal of the vendor to convey in Glock v. Howard & W. Colony Co., 123 Cal. 1, 69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713, an abandonment or a consent to a rescission.'"

In Newell v. E. B. & A. L. Stone Co., 181 Cal. 385, 184 Pac. 659, 9 A. L. R. 993, the vendor having accepted payments after the times specified in the agreement, and having thereby waived the provision with reference to time being of the essence of the contract as to those payments, it was held that the vendor could not thereafter effectually declare a forfeiture of vendee's right to purchase and of the payments already made without notice that in the future a strict performance would be required. After having received such payments, the vendor tendered a deed conditioned upon payment of the balance of the purchase price, provided the entire balance should be paid immediately upon receipt of the notice, and the notice further declared that unless such payment be made immediately the vendee should forfeit all of his rights under the contract. Discussing the effect of this notice, the court said:

"The mere fact that the vendor may have been in error in supposing and declaring that unless immediate payment were made of the entire balance of the purchase price it could consider the rights of the vendee foreclosed does not convert the notice into a declaration that the vendor elected to rescind. On the contrary, defendant sought to stand upon the contract and to enforce its terms. * * * Plaintiff was in default when the notice was received by him. True, his prior defaults had been condoned, and he could have reinstated himself by making prompt payments of the balance due under the terms of the contract, but he could not, by merely saying nothing, gain

the right to demand repayment of the installments of the purchase price previously made. He could not place defendant in default unless he at least tendered to defendant all that was due under the agreement up to the date of his offer."

In view of the decisions above noted, the only consistent conclusion in this case is that, although the investment company was in error when it claimed that the defendant was in default prior to September, 1916, and gave notice of default based upon this erroneous theory, and although the plaintiff was not entitled to maintain its former action, it did not thereby lose its right to prompt payment of the September and following installments as they became due. By the very terms of the contract, the vendee lost her right to possession of the property prior to the time of the trial and judgment in the superior court in the former action. Neither the prosecution of that action nor the notice of default precedent there to had interfered with defendants' possession of the premises when the actual default occurred.

[2] The finding of the court in this case that the plaintiff at "some time prior to August, 1917," physically took possession of the premises, is not sustained by the evidence. That act did occur in August, 1917, and was an act whereby the vendor obtained peaceable and quiet possession of the property, in the absence of the vendee, who for nearly a year had been in default, and who therefore had lost her right of possession.

But respondents say that the entry of judgment on March 8, 1917, in the former action, operated as a constructive ouster of the vendee; and it is argued that since that judgment was reversed, the vendee must be deemed to be restored to her right of possession as of the date when the judgment was entered. Assuming that the vendee had lost possession by reason of that judgment alone, and that no other default had intervened, we may concede that this argument would prevail. But we must also take into consideration the fact that the vendee did not make tender of any of the numerous payments which fell due after August, 1916, and thereby lost her right of possession before any judgment was rendered against her. Respondents claim that the vendee was excused from making any such tender because, they assert, appellant would not have accepted the money if it had been offered. On this point the court made the following finding:

"The court further finds that from April 3, 1916, to March 8, 1917, the date of the judgment of the superior court, the plaintiff was standing on its notice of forfeiture of defendants' interest (dated April 3, 1916), and would not have recognized defendants' rights under said agreement, or have restored the defendants to their rights under said agreement, except on payment by the defendants of the entire amount claimed by the plaintiff, and for which it had obtained judgment as aforesaid."

In other words, the only controversy was over the amount due. Relating to this finding, the only evidence brought to our attention, in addition to the notice and the pendency of the former action, is in the testimony of the witness Owens, who was an escrow officer of appellant, and Mr. Herbert, assistant general manager of the company. Mr. Owens testified that Mr. Herbert had stated that the contract was forfeited "by reason of the act committed prior to the filing of the first complaint"; that he never heard Mr. Herbert discuss anything that occurred after the filing of the complaint which changed his opinion; that he presumed that the company continued to consider the contract forfeited by reason of the judgment until that judgment was reversed by the Supreme Court. Mr. Herbert testified, referring to the notice given May 11, 1920:

"On behalf of the company I would have accepted the $30 due on September 1, 1916, under the ruling of the Supreme Court, not as full payment but I would have taken this and asked for more. I was only generally familiar with the answer filed by the Wilsons in the first case. I know they had claimed payment up to September, 1916. I do not remember their stating in their answer that they were willing to pay. I know nobody offered us any money. I would have accepted the $30 September 1st, as full payment. Had they offered $36 as full payment on October 1st, I might have accepted it—might have taken the matter up with the attorneys. I would not be willing to state that we would not have taken it. If the Wilsons had offered less than the court ordered paid in its findings, I do not believe we would have accepted it—we would have consulted with our attorneys. I considered the contract forfeited in every way after the court had entered its order. Any further negotiations would have been taken up with our attorneys."

The court found that the plaintiff did not at any time subsequent to the reversal of the former judgment offer to restore possession of the premises to the defendants; that a short time after the reversal of said judgment the defendants "did offer to pay the amount due on the purchase price under the terms of said agreement, less the amount of the rentals which the plaintiff might have received by the exercise of ordinary diligence for the use and occupation of said premises, during the period in which the defendants had been excluded therefrom, and on numerous occasions did endeavor to ascertain the state of their account with the plaintiff"; that the plaintiff "refused to accept any sum of money whatsoever upon account of said agreement, or to carry out the terms thereof, and at all times subsequent to December 1, 1919, has refused to credit the defendants with the rentals received by it for the use and occupation of the property, or for the reasonable rental value thereof from the date of the eviction of said defendants."

[3, 4] It is true that the notice and demand served by the plaintiff on May 11, 1920, demanding payment of the amount of installments then due, and that such payment be made on or before the 22d day of that month, did not directly offer to restore possession to the vendee, if such payment be made. But the notice and demand were not necessary. The vendee being in default, the vendor might have held possession, lawfully, without any affirmative action. Glock v. Howard etc., Co., 123 Cal. 1, at page 10, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17. The notice of May 11, 1920, was a voluntary offer, not constituting a waiver of default, unless accepted. If in response to that offer payment of the demanded sum had been made, the vendee then would have been entitled to be restored to possession. The fact that the second vendee, Bachman, was in possession, is not alone sufficient to show that the company would have been unable to restore possession to Mrs. Wilson. In the absence of pleading or proof that the rights of the vendee have not been reserved by the vendor in making a sale or conveyance to a third party, the fact that such contract or deed had been made is not presumed to be adverse or injurious to a vendee whose right to a deed had not yet matured when the third party transaction occurred. Brimmer v. Salisbury, 167 Cal. 522, 140 Pac. 30.

We are of the opinion that Mrs. Wilson has not been entitled to possession of the described real property at any time since September 1, 1916. Therefore she is not entitled to claim credit on her contract for the rental value of the premises while they have been occupied by the plaintiff; and, indeed, on the facts as they now appear, she is not entitled to enforce the contract at all.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

---

60 Cal. App. 43

## OCEAN SHORE R. CO. v. SPRING VALLEY WATER CO. (Civ. 4283.)

(District Court of Appeal, First District, Division 1, California. Dec. 1, 1922. Hearing Denied by Supreme Court Jan. 29, 1923.)

**1. Railroads ⟸82(2)—Right of way held not abandoned.**

Where the engineer of a corporation, which agreed to grant a railroad right of way, did not designate the location thereof and specify the conditions on which the grant should be made, as provided by the directors' resolution, neither the railroad nor its successor abandoned the right of way by not proceeding with the construction of the road, though the county board of supervisors, after the railroad went into the hands of a receiver, refused to renew the railroad franchise, the grant never having been completed.

**2. Limitation of actions ⟸66(6)—Railroad's right of action for purchase money paid for unexecuted grant of right of way, held not barred.**

Where the engineer of a company, agreeing to grant a railroad right of way across its land, failed to designate the location and specify the conditions as provided by the directors' resolution authorizing the grant, at a meeting held in November, 1905, and, by reason of the prolonged financial disturbance due to the San Francisco fire of 1906, no demand was made that the grant be executed and delivered until March, 1914, the right of the railroad's successor, in a suit begun the following September, to recover the purchase money paid by its predecessor, was not barred by the statute of limitations; the burden of proceeding in the execution of the agreement being on defendant, while there was sufficient cause for delay in making demand, if demand was essential.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Action by the Ocean Shore Railroad Company against the Spring Valley Water Company. Judgment for plaintiff, and defendant appeals. Affirmed.

H. S. Young, of San Francisco, for appellant.

Corbet & Selby, of San Francisco, for respondent.

ST. SURE, Justice pro tem. This is an appeal from a judgment in favor of the plaintiff for $50,993, consisting of $35,000, with interest at the rate of 7 per cent. per annum from March 11, 1914, to date of judgment.

On the 14th day of October, 1905, the Ocean Shore Railway Company paid to the defendant the sum of $35,000 for a grant of a right of way across certain property of the defendant. The agreement between the parties is evidenced by a receipt for the purchase price, which reads as follows:

"San Francisco, October 14, 1905.

"Received from Ocean Shore Railway Company, the sum of thirty-five thousand dollars ($35,000.00) October 14, 1905, in full compensation for the right of way across and upon the east and north boundaries of Rancho Laguna de la Merced, in accordance with the arrangements made by the board of trustees of the Spring Valley Water Company, at the meeting held in the city of San Francisco, on October 12, 1905, as follows:

| | |
|---|---|
| 22.50 acres at $2,000.00 per acre | $45,000 00 |
| Less amount allowed in reduction of the above charge | 10,000 00 |
| Balance | $35,000 00 |

"Spring Valley Water Company,
"By Pelham W. Ames, Secretary"

and a resolution of the Spring Valley Water Company, passed by the board of directors at

a meeting held November 23, 1905, as follows:

"Resolved that this corporation will grant a surface easement for a right of way sixty (60) feet wide, to the Ocean Shore Railway Company for its line of railway and solely for railway purposes, over the Lake Merced Rancho in the city and county of San Francisco, state of California, and in a location near the easterly and northerly sides of said rancho, but such surface right of way shall be south of Ocean avenue, and shall be, as to exact location and details of locations and conditions on which the grant shall be made (which conditions shall be precedent, present and subsequent) subject to the directions and approval of the chief engineer of this corporation on his return before any grant is made in the premises."

Subsequently, on account of the fire of 1906, the Railway Company encountered financial difficulties and did not urge the completion of the contract at the time it was originally contemplated the road would be built.

On June 10, 1909, in reply to a letter from the water company making inquiry of the railway company regarding various transactions between the two companies, the then president of the railway company, referring to the right of way which forms the basis for this action, said:

"The other right of way can wait until we are ready to build through the easterly and northerly ends of your property."

No objection is alleged to have been made by the water company to this proposal. Subsequently the railway company went into the hands of a receiver and later was sold, together with "all real property, rights of way * * * and also the Richmond Branch of Ocean Shore Railway Company," to the Ocean Shore Railroad Company, which was incorporated October 9, 1911.

While in the hands of the receiver an attempt was made to secure a renewal of the Richmond branch franchise in connection with which it was originally contemplated to use this right of way, but this renewal was refused by the board of supervisors.

No further steps are shown to have been taken by either the plaintiff or defendant until January 2, 1914, when the president of the plaintiff company, which had succeeded to the interests of the original railway company, requested the president of the water company to mail him a "copy of the minutes of the board of trustees of the Spring Valley Water Company in reference to this transaction at their meeting held October 12, 1905."

In reply thereto the vice president and manager of the water company forwarded to the railroad company a letter under date of February 20, 1914, in which he reviewed the history of the entire transaction, referred to in the resolution of November 23, 1905, and, after setting it forth in detail, added: "These conditions have never been complied with." He also quoted from the letter of June 10, 1909, in which the railroad company had stated that this right of way could wait and added: "This refers to the proposed Richmond branch," and then recounted the history of the expiration and refusal by the board of supervisors, to grant a renewal of the franchise for this branch.

Subsequently and on March 2, 1914, the railroad company requested the water company to execute and deliver the grant, and on March 11, 1914, the water company refused the request with the assertion that the railway company had forfeited all rights in connection with the right of way.

On September 12, 1914, plaintiff sued to recover the purchase money paid by its predecessor. The action was tried by the court without a jury, and judgment was given to the plaintiff as prayed. From this judgment the defendant appealed and urged as grounds for reversal that: (1) The purchased right of way was abandoned by the Ocean Shore Railway Company and by its plaintiff successor. (2) The remedy sought by plaintiff's complaint is barred by the statute of limitations.

[1] With regard to the first contention the trial court found "that the right of way acquired by Ocean Shore Railway Company on or about October 14, 1905, was never abandoned by Ocean Shore Railway Company, or its successors in interest, or by this plaintiff or at all." There is sufficient evidence to sustain this finding. The resolution of the board of directors of the water company required its own engineer to specify the conditions under which the grant should be made, and this he failed to do when requested, and there is no evidence that he ever offered to carry out the terms of the agreement. That there was no intention to abandon was shown by the letter of June 10, 1909, to which the water company acquiesced and by the fact that the new company gave in its articles of incorporation, as one of its objects, the building of the Richmond branch, and as late as 1912 provided for a bond issue for this purpose.

The refusal to renew the franchise in 1910 did not make the building of the road "impossible" as appellant contends. A subsequent board of supervisors might have taken a more liberal view than did the one in office in 1910, and it is possible that the railroad company, which at the time demand was made for the execution of the grant (March, 1914), was a going concern, might have then contemplated some transfer, or other arrangement, with the then existing railway lines in the vicinity.

Before the right of way could have been abandoned it should first have been designated by the water company's engineer as provided by the resolution of November 23, 1905. The cases cited by appellant in support of

the abandonment theory relate to rights of way in which the grantors had completely performed and which had been subsequently abandoned by the grantees. Home Real Estate Co. v. Los Angeles Pacific Company, 163 Cal. 710, 126 Pac. 972, cited by appellants in support of the contention that respondent had abandoned, merely holds that where there has been an abandonment of a railroad right of way consisting of an easement only, the owner of the fee may maintain ejectment to recover possession. That is not the case here—the grant had never been completed, and therefore it is manifest that ejectment could not lie.

[2] For the second ground for appeal the appellant relies chiefly upon the case of Thomas v. Pacific Beach Co., 115 Cal. 136, 46 Pac. 899, but we are of the opinion that the instant case is materially different from this case, in that the cited case was based upon a carefully drawn contract which, among other things, provided that the grantee must make demand for the execution of the deed. As will be noted there is no such provision in the two documents which constitute the contract in the instant case. In the Thomas Case (at page 142) Mr. Justice Van Fleet, speaking for the court, says:

"Where a party's right to sue depends for its perfection solely upon the necessity of a demand by him to put his adversary in default, he cannot indefinitely and unnecessarily extend the bar of the statute by deferring such demand, but must make it within a reasonable time."

We are of the opinion that a fair interpretation of the receipt and resolution constituting the agreement in this case, coupled with the letter of June 10, 1909, placed the burden of proceeding in the execution of the agreement upon the defendant.

In Meherin v. S. F. Produce Exchange, 117 Cal. 215, 48 Pac. 1074, also cited by the appellant, the court, quoting an older case, says:

"What is to be considered a reasonable time for this purpose does not appear to be settled by a precise rule. It must depend on circumstances. If no cause for delay be shown it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action."

Under the circumstances in this case, it cannot be said that respondent was guilty of laches in making demand. Certainly the prolonged financial disturbance, due to the great fire, furnishes sufficient cause for delay in making demand if, indeed, demand was essential.

Other cases cited by the appellant, like Thomas v. Pacific Beach Co., supra, are predicated upon the necessity of demand by the grantee, which we have already stated we do not think was required in the instant case.

For the reasons stated the judgment is affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

---

(59 Cal. App. 762)

## ALTUBE v. AGUIRRE et al.
(Civ. 4378, S. F. 10102.)

(District Court of Appeals, First District, Division 2, California. Nov. 24, 1922. Hearing Denied by Supreme Court in Bank Jan. 22, 1923.)

**1. Limitation of actions ⟸157(3)—Notes in payment of interest on note sued on admissible as acknowledgment importing new promise to pay.**

Notes given for interest on a note sued on are admissible to overcome the bar of the statute (Code Civ. Proc. § 337), if they constitute payments of interest; part payment of principal or interest, unless accompanied by qualifications, being an unequivocal acknowledgment of a contract or liability, from which a new contract to pay the debt, as required by section 360, must be inferred.

**2. Stipulations ⟸14(1)—Stipulation that notes were not for payment of interest on note sued on held insufficient to show such fact.**

A stipulation of counsel that notes given for interest on a note sued on were "not for the payment of interest" *held* insufficient to show that they did not constitute payments thereof, so as not to overcome the bar of the statute.

**3. Limitation of actions ⟸157(3)—Whether notes for interest on note sued on constitute payments of interest depends on intent.**

Whether notes given for interest on a note sued on constituted payments of interest, so as to overcome the bar of the statute, depends on the parties' intent when they were given, which may be determined by their conduct.

**4. Evidence ⟸215(1)—Notation on note held admissible as admission on issue whether notes "for interest" were intended as payments of interest.**

A memorandum on the back of a note given for interest on a note sued on, showing the parties' recognition of a mortgage securing the latter note and of several notes "for interest" thereon as outstanding obligations of the maker, *held* admissible as an admission against interest on the issue whether the parties intended the several notes as payments of interest, though probably insufficient as an acknowledgment or promise under Code Civ. Proc. § 360.

**5. Limitation of actions ⟸197(4)—Notes "for interest" held intended as payments of interest on note sued on.**

Evidence *held* to show that notes "for interest" on a note sued on were given, accepted, and intended by the parties as payments

of interest on the original indebtedness, so as to overcome the bar of the statute of limitations.

Opinion of Supreme Court Denying Hearing.

6. Limitation of actions ⟸148(3)—Note in payment of interest on mortgage held sufficient acknowledgment of indebtedness.

A note given in payment of interest on a mortgage securing a note sued on, accompanied by a letter signed by the makers stating that it was in payment of such interest, with a notation on the back referring to the mortgage, constituted a sufficient acknowledgment of the indebtedness to overcome the bar of the statute.

7. Limitation of actions ⟸142—Acknowledgment of indebtedness to distributee of note and mortgage from payee's estate made to proper party.

An acknowledgment of an indebtedness to one owning it as distributee of a note and mortgage from payee's estate was made to the proper party.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by Julius John Altube against M. J. Aguirre and another. Judgment for plaintiff, and defendants appeal. Affirmed.

William A. Kelley, of San Francisco, for appellants.

Frank J. Hennessy, of San Francisco, for respondent.

LANGDON, P. J. The defendants have appealed from a judgment against them upon a promissory note for $2,500, which judgment also decreed a foreclosure of a mortgage given as security therefor.

The only question presented by the appeal is: Was the debt barred by the statute of limitations? Code Civ. Proc. § 337. The trial court found that it was not barred. The evidence upon which this finding was based was admitted over the objection of defendants, and such evidence is attacked upon this appeal as irrelevant and immaterial and insufficient to support the finding even though properly admitted.

The note and mortgage were executed and delivered to Bernardo Altube, the father of plaintiff, and there is no dispute about the fact that they were distributed to the plaintiff under the decree of distribution in the estate of his said father, and that he was the owner and holder thereof at the time of the trial. The note and mortgage were dated February 1, 1913. On February 1, 1915, the defendants gave to Bernardo Altube their note for $550. It was stipulated that this note was given "for interest," and the same stipulation was made in regard to a note for $183 given on February 1, 1916, to said Bernardo Altube, and also with reference to a note for $194 given to the plaintiff on February 1, 1917. These notes given "for interest" appear in the record and are signed by the defendants. Upon the back of the last-mentioned one appears the following: "Mort. $2500. Note 550. Feb. 1/15. Do. 183. Do. 1/16. do 194. do 1/17." The record also contains some letters from defendants referring to the indebtedness; but as these, admittedly, do not contain an unqualified "acknowledgment or promise" within the meaning of section 360, Code of Civil Procedure, we shall exclude them from consideration here.

[1] Appellants contend that the notes given for interest do not contain an "acknowledgment or promise" as required by section 360, Code of Civil Procedure, and therefore do not overcome the bar raised by section 337, Code of Civil Procedure. No doubt can exist upon that question in this state in view of the language used by our Supreme Court in the recent case of Minifie v. Rowley, 187 Cal. 481, 202 Pac. 673. It is said in that case:

"In the case of a part payment, for instance, of either principal or interest, the conduct itself has always been deemed, unless accompanied by qualifications, an unequivocal acknowledgment of a subsisting contract or liability from which a new contract to pay the debt must be inferred. Barron v. Kennedy, 17 Cal. 574, 577."

[2, 3] It is clear, therefore, that the notes given for interest were properly admitted in evidence to overcome the bar of the statute of limitations, provided such notes constituted payments of interest. And this qualification leads us to the other contention of appellants, which is that these notes were not a "payment" of interest. Counsel bases this contention upon an alleged differentiation in his stipulation upon this subject. The stipulation reads: "I will stipulate the notes were given for interest not for the payment of interest." The distinction, if there be any, is too attenuated to be persuasive. However, regardless of the stipulation, the trial court found that the defendants had paid the interest by these notes. In support of that finding we have the testimony of the plaintiff that the note of February 17, 1917, was sent to him through the mail, together with a letter from defendants stating that it was a payment of interest, and that he accepted it as a payment of interest. The question of whether or not these several notes constituted payments of interest was one of intent of the parties at the respective times they were given, and that intention may be determined by the conduct of the parties. It is evident that the notes were received and accepted by the plaintiff and his predecessor in interest, and the significant fact also appears that these notes given for interest also bore interest. This fact was considered of impor-

tance in the case of Bennett v. Baird, 67 Ill. App. 422, in which it was said:

"Another assignment of error is the admission of the $206 note because it did not amount to payment, and was nothing more than a promise to pay, and therefore did not operate to bar the statute of limitations. This transaction was intended and treated by the parties as a payment, and the original note was so credited. * * * By it the creditor received an independent and distinct obligation for the payment of the interest, with interest thereon.

"Without it the interest then accrued would have borne no interest, and this circumstance alone was enough to make the note in substance and fact a new undertaking, so that holding both notes the plaintiff could enforce the original only to the extent of the principal and interest accruing after the date of the new one.

"The law will, therefore, treat the transaction as the parties treated it—as a payment."

[4, 5] It its clear from the notation on the back of the note of February 1, 1917, that the parties hereto treated the several notes as payments. In that notation in the handwriting of the defendant, M. J. Aguirre, it clearly appears that the parties recognized as outstanding obligations of the defendants at that time the mortgage of $2,500, the note for $550, dated February 1, 1915, the note for $183, dated February 1, 1916, and the note for $194, dated February 1, 1917. The recognition by the parties of these obligations indicates that they regarded the notes of February 1, 1915, 1916, and 1917 as payments of interest due upon the principal obligation. It is true that the note of February 1, 1917, upon which the memorandum just referred to appears, was a note given to the plaintiff and not to the original creditor. Appellants contend that the "acknowledgment or promise" required by section 360 of the Code of Civil Procedure must be made to the creditor himself, and not to a third person, and that this memorandum is not admissible against the defendants. It is not necessary for us to determine here to whom the "acknowledgment or promise" must be made. Irrespective of the answer to that question, it is probable that the memorandum under consideration is insufficient as an acknowledgment or promise, and it has not been considered by us as bearing upon that point. It may be conceded that no "acknowledgment or promise" as required by section 360 of the Code of Civil Procedure was proven by the plaintiff other than that implied by the payment of interest.

However, the memorandum was admissible as bearing upon the intentions of the parties in giving and accepting the several notes "for interest." The intentions of the parties are vital considerations in reaching a conclusion as to whether or not these notes were given and accepted as payments of interest. The written declaration of the defendants, showing that they considered these notes as outstanding obligations against them, is certainly an admission against interest and was competent upon the question of their intention. Considered thus, it is immaterial to whom the memorandum was addressed. We apprehend it would have had the same probative value if found in the defendants' private books or on the stubs of check books.

We think this memorandum was admissible as throwing light upon the question of whether or not the interest had been paid. It, together with the record as a whole, indicates that the notes given in 1915, 1916, and 1917 were given and accepted and intended by the parties to be payments of interest upon the original indebtedness. This warrants the finding made by the trial court upon this subject. The case then falls within the rule of law announced by our Supreme Court in the case of Minifie v. Rowley, supra, and the judgment, undoubtedly, does substantial justice between the parties.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [6] The petition for transfer to this court is denied. The note of February 1, 1917, signed by both the defendants, was forwarded to the plaintiff in a letter wherein it was stated that the note was given as payment of interest upon the mortgage for $2,500. In addition thereto, there was a memorandum upon the back of the note referring to the $2,500 mortgage. These indorsements were in the handwriting of M. J. Aguirre. This note having been given in payment of interest upon the main debt, accompanied by a letter signed by the defendants stating that it was in payment of such interest with the notation upon the back of the note, constituted a sufficient acknowledgment of the indebtedness. Minifie v. Rowley, 187 Cal. 481, 202 Pac. 673; Clunin v. First Federal Trust Co. (Cal. Sup.) 207 Pac. 1009.

[7] The acknowledgment was made to the proper party, namely, to the person who owned the indebtedness by reason of the distribution to him of the property from the estate of the original payee. Visher v. Wilbur, 5 Cal. App. 562, 90 Pac. 1065, 91 Pac. 412; Farrell v. Palmer, 36 Cal. 187.

Rehearing denied.

WILBUR, C. J., and LAWLOR, LENNON, WASTE, SEAWELL, KERRIGAN, and MYERS, JJ., concur.

60 Cal. App. 98

## Ex parte TEPPER. (Cr. 889.)

(District Court of Appeal, Second District, Division 2, California. Dec. 7, 1922.)

**1. Licenses ⟸1—Ordinance requiring license fee for each alcoholic liquor prescription held revenue measure.**

An ordinance, requiring retail druggists selling certain alcoholic liquors containing more than ½ per cent. of alcohol by volume for medicinal purposes to pay a license fee for each prescription filled, *held* a revenue measure, not a regulatory or police enactment, though entitled "An ordinance providing for licensing and regulating the carrying on of certain professions, trades, callings and occupations."

**2. Licenses ⟸7(3)—Ordinance requiring license fee for each prescription of alcoholic liquors held void as discriminatory between persons engaged in same "business."**

An ordinance requiring retail druggists disposing of certain alcoholic liquors containing more than ½% of alcohol for medicinal purposes to pay a license fee for each prescription filled, in addition to a graduated license tax imposed by another ordinance on all who conduct "the business of a retail drug store" *held* void as violating Los Angeles charter, § 2, subd. 21, giving that city power to license businesses and callings "provided, that no discrimination in the amount of license tax shall be made between persons engaged in the same business, otherwise than by proportioning the tax on the amount of business done," which means the entire business.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Business.]

Application by B. F. Tepper for a writ of habeas corpus to secure his release from custody. Petitioner discharged.

Ray E. Nimmo and Lloyd W. Moultrie, both of Los Angeles, for petitioner.

W. D. McConnell, City Prosecutor; J. Friedlander, Asst. City Prosecutor; J. D. Taggart, Deputy City Prosecutor; Jess E. Stephens, City Atty.; and Chas. B. MacCoy, Deputy City Atty.; all of Los Angeles, for respondent.

WORKS, J. Petitioner is in the custody of the chief of police of Los Angeles under a judgment convicting him of a violation of section 79 of ordinance No. 41,950 of the municipality, as amended by a later enactment. Section 11 of the ordinance, which is introductory to the sections following it, reads:

"The amount or rate of license fees to be paid to the City of Los Angeles by any person, firm, association or corporation engaged in or carrying on any profession, trade, calling, or occupation hereinafter designated is hereby fixed and established as hereinafter in this ordinance provided, and such license fee shall be paid by every person, firm, association or corporation engaged in carrying on any such profession, trade, occupation or calling in the City of Los Angeles."

Section 79 provides:

"For every person, firm or corporation conducting, managing or carrying on the business of a retail drugstore where spirituous, vinous or malt alcoholic liquors, containing more than one-half of one per cent. of alcohol by volume, are sold, distributed or given away for medicinal purposes upon a physician's prescription, fifty cents (50c) for each such prescription filled; provided nothing in this ordinance shall be deemed or construed to apply to prescriptions containing other ingredients than spirituous, vinous or malt alcoholic liquors containing more than one-half of one per cent. of alcohol by volume. The license provided for in this section shall be payable monthly, and in ascertaining the amount of license to be paid, the person, firm or corporation procuring such license shall render to the city clerk a written statement, sworn to before some officer authorized to administer oaths, showing the number of prescriptions during the month next preceding the date of such statement."

Petitioner, who was conducting a retail drug store at the time of his arrest, is suffering punishment under his conviction because of the fact that he failed both to pay the license fee and to make the statement provided for in section 79. As, however, the statement is required merely for the purpose of ascertaining the amount of the license fee, we need concern ourselves only with the part of the section denouncing a failure to pay the fee prescribed. If, as claimed by petitioner, the requirement that the license fee be paid is void, the requirement that the statement be made falls with it.

[1, 2] One of the contentions made by petitioner is that the provision in section 79 for a license fee is unjustly discriminatory. In dealing with this question it is to be noted, first, that the entire ordinance of which section 79 is a part is a revenue measure, and not in any sense a regulatory or police enactment. It is true that the title of the measure is "An ordinance providing for licensing and regulating the carrying on of certain professions, trades, callings and occupations," but the Supreme Court has said of an enactment with an identical title, "While thus described as 'regulatory,' an inspection of the ordinance discloses that it is an ordinance simply for revenue; the only attempt at regulation being the prohibition against conducting or carrying on any of the enumerated professions, trades, callings, or occupations without first procuring a license so to do." City of Los Angeles v. Lankershim, 160 Cal. 800, 118 Pac. 215. An inspection of the text of the measure now before

us places it in the same category with the ordinance referred to in the language just quoted. Certainly a view of section 79 convinces that the only attempt at regulation therein contained is "the prohibition against conducting or carrying on" the business therein mentioned. There is no general language of the ordinance as a whole which carries into section 79 any further or greater "regulation." Taking the ordinance, then, as a revenue measure, pure and simple, we are brought to a mention of subdivision 21 of section 2 of the freeholders' charter of Los Angeles. It gives the municipality power to license businesses and callings, "provided, that no discrimination in the amount of license tax shall be made between persons engaged in the same business, otherwise than by proportioning the tax to the amount of business done." Can the provisions of section 79 of the ordinance be harmonized with this language of the city's organic law?

All who conduct "the business of a retail drug store" are required to pay a graduated license tax by the provisions of a section of the ordinance to which we have not yet adverted, section 155. This graduated tax, which is based upon a sliding scale proportioned strictly upon the amount of business done by different concerns, and which therefore falls within the language of subdivision 21 of section 2 of the charter, had been paid by petitioner along with the other retail druggists of the municipality. So far so good, but section 79 represents an attempt to provide an additional schedule. Not only so, but the attempt appears not to have been made upon any principle of graduation whatsoever, with the "business" itself as a basis. Subdivision 21 of section 2 of the charter, in providing for a proportioning of license tax only "to the amount of business done," plainly means that the proportion shall depend upon the activities in particular cases of the entire "business" itself, and not upon a part or fraction of general business done in the sale of a single article or commodity handled by the "business" as a whole. The subject-matter of section 79 is not a business at all, but merely a part of the business of a retail druggist. This proposition is to us self-evident. A retail druggist is plainly engaged within the main lines of his business as such when he fills physicians' prescriptions calling for the furnishing or compounding of drugs or medicines for healing or curative purposes, whether such prescriptions call for "spirituous, vinous or malt alcoholic liquors," or simply for alcohol along with other ingredients, as well as when they call for ipecac or asafœtida. If authority is necessary upon such a manifest proposition, it is to be found in Commonwealth v. Fowler, 96 Ky. 166, 28 S. W. 786, 16 Ky. Law Rep. 360, 33 L. R. A. 839; McNulty v. Toopf, 116 Ky. 202, 75 S. W. 258, 25 Ky. Law Rep. 430, and Freund, Police Power, § 223, although we are not called upon to decide the constitutional question referred to in those authorities.

Upon these considerations it seems clear to us that section 79 of the ordinance cannot stand, in the light of subdivision 21 of section 2 of the charter. Section 155 of the ordinance having provided a proper graduation under subdivision 21, the proportion thus provided is utterly destroyed if the mandate of section 79 be followed. In fact, section 79 were void if section 155 had no existence. No license tax is proportioned upon business done by a retail druggist, where he is required to pay tax of 50 cents, or any other sum, upon the filling of each single prescription composed of or containing a particular ingredient, whether it be alcohol or menthol. Under such a requirement, a particular druggist, who has more calls for the filling of prescriptions containing the ingredient so discriminated against, may be called upon to pay, when the total of such prescriptions filled by him is computed, a heavy tax, while other druggists are made to pay a slight tax, or no tax whatever, though these latter may be conducting businesses of much greater magnitude than the first, considering the entire business operated by them as compared with that operated by the first.

We are cited to various California cases upon this question by counsel on both sides of the controversy, but none of them is greatly helpful to us, because of the difference in the questions involved. We do refer, however, to City of Los Angeles v. Lankershim, 160 Cal. 800, 118 Pac. 215, as lending a general support to the conclusion which we have reached. Having arrived at that conclusion, it becomes unnecessary to discuss other points made by petitioner.

Petitioner is discharged from custody.

I concur: FINLAYSON, P. J.

CRAIG, J. (concurring). Under the freeholders' charter of Los Angeles, subdivision 21 of section 2 thereof, the power of the municipality to discriminate in the amount of license taxes between persons engaged in the same business is limited to discrimination "by proportioning the tax to the amount of business done." Respondent insists that the ordinance here under consideration divides those engaged in the retail druggist business into two classes; the first consisting of those who sell liquor upon subscription by a physician, and the second being those who do not. Assuming that this is the intent of the ordinance, and that it is a lawful classification, the levying of a definite tax upon each prescription, regardless of its

value, is an unlawful discrimination between members of the first class. It cannot be said that the number of prescriptions filled is in any sense a measure of the "business done." Upon this ground I concur in the conclusion of my Associates.

---

60 Cal. App. 83

## CAIRNS v. HADDOCK. (Civ. 2466.)

(District Court of Appeal, Third District, California. Dec. 5, 1922.)

**1. Waters and water courses ⟸157—Executed parol license for ditch creates easement.**

A parol license for the construction of an irrigating ditch over the licensor's land, which is executed by the construction of the ditch by the licensee, becomes in all essentials an easement upon licensor's land continuing for such time as the use of the ditch may continue.

**2. Waters and water courses ⟸158½(2) — Evidence held to sustain finding of executed parol license for ditch.**

In a suit to restrain an obstruction of a ditch, evidence that plaintiff had paid defendant's predecessor the sum asked for an easement for the ditch and had received a deed conveying an easement which, through mistake, failed to describe the land occupied by the ditch, but that plaintiff had entered upon the land, constructed his ditch, and maintained it for several years, *held* to sustain a finding that there was an executed parol license for the right of way for the ditch as it existed.

**3. Trial ⟸105(2)—Hearsay testimony received without objection cannot be ignored.**

Even if evidence received without objection was hearsay, it cannot be ignored in determining the sufficiency of the evidence to support the findings.

**4. Waters and water courses ⟸154(1) — Easement for ditch by adverse possession held established.**

Evidence that plaintiff entered on defendant's land under a deed conveying an easement for a ditch which he assumed covered the land on which he constructed the ditch, but which erroneously described other land, and that he had exercised acts of ownership over the ditch and other structures for more than five years under a claim of right of way with the knowledge of the grantor, was sufficient to justify a finding he had acquired title by adverse possession.

**5. Waters and water courses ⟸154(1)—Only taxes assessed need be paid to support easement for ditch by adverse possession.**

It is only the payment of taxes levied and assessed which, by Code Civ. Proc. § 325, is made a condition for acquiring title by adverse possession, so that title may be acquired in that manner to an easement for a ditch where no taxes were assessed separately against the ditch and the claimant had paid all taxes assessed upon the land to which it was appurtenant.

**6. Waters and water courses ⟸154(1)—Purchaser has notice of easement under which ditch has been constructed across premises.**

A purchaser of land is charged with notice of the claim of an easement by one who had openly constructed and was maintaining a ditch across the land, and, if such purchaser chose to rely upon the vendor's statement there was no easement, without inquiring of the owner of the ditch, he cannot claim to be an innocent purchaser.

**7. Waters and water courses ⟸158½(2) — Deed erroneously describing easement held admissible to corroborate parol license.**

In a suit to restrain obstruction of a ditch, evidence of a deed conveying a right of way to plaintiff from defendant's predecessor, but which did not describe the land occupied by the ditch, was competent, not as the source of plaintiff's title, but to show that the predecessor had received the money which plaintiff testified he paid for the right of way and had dealt with him with reference thereto, notwithstanding her denials.

**8. Waters and water courses ⟸158½(2) — Claimant of ditch easement need not elect between claim by grant, executed parol license, and adverse possession.**

Where the claimant of an easement for a ditch alleged that he was then, and for more than six years last past had been, the owner of and in actual possession of the ditch and the right of way, his allegation was sufficient to entitle him to show a grant, an executed parol license, and title by prescription and to prevail, if proof of any was satisfactory, and he need not be put to an election as to the source of his title.

**9. Waters and water courses ⟸158½(2)— Allegation plaintiff owned "ditch" held not variance from evidence of easement.**

An allegation in the complaint that plaintiff was the owner of a ditch, which was repeated in the findings, was not a variance from proof that he owned only an easement and not the fee in the land on which the ditch was constructed, since a "ditch" in such connection means simply a right of way for the passage of water, especially where the allegation was qualified by a further allegation of ownership of the right of way and site.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ditch.]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by J. J. Cairns against M. C. Haddock to restrain obstruction of an irrigation ditch. Judgment for plaintiff, and defendant appeals. Affirmed.

Lewis H. Smith and Alva E. Snow, both of Fresno, for appellant.

Power & McFadzean, of Visalia, for respondent.

BURNETT, J. The action was to restrain defendant from obstructing a ditch which

was being used by plaintiff in conducting water across defendant's land from a natural water course known as Elk Bayou to a certain tract of land owned by plaintiff. In the complaint it was alleged:

"That said plaintiff is now, and for more than six years last past has been, the owner and in the actual possession of that certain water ditch heading in and leading out of a certain natural water course situate in the county of Tulare, state of California, known as the bayou, and the weirs and gates in and across said bayou at the head of said ditch and of the right of way and site upon which said ditch, weirs, and headgates are located, which right of way and site is situate in said county and state, and is more particularly described as follows, to wit" (describing it).

The answer denied "that said plaintiff is now or at any time last past has been the owner, or in the actual possession of any water ditch heading in or leading out of any natural or other water course situate in the county of Tulare, state of California, known as the bayou, or any water course at all, or of any weir or gate in or across any bayou at the head of any ditch or of any right of way or site on which any ditch or weir or headgate is located, as described or attempted to be described in plaintiff's complaint on file herein, or otherwise or at all," and it was further denied that "plaintiff is entitled to divert any water by means of the ditch described or attempted to be described in plaintiff's complaint, or otherwise, or upon any lands of plaintiff described in said complaint for any purpose whatever."

Thus was presented the issue which was tried in the court below and found in favor of plaintiff, and the main contention herein by appellant is that the evidence fails to support said finding. The evidence is uncontradicted that respondent constructed the ditch in December, 1913, and that he used it to irrigate his land, from that time, without interruption until the 8th day of March, 1920, and he claims that he established his ownership of the right of way and the right to use said ditch for said purpose in two ways:

"First, by showing an executed parol license, or facts from which the trial court was justified in inferring the existence of an executed parol license within the rule declared in Flickinger v. Shaw, 87 Cal. 126, 25 Pac. 268, 11 L. R. A. 134, 22 Am. St. Rep. 234; and Stoner v. Zucker, 148 Cal. 516, 83 Pac. 808, 113 Am. St. Rep. 301, 7 Ann. Cas. 704; and, second, because he had also acquired title to the easement by adverse possession."

[1] As to the first consideration no doubt the rule is as stated in the Stoner Case:

"A parol license to defendant to construct an irrigating ditch over plaintiff's land, which is executed by the construction of the ditch by defendant with the expenditure of a large sum of money, becomes in all essentials an easement upon plaintiff's land, continuing for such a length of time as the use of the ditch may continue."

[2] As to this aspect of the case, though, appellant claims that the evidence is insufficient to support the theory that there was a parol license. It appears that plaintiff's property was in charge of his son, W. S. Cairns, and the land through which the ditch was constructed was occupied by H. K. Wheeler, who was farming it for his father, J. Kittridge Wheeler, who was living in Los Angeles. Said H. K. Wheeler testified that—

His father and "Clara B. Heywood had the property together. * * * Their general purpose was to get the land in condition to sell it in subdivisions. I had some negotiations with W. S. Cairns with reference to the ditch. Mr. Cairns came to the ranch and said he would like to get a ditch put through the property there so that he could divert water from the ditch that was on the property at the time, over to his property; that he understood the Wheeler ranch was to be subdivided and sold; and that he would like to get this ditch at that time, because he could not tell what trouble they might run into later on. He asked me to see what could be done about getting the right of way for the ditch and permission to get a head gate in there to divert the water. My father, J. Kittridge Wheeler, died in 1914. He came up to the ranch and said that he and Clara B. Heywood would give permission to put the ditch through the property. * * * The sum of $200 was named as the sum for which Mr. Cairns could have the right of way. * * * I know as a matter of fact that the land stood in the name of Clara B. Heywood, of record, but my father had a contract with her for a one-half interest. * * * There was no work done on the ditch until after I had told Mr. Cairns that permission could be had from Clara B. Heywood."

The testimony of W. S. Cairns was of a similar character, and he added that—

He pointed out to H. K. Wheeler "where we wanted the ditch. We pointed out the place where the ditch now is, where this bayou comes closest to the fence—closest to our land. * * * There was no limitation on the time that we should have the ditch there. That I would say pretty positively—no, there was not, there was nothing said about it from the fact, as I told you, we were promised a deed for it."

The above would be ample beyond question, but the problem is complicated somewhat by the consideration that objection was made to some of the questions calling for the communication from J. Kittridge Wheeler; but the answers were received subject to the objections, and thereafter the clerk's transcript shows the following:

"Friday, July 16, 1920. Hon. W. B. Wallace, Judge. J. J. Cairns, Plaintiff, v. M. C. Haddock et al., Defendants. In the above-entitled cause, it is ordered that the testimony of J. Kittridge Wheeler as to what his father, H. K.

Wheeler told him of a conversation had with Miss Heywood be stricken out as hearsay testimony."

It may be doubted whether this has been sufficiently authenticated as an order of the court, and it is clear that "J. Kittridge Wheeler" did not testify at all in the case; but, since it is not disputed, we assume that said testimony admitted under objection was afterward excluded by the court. Nevertheless, the record shows without any objection or motion to strike out these questions and answers in the testimony of W. S. Cairns:

"Mr. Power: Now, I had reached the point with you where I asked you if you had seen Mr. Wheeler and had any conversation with him with reference to acquiring a right of way for this ditch, and you stated you had gone over or pointed out the line where the ditch now is. Now I will ask you to state what was said and done between you and Mr. Wheeler with reference to getting the right of way for the ditch, the conversation you had, and what you did. Just go on and state in your own way. A. Well, I went to Mr. Wheeler and asked him about getting this right of way for a ditch and a line to the headgate. And I asked him at the time if he could give me the deed, and he said no, that he could not give it to me direct. 'Well,' I says, 'who can?' And then, I do not remember now, but he told me his father and Miss Heywood would be the ones that I would have to get the deeds from, and I am quite sure that he told me that Miss Heywood would be the one that I would have to get the deed from. Anyhow, after seeing and talking to Wheeler a couple of times, he promised to get the deed, and he said it would be all right. Q. What was said about what you should pay for it, if anything was said in that conversation, or what you should pay if you got the right of way? A. At that time he asked me what I thought would be the right consideration for the deed, and I told him we would give him $200 for a right of way for a ditch and headgate. Then, later he came back, and he said that would be all right, providing we would put a bridge on top of this headgate, so that they could get onto that little bit of three-cornered piece of alfalfa they had in there to get their hay in and out of that tract of land. I told him that would be all right; we would do that. Q. Then what did you do with reference to building a ditch? A. We started to work on that without any deed or more right than that."

[3] It is a fair inference from the foregoing that Wheeler communicated with his father and Miss Heywood, and they authorized him to assure Cairns that he could have the right of way upon the terms suggested and that said terms were afterward accepted by plaintiff. Even if it might be said that hearsay testimony was involved, no objection was made on that ground, and it cannot be ignored as evidence in the case. Indeed, it is fairly deducible from all the facts and circumstances that an agreement for a deed was reached, and that relying upon the faith of that agreement plaintiff paid the consideration and constructed the ditch. It is of no decisive moment herein that Miss Heywood testified that she "told Mr. Wheeler he could give him (Mr. Cairns) the right to use this until we sold the land, by putting a ditch across there, * * * that was a temporary right of way that I gave, until we sold or subdivided the land." In the first place, her testimony apparently did not carry conviction to the mind of the trial judge, and we cannot say that he acted arbitrarily in rejecting her statement that the license was to be conditional. That her memory was not trustworthy is shown by her declaration that she had entirely forgotten "ever signing any paper in connection with this, and I told Mr. Haddock that I never had signed a right of way when I sold him the land"; whereas, on the 1st of January, 1914, she had executed a deed to Mr. Cairns of an unconditional right of way, and therein she admitted the receipt of the consideration of $200, although denying upon the stand that she had received any money for the license. We may add that the execution of this deed without having inserted therein any limitation as to the right of way was regarded, no doubt, by the trial judge as persuasive evidence that she intended and prescribed no conditional limitation. It is true that said deed by reason of a mistake in the description of the right of way was ineffective to convey the title, but a reading of the record can leave no doubt that she thereby intended to grant absolutely to plaintiff what he is now claiming under an executed parol license. Other reasons for viewing with caution, if not distrust, her statement as to the character of the license have been suggested by respondent; but we see no necessity for repeating them. Moreover, if it be assumed that she thus instructed Mr. Wheeler, there is no evidence whatever that it was so communicated to plaintiff. As far as the record shows, the only proposal which was submitted to respondent and upon which he acted was, as we have seen, an unconditional promise to convey the right of way. If Mr. Wheeler was remiss in failing to submit all the terms, Miss Heywood could hold her agent responsible; but she could not successfully question the rights acquired in good faith by plaintiff through reliance upon the representation of the agent.

[4, 5] Again, if it may be said that the evidence of parol license is inadequate, then the situation is such as to justify a finding that plaintiff acquired a title by "adverse possession." All the facts material to such title appear in the record. Plaintiff undoubtedly believed that by payment of the $200 he acquired the right to construct said ditch. With this understanding he entered upon the property of Miss Heywood and made the improvement at a large expense. A short

time after having begun the work, he received a deed of a right of way which he understood to be of the ground upon which the ditch was constructed. Regarding said instrument as constituting what had been promised him, he exercised acts of ownership over the ditch and the structures constructed upon it for more than five years under a claim of right of way and notoriously and with the knowledge of Miss Heywood, as shown by her testimony, that he was using said ditch for the purpose of irrigation. His ownership was not questioned until March 8, 1920, although the ditch was constructed in December, 1913, and said deed was executed in January, 1914. The ditch was not separately assessed, so that the question of the payment of taxes does not arise, although plaintiff paid all the taxes assessed upon his land to which this right of way became appurtenant. No taxes being shown to have been assessed, it was not incumbent upon plaintiff to show payment thereof. Baldwin v. Temple, 101 Cal. 403, 35 Pac. 1008.

"It is only the payment of taxes levied and assessed which, by section 325 of the Code of Civil Procedure, is made a condition for acquiring title by adverse possession." Smith v. Smith, 21 Cal. App. 378, 131 Pac. 890.

It would be difficult to find a case wherein the showing of adverse possession is more satisfactory than herein.

In the cases cited by appellant we find nothing inconsistent with the foregoing. They illustrate the application of well-established principles to varying situations and are of no particular assistance herein.

[6] We can see no merit in the claim that appellant should be protected as an innocent purchaser. He acquired title to the Heywood-Wheeler property after the right of plaintiff to the easement had become vested. The ditch and its headworks were upon the land when he bought it and they were being openly used by plaintiff. Appellant was clearly charged with notice of whatever rights Mr. Cairns had, and if he chose to rely upon the statement of Miss Heywood and to make no inquiry of plaintiff, he must abide the consequences.

[7] We are satisfied the court committed no error in admitting said deed in evidence. As stated by respondent, it was not offered "as a muniment of title because the description in it was erroneous, but it was offered to show that Miss Heywood, who did not know Mr. Cairns and never had any business with him except with reference to this right of way, and who denied even receiving any money from him, acknowledged receiving from him the sum of $200, at or about the time he states he paid that sum for the right of way described in the complaint. * * * It was also competent for the purpose of showing when Mr. Cairns commenced to assert title to the easement." Thinking as he did that it conveyed the right of way in question, it would necessarily follow that when the deed was delivered he would begin to claim and assert ownership therein. The deed was offered and received in evidence for the limited purpose thus suggested and was no doubt so considered by the court.

In Pierson v. McCahill, 21 Cal. 123, cited by appellant, parol evidence was received, over objection, to show that a certain provision was omitted from a written agreement. The ruling was held to be erroneous because the mistake was not averred in the answer and that the effect of the parol testimony was to vary the terms of a written instrument. The Supreme Court said:

"Until reformed, the instrument must stand as the contract of the parties, and it was error to allow the defendant to prove a different contract, or to give evidence of an intention different from that actually expressed."

Manifestly, we have no such instance before us.

The case of Van Slyke v. Broadway Ins. Co., 115 Cal. 644, 47 Pac. 689, also cited by appellant, is no nearer the mark. Therein it was held that parol evidence was inadmissible to aid a written instrument which was entirely void for uncertainty.

[8] We understand that plaintiff was not put to an election as to the source of his title. He had alleged in his complaint, as we have seen, that he "is now, and for more than six years last past has been, the owner and in the actual possession of that certain water ditch * * * and the weirs and gates in and across said bayou at the head of said ditch, and of the right of way and site upon which said ditch, weirs, and headgates are located," etc. Under the liberal system of pleading which prevails in our practice, this general allegation of ownership was sufficient and warranted an effort to support it by showing a grant, an executed parol license, or title by prescription. Indeed, plaintiff might offer evidence of all these conditions and prevail if proof of any was satisfactory.

[9] At the oral argument it was suggested by appellant that the complaint contemplated ownership in fee of the strip of land in controversy and the findings corresponded therewith, but that the evidence at most showed only an easement, and therefore a fatal variance occurred. In this appellant is in error. It is true that said allegation and findings are that plaintiff is the owner of the ditch, but it is clear that the word "ditch" as there used means simply "a right of way for the passage of water." Smith v. Hampshire, 4 Cal. App. 8, 87 Pac. 224; Conover v. Atlantic City Sewerage Co., 70 N. J. Law, 315, 57 Atl. 897. Indeed, the expression is qualified by the following phrase and "of the right of

way and site," etc., so that there can be no doubt that only an easement was found to exist in favor of plaintiff.

We feel satisfied that the decision of the lower court is just and legal, and the judgment is therefore affirmed.

We concur: FINCH, P. J.; HART, J.

---

60 Cal. App. 105

## GRAY v. YARBROUGH et al. (Civ. 2543.)

(District Court of Appeal, Third District, California. Dec. 9, 1922.)

**Appeal and error ⟹771—Diligence in prosecuting appeal principal question governing dismissal for failure to file brief.**

Diligence in prosecuting an appeal is the principal question governing the dismissal of an appeal for failure to file briefs, and where counsel filed an affidavit stating that the action involved questions of fraud, and the preparation of the briefs required a great deal of time, and that counsel had been diligent, *held*, that the discretion of the court should be exercised in favor of hearing the appeal.

Action by Harry J. Gray against P. L. Yarbrough and others. On motion to dismiss appeal. Motion denied.

John R. Connelly and Evan J. Hughes, both of Sacramento, for appellant.

Chas. A. Bliss, of Sacramento, for respondent.

FINCH, P. J. On the 18th day of November, 1922, respondent served and filed notice of motion to dismiss the appeal herein on the ground that appellant's opening brief had not been filed. Such brief was thereafter filed December 2d, and the motion to dismiss was made and argued December 4th.

The transcript on appeal was filed September 18, 1922. October 26th, on affidavit, this court made an order granting appellant "an extension of 30 days in which to file" his opening brief, his time not having theretofore been extended by stipulation or order. Counsel for appellant presented his affidavit at the hearing of this motion to the effect that he and the attorney associated with him on the appeal believed that, by the said order, appellant's time had been extended to and including November 27th. On that day appellant secured a further order extending his time to and including December 2d within which to file his opening brief, conditioned, however, that such order should not prejudice respondent's motion to dismiss. The affidavit of appellant's counsel states that the action involves questions of fraud and that the preparation of the brief required a great deal of time, and that counsel had been diligent in the preparation thereof. In Town of Mill Valley v. Massachusetts Bonding & Ins. Co. (Cal. Sup.) 207 Pac. 253, the Supreme Court said:

"The primary subject of investigation upon a motion to dismiss for failure to file a transcript within the time prescribed by our rule, whatever the technical aspect of the case may be, is always the question whether the appeal has been diligently prosecuted. In the decision of that question the court has a very large discretion."

See, also, Borgmeyer v. Solomon, 39 Cal. App. 106, 178 Pac. 544; Friend & Terry Lumber Co. v. Devine, 44 Cal. App. 208, 186 Pac. 187; Yolo W. & P. Co. v. Edmands, 45 Cal. App. 410, 187 Pac. 755.

Under the circumstances of this case it is believed that discretion should be exercised in favor of a hearing of the appeal on its merits.

The motion to dismiss is denied.

We concur: BURNETT, J.; HART, J.

---

60 Cal. App. 146

## Ex parte KENDRICK. (Cr. 1100.)

(District Court of Appeal, First District, Division 2, California. Dec. 14, 1922.)

**1. Parent and child ⟹17(1)—Financial inability is "lawful excuse" for failure to support child.**

Financial inability is "lawful excuse" for failure to support child under Pen. Code, § 270, as amended by St. 1921, p. 1723, making such failure "without lawful excuse" punishable.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Lawful Excuse.]

**2. Parent and child ⟹17(1)—Support by other parent lawful excuse for failure to support child; "other persons."**

Within the meaning of Pen. Code, § 270, amended by St. 1921, p. 1723, providing that "a parent * * * who willfully omits, without lawful excuse," to care "for his child is punishable, * * * and it shall be no defense that such child has been provided for by other persons," support by the other parent is "lawful excuse," since the statute is applicable to "parents" making both liable, and care by one parent is not care by "other persons," particularly in view of Civ. Code, § 196, making the parent entitled to the custody of a child responsible for its care and section 206, requiring both parents to maintain their children unable to maintain themselves.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Other.]

**3. Parent and child ⟹17(1)—Sufficient private income of child lawful excuse for failure to support.**

A sufficient private income of a child is lawful excuse for failure to support, under Pen. Code, § 270, as amended by St. 1921, p. 1723.

Application by Rodney Kendrick for a writ of habeas corpus to be directed to the Sheriff of Alameda County. Prisoner discharged.

Henry C. McPike, of Oakland, for petitioner.

Ezra W. Decoto, Dist. Atty., and Frank Mitchell, Jr., Deputy Dist. Atty., both of Oakland, for respondent.

NOURSE, J. Petitioner was held to answer to the superior court upon a complaint charging a violation of section 270 of the Penal Code. He instituted this proceeding in habeas corpus asking his release from custody upon the ground that the evidence heard at the preliminary examination failed to show reasonable or probable cause for believing that the petitioner had committed any public offense.

The section of the Penal Code under which the charge was laid reads:

"A parent of either a legitimate or illegitimate minor child who willfully omits, without lawful excuse, to furnish necessary food, clothing, shelter, or medical attendance for his child is punishable by imprisonment in the state prison, or in the county jail, not exceeding two years, or by fine not exceeding one thousand dollars, or by both, and it shall be no defense to such an action that such child has been provided for by other persons. The superior court, sitting as a juvenile court may exercise original jurisdiction over all such offenses."

The complaint charged that the petitioner, without lawful excuse, omitted to furnish his minor child with necessary food, clothing, shelter, and medical attendance. It was signed by petitioner's wife, who was the mother of the child.

The testimony offered by the prosecution at the preliminary hearing disclosed that the child was provided with all the necessaries of life by its mother, aided to some extent by its father; that during a portion of the period when petitioner was charged with having neglected the child it was in the custody of petitioner's mother by his arrangement and was properly and amply cared for; that on August 10, 1922, the mother of the child took it from the custody of petitioner's mother and moved with it to the home of friends, where she paid out of her own funds $60 a month to cover the board and lodging of herself and the child; that the petitioner had been a newspaper artist, but had been out of employment since August 8, 1922. It also appeared that prior to the filing of the complaint the complainant had instituted proceedings for a divorce from petitioner herein and had obtained an order from the superior court awarding her temporary alimony for the support of herself and the child.

At the hearing upon the return of this writ it was conceded that the mother of the child had sufficient funds from her private income to support the child. The case may thus rest upon the single point advanced in the argument as to the proper interpretation of section 270, Penal Code: Is one parent criminally liable for failure to support his minor child if the child is fully supported by the other parent? It may be conceded that "both a legal and moral obligation rests upon a father to support his minor children." Pac. Gold D. Co. v. Ind. Acc. Comm., 184 Cal. 462, 466, 194 Pac. 1, 13 A. L. R. 725. But section 196 of the Civil Code provides:

"The parent entitled to the custody of a child must give him support and education suitable to his circumstances. If the support and education which the father of a legitimate child is able to give are inadequate, the mother must assist him to the extent of her ability."

Section 206 of the same Code requires both the father and the mother to maintain their children who are unable to maintain themselves.

[1] These sections are in harmony with the Penal Code section which makes it a crime for "a parent" of a minor child to willfully omit to support it. This section relates to the mother as well as to the father of a minor, and both or either are liable if the neglect is "without lawful excuse." The financial inability to do so is a lawful excuse. People v. Clarke (Cal. App.) 201 Pac. 465; People v. Forester, 29 Cal. App. 460, 155 Pac. 1022. The fact that the child was supplied by others with the necessary food, clothing, shelter, and medical attendance was a lawful excuse prior to the amendment of section 270 in 1921 (St. 1921, p. 1723), when the words "and it shall be no defense to such an action that such child has been provided for by other persons" were added. It was under the old section that People v. Clarke (Cal. App.) 201 Pac. 465, was decided, holding that the father was excused because his child was supported by its grandparents with their consent and solicitation.

[2, 3] It is argued that, by reason of the amendment, a father is not excused if his child is amply supported by its mother. But the amendment relates only to "other persons"; that is, persons other than a parent or the child itself. Thus, when a minor child is furnished with the necessary food, clothing, shelter, and medical attendance by one parent, such fact is a lawful excuse to relieve the other parent from criminal liability under the Code section. The same is true if the child has a sufficient private income.

The prisoner is discharged.

We concur: STURTEVANT, J.; TYLER, Presiding Justice pro tem.

60 Cal. App. 64

**MacRAE v. HEATH et al. (Civ. 3857.)**

(District Court of Appeal, Second District, Division 2, California. Dec. 5, 1922. Rehearing Denied Jan. 5, 1923. Hearing Denied by Supreme Court Feb. 1, 1923.)

**1. Sales ⟸61—Whether there is sale or contract to sell depends on parties' intent, gathered from language used, read in light of surrounding circumstances if uncertain.**

Whether there is a sale or an executory contract to sell depends on the parties' intent, which must be gathered from the language of their contract, read, if uncertain, in the light of the circumstances surrounding its making.

**2. Sales ⟸61—Use of words "buyer buys" or "seller sells" not conclusive on issue as to sale or contract to sell.**

The use of the words "the buyer buys" or "the seller sells," which, standing alone, import a present passing of title (Civ. Code, §§ 1721, 1722), is not conclusive of the question whether a contract is a sale or an executory contract to sell, as the whole instrument must be examined.

**3. Sales ⟸61—Contract held one for future delivery and sale.**

A contract whereby, in consideration of an advance payment to be deducted from the last deliveries, "the buyer buys and the seller sells" a crop of citrus fruit for $.03 per pound, "delivered at a packing house to be designated by the buyer" at times and in quantities directed by him, the seller to properly care for the orchards, clip the fruit carefully, and handle it so as to avoid unnecessary mechanical injury, *held* not a contract of sale under which title would pass immediately, throwing a subsequent loss by freezing on the buyer, but a contract for future delivery and sale.

**4. Sales ⟸61—Parties held not to have practically construed contract as immediately passing title.**

That the seller of a fruit crop was notified by the buyers to pick it, and that some of it was delivered and accepted after a freeze which injured a part, *held* not a practical construction of the contract, which contained no express warranty of quality or merchantability, which is not implied by law (Civ. Code, § 1764), as immediately passing title; the parties' conduct being equally accounted for by the belief that the contract, though executory, was still binding.

**5. Sales ⟸48—Seller delivering fruit after discovering condition rendering sale unlawful cannot recover contract price.**

Under Act May 3, 1915 (St. 1915, p. 328), declaring the sale of citrus fruit, 15 per cent. or more of which shows a marked drying in 20 per cent. or more of the exposed pulp, a misdemeanor, a seller delivering fruit, pursuant to an executory contract for the sale of his entire crop, after discovering that it was frosted to such extent, cannot recover the contract price, though the agreement was valid when made; Act May 24, 1917, § 11a (St. 1917, p. 912), prohibiting the sale of citrus fruit, except on trees, if "frozen to the extent of injuring the reputation of the citrus industry of the state," which is unconstitutional for the same reason as Act June 3, 1921 (St. 1921, p. 1234), and Act May 27, 1919, § 9 (St. 1919, p. 1225), only purporting to supplement and not repealing, expressly or impliedly, the Act of 1915.

**6. Contracts ⟸105—No action entertained on contract expressly prohibited by law.**

No action will be entertained on a contract expressly prohibited by law or on any asserted rights growing out of it.

**7. Sales ⟸50—Illegal sale not validated by delivery and acceptance of goods.**

That oranges frozen to such extent as to render the sale thereof illegal under Act May 3, 1915, were delivered to and received by the buyer, does not entitle the seller to recover the contract price, for an illegal contract cannot be rendered valid so as to support an action by invoking the doctrine of estoppel.

**8. Sales ⟸48—Seller not bound to deliver fruit crop so damaged by frost as to render sale illegal.**

Under an executory contract for the sale of an entire fruit crop, part of which was subsequently so damaged by freezing as to render the sale thereof illegal under Act May 3, 1915, the seller could lawfully deliver the fruit, if required by the buyer, to enable separation of the frozen from the unfrozen and payment for the latter, but was not bound to deliver the whole bulk as a consummation of the contract, and hence cannot recover the contract price therefor.

**9. Sales ⟸152—Buyers held not liable for increased loss from delay in calling for delivery of fruit.**

Where the seller of a fruit crop for delivery at times directed by the buyers, who agreed to call for delivery of certain parts by certain dates, did not demand that they take the fruit earlier than they did, which was long before they were required to do so, though, after the fruit was matured and ready for shipment, acquiesced in its being taken when it was, and delayed picking it after being directed to do so, the buyers were not liable for the increased damage from frost, though they made no serious protest at the seller's delay and the latter complied with their directions as to delivery, especially where the amount of such increased loss was not shown and the extent of the freezing could not be estimated until long afterward when the fruit passed through the separator.

**10. Sales ⟸181(11)—Buyer's repudiation of contract and refusal to accept delivery held not shown.**

Evidence *held* not to show the buyers' repudiation of an entire contract for the sale of a fruit crop or refusal to accept delivery of part, so as to entitle the seller to recover the difference between the contract price thereof and the amount for which he sold it to another.

**11. Sales ⇐194—Seller held not warranted by buyers' failure to pay for fruit delivered in treating contract as abandoned and suing for lost profits on undelivered fruit.**

A seller of oranges and grapefruit *held* not warranted by the buyer's failure to pay for the oranges which were delivered, in treating the entire contract as abandoned and suing for loss of profits on the grapefruit, which were not tendered before being sold to another, especially where the oranges were frozen to such an extent as to render the delivery thereof illegal under Act May 3, 1915.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Kenneth MacRae against J. E. Heath and others. Judgment for plaintiff, and defendants appeal. Reversed.

G. P. Adams, of Los Angeles, for appellants.

L. M. Chapman, and Ward Chapman, both of Los Angeles, for respondent.

WOOD, Justice pro tem. On October 7, 1918, plaintiff as "seller" and defendant Heath as "buyer" executed the following contract:

"For and in consideration of an advance payment of two thousand dollars ($2,000.00), receipt of which is hereby acknowledged, the buyer buys and the seller sells the entire crop of citrus fruit, except lemons, on his several properties at Rialto, San Bernardino county, California, for three cents (3c) per pound for all varieties, delivered at a packing house to be designated by the buyer, at Rialto, California, at such times and in such quantities as buyer may direct.

"It is understood that the advance will be deducted from the last deliveries made, and that in the event such deliveries do not amount to two thousand dollars ($2,000.00), any balance due will be paid by seller on demand.

"It is also agreed that buyer will pay for each sixty thousand (60,000) pounds of fruit as soon as delivered.

"Seller agrees to take proper care of the orchards, to see that all fruit is carefully clipped, and handled in every respect with a view to avoiding unnecessary mechanical injury.

"Buyer agrees to call for the delivery of all Washington navels by May 20th, all Med. sweets Mikes by June 15, all Valencias by August 15th, and all grapefruit by October 1st."

Defendant Angeles Brokerage Company, guaranteed the faithful performance of the contract by Heath. Defendant Pann is president and holder of 90 per cent. of the stock of the brokerage company. Defendants acted together in making the contract and in all that transpired thereafter and will be spoken of herein without distinction as defendants or buyers.

About January 1, 1919, cold weather set in, and a large part of the fruit in plaintiff's orchard was frozen. Plaintiff had taken proper care of the orchards and the injury from frost was not contributed to by any negligence of his. In early March defendants directed plaintiff to pick and to deliver the fruit at a packing house agreed upon, the proprietor thereof becoming under the contract the agent of defendants for the purpose of receiving deliveries. All the oranges, except those in one orchard, the delivery of which was waived by defendants, were duly delivered. When delivered, 42 per cent. of the navels, 18 per cent. of the Mikes, 33 per cent. of the Valencias, and 62 per cent. of the Mediterranean sweets were so frozen as to be utterly worthless. There was no delay in delivery not acquiesced in by defendants. There is no complaint of lack of care in picking or handling. Three deliveries, made between March 27th and May 20th aggregating 198,270 pounds, frozen and unfrozen, were paid for at the contract rate. Defendants refused to pay for the rest of the oranges Plaintiff sold the grapefruit to third parties at its market price. This, in substance, the trial court finds, and the finding is supported by evidence. The court made other findings to which reference will be made. Judgment was rendered at the contract rate for the oranges delivered and not paid for, and for the difference between the contract price of the grapefruit and the amount for which plaintiff sold them. It was rendered against Heath and the brokerage company for the whole amount, and against Pann for 90 per cent. thereof. Defendants appeal.

(a) The first question that confronts us is: Was the contract a sale, sometimes though tautologically spoken of as a "present sale," or was it an executory contract—a contract to sell? If the former, the property in the fruit passed immediately, and the loss by freeze was upon the buyer, regardless of other considerations. If the latter, other serious questions must be examined.

[1, 2] Whether there is a sale depends upon the intent of the parties. This must be gathered from the language of their contract, read, in case of uncertainty, in the light of the circumstances surrounding its making. The use of the words "the buyer buys" or "the seller sells," which, standing alone, would import a present passing of title (Civ. Code, §§ 1721, 1722; Johnson v. Dixon Farms Co., 29 Cal. App. 54, 155 Pac. 134, 136), is not conclusive. The whole instrument must be examined.

[3] When this contract was made, most, if not all, of the fruit was not in condition in which the buyer could be called upon to accept it. The seller was to care for it until delivery. He was to clip the fruit carefully and handle it so as to avoid unnecessary mechanical injury. He might or might not do this. The buyer within broad limits was to fix the times and quantities of delivery.

There was neither immediate delivery nor payment of the purchase price. The terms were, in effect, cash on delivery. There are no provisions of the contract or circumstances surrounding its making that negative the inference from these facts that title was not intended immediately to pass. Significantly, the contract words, "the buyer buys and the seller sells the entire crop of citrus fruit," are modified by the words, "delivered at a packing house to be designated by the buyer." Under the rule in this state, clearly announced by our Supreme Court, following the Supreme Court of the United States, and in the main the English rule, and applied by this court, it is clear that this contract is not one of sale but is a contract for future delivery and sale. Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199; Walti v. Gaba, 160 Cal. 325, 116 Pac. 963; Algee Cotton Cases, 22 Wall. 180, 22 L. Ed. 863; Benjamin on Sales [7th Ed.] § 318 et seq.; Kenney v. Grogan, 17 Cal. App. 527, 120 Pac. 433; Pfoh v. Porter, 23 Cal. App. 59, 137 Pac. 44.

The case of Bill v. Fuller, 146 Cal. 50, 79 Pac. 592, cannot be regarded as throwing doubt upon the rule. The statement that the agreement there involved imported a present sale is little more than an observation made after the decision of the case upon another point and without consideration of Blackwood v. Cutting Packing Co. or the rules there set forth. Nor does Lassing v. James, 107 Cal. 348, 357, 40 Pac. 534, militate against our view that this was an agreement to sell. There the hay sold was in stacks in the field where the buyer under his contract was to pasture his cattle and feed the hay. In effect it was delivered. Nothing further was to be done except to determine the tonnage in an agreed manner and pay for the hay at the agreed rate. The case points out, following Blackwood v. Cutting Packing Co., that weighing or measuring to ascertain the price is not an essential to a valid sale where the parties "agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not." In Greenbaum v. Martinez, 86 Cal. 459, 464, 25 Pac. 12, a definite number of sacks of wheat were sold at a stated price per cental. The wheat was delivered at an agreed warehouse. Nothing remained for the seller to do except to deliver weight certificates and collect the purchase price. Miller v. Hunt et al., 47 Cal. App. 768, 191 Pac. 75, upon the point here under consideration, goes no further than to quote the observation as to passing of title made in Bill v. Fuller, without adding anything in reasoning or authority that would strengthen the quotation. In Gianelli v. Globe Milling Co. (Cal. App.) 191 Pac. 720, the hay in question was stacked. Three-fourths of the purchase price was paid. There was nothing further to be done except for the seller, for a consideration apart from the purchase price, to haul the hay to one of two designated places and collect the balance due him. They were special circumstances about the transaction held to indicate an agreement for a present transfer, and the court points out that in such case actual payment or delivery is not necessary to a sale and passage of title. Nothing militating against the rule is found in Grange Co. v. Farmers Union, etc., Co., 3 Cal. App. 519, 86 Pac. 615; and little of value upon the subject is to be found in Hamilton v. Klinke, 42 Cal. App. 426, 183 Pac. 675.

[4] The fact that plaintiff was notified by defendants to pick and that there was a delivery and acceptance of some of the fruit after the freeze cannot be regarded as a practical construction of the contract by the parties as immediately passing title. Their conduct is to be equally accounted for by the belief that the contract, though executory, still obliged the plaintiff to deliver and the defendants to receive and pay for the entire crop, though injured by the elements. Except for the Act of May 3, 1915, which we shall next consider, this belief would have been well founded, for the contract contains no express warranty of the quality or merchantability of the fruit and none is implied by law. Civ. Code, § 1764; Kenney v. Grogan, 17 Cal. App. 527, 120 Pac. 433; Carpenter v. Grogan, 18 Cal. App. 505, 123 Pac. 538.

[5] (b) Since the contract did not effect an immediate sale, but was only an executory agreement to sell, what is the effect of the Act of May 3, 1915 (St. 1915, p. 328), upon the parties' transactions and their remedies? This act provides:

"Section 1. It is unlawful for any person, firm or corporation to ship, offer for shipment, sell or offer for sale citrus fruits in boxes or in bulk, if the contents of any package, or if the fruit in bulk contains fifteen per cent. or more of citrus fruits which on a transverse section through the center, shows a marked drying in twenty per cent. or more of the exposed pulp.

"Sec. 2. It shall be the duty of the commissioner of horticulture and his deputies to enforce the provisions of this act and bring to the notice of the proper authorities any violation thereof. The commissioner and his deputies shall have full power to enter any place where oranges, lemons, or grapefruit are grown, picked, packed, shipped or offered for shipment, sold or offered for sale, to inspect such place or any part thereof.

"Sec. 3. Any person, firm or corporation violating any provision of this act is guilty of a misdemeanor."

Section 11a of the Act of May 24, 1917 (Stats. 1917, p. 909), prohibiting the sale of citrus fruits which are "frozen to the extent of injuring the reputation of the citrus industry of the state of California, if shipped," and which is unconstitutional for

the same reason that made invalid the Act of June 3, 1921 (Stats. 1921, p. 1234; In re T. H. Peppers [Cal. Sup.] 209 Pac. 896), only purported to supplement and did not repeal, expressly or impliedly, the Act of May 3, 1915. The same is to be said of section 9 of the Act of May 27, 1919 (Stats. 1919, p. 1221). Incidentally, it may be noted that the Act of 1917 expressly excepted from its operation the sale of frozen fruit to by-product factories and the sale of citrus fruit on trees, an exception that the Legislature did not see fit to make from the more definite prohibitions of the Act of 1915.

The Act of May 3, 1915, applies to the fruit covered by this contract. There is no room for construction to exclude sale of fruit on trees. The legislative intent is clear. The expediency of including in the act the sale of such fruit, particularly when the contract for sale is made when the fruit is perfectly sound, may be open to question. The power of the Legislature to so include it is not.

It does not appear whether when plaintiff and defendants made their agreement they had the act in mind. They are, however, conclusively presumed to have known of it. They must be deemed to have made their agreement in view of its provisions and of its possible effect upon their contract and upon their respective rights thereunder. They must be deemed to have understood that if, subsequent to their executory agreement to sell, the fruit became frosted to the extent that its sale or shipment would be illegal under the statute, then the vendor could not legally sell nor the vendee legally buy under that contract. Under their agreement only delivery can effect a transfer of the title and consummate the sale. Then, but then only, is there a "sale." Though the executory agreement be valid when made, if the fruit later becomes frosted to the extent proscribed by the act, a "sale" thereof is illegal; and therefore delivery for the purpose of effecting a sale under the contract is equally illegal. There were several deliveries, each made by plaintiff for this purpose. Each was an illegal act.

The presumption of innocence which attends people's acts until a guilty intent appears might enable the court to presume in some cases that when delivery is made there is no intent thereby to consummate the sale, but that the delivery is for the purpose of segregating the fruit to enable the parties to know what may lawfully be accepted and paid for under the contract. Here, however, the presumption cannot be indulged. The seller delivered expecting payment for all fruit, frozen and unfrozen; he demanded and collected for the first three deliveries; and he seeks here to recover the contract price for all of the balance of the delivered fruit—the frozen as well as the unfrozen.

The rule sometimes applied that ignorance, not of the law but of the fact which makes the act illegal, saves the act from its ordinary consequences cannot be invoked in plaintiff's behalf. Whatever might be said as to when the parties first definitely knew that the fruit was in a condition that rendered its sale unlawful, there can be no question that both parties knew it when the first fruit passed through the separator. The fruit, for the full contract price of which plaintiff had judgment, was all delivered later, when its condition was substantially known to all. Under such circumstances, plaintiff cannot have the aid of the court to enforce his contract. The illegality of the sale consummated by his own act, delivery of the fruit, precludes a recovery by him of the contract price. The sale is void, not because it is contrary to public morals or founded on an immoral consideration, but because the statute expressly declares it so.

[6] The law applicable is fully stated in Berka v. Woodward, 125 Cal. 119, 126, 57 Pac. 777, 779 (45 L. R. A. 420, 73 Am. St. Rep. 31), a decision cited, followed, and not questioned in later decisions of our Supreme Court, and relied upon by the courts of last resort of many other states:

"This, then, is the undoubted rule, that when a contract is expressly prohibited by law, no court of justice will entertain an action upon it, or upon any asserted rights growing out of it. And the reason is apparent, for to permit this would be for the law to aid in its own undoing. Says the Supreme Court of the United States in Bank of United States v. Owens, 2 Pet. 527: 'No court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of the country. How can they become auxiliary to the consummation of violations of law? There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal.' And again the same august tribunal, in Coppell v. Hall, 7 Wall. 542, says 'Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reasons. Where the contamination reaches it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded on its own violation.'"

[7] The fact that the frozen oranges were delivered to and received by the buyer does not entitle the seller to recover the contract price. The sale being illegal, and therefore void, it cannot be rendered valid so as to support an action by invoking the doctrine of estoppel. This is likewise completely covered by the court in Berka v. Woodward, supra:

"Nor in such case does it matter whether the contract has been partially or wholly performed, or whether the consideration has passed or not. 'The test,' says Judge Duncan in Swan v. Scott, 11 Serg. & R. 164, 'whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant.' And this must be so, for, while as a matter of private justice between individuals it would be but fair that one under such an illegal contract should restore the consideration or should make the payment, the rights of the public are superior to any such private considerations, and the public's right is that the fountains of justice shall remain unpolluted; that no court shall lend its aid to a man who grounds his action upon an immoral or illegal act. Therefore, there is no place for equitable considerations, presumptions, or estoppels. Fowler v. Scully, 72 Pa. St. 456, 13 Am. Rep. 699. Ex turpi causa non oritur actio. Whenever such a contract comes before the court the action must fail, and the parties will be left in the situation in which they may be found. Some slight attempt will be found occasionally to evade the application of this well-settled doctrine upon the ground of the hardship which sometimes results, but in no case, we think, has the existence of the rule been denied, or its justice as a matter commanding public necessity been questioned."

In Kreamer v. Earl, 91 Cal. 112, 27 Pac. 735, it is held that, although the point be not raised by either party, when the illegality of the contract appears, it is the duty of the court to refuse to enforce it. In Colby v. Title Insurance & Trust Co., 160 Cal. 633, 117 Pac. 918, 35 L. R. A. (N. S.) 813, Ann. Cas. 1913A, 515, the court, citing many decisions in support thereof, says:

"But the doctrine of estoppel by conduct or by laches or even ratification has no application to a contract or instrument which is void because it violates an express mandate of the law or the dictates of public policy."

As aptly stated in 23 Ruling Case Law, p. 1321:

"The objection that a contract is immoral or illegal as between the plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff; not for the sake of the defendant, but because the court will not lend its aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, potior est conditio defendentis."

[8] Counsel for plaintiff say that under the contract plaintiff was bound to deliver the entire crop regardless of its condition, citing Rosenberg v. Rogers, 44 Cal. App. 196, 186 Pac. 366. That case is inapplicable. No question of illegality was there involved. If the defendants had demanded the whole bulk of the oranges as a delivery under, and a consummation of, the contract of sale, plaintiff would have been protected by the statute in refusing to so deliver them. That he could have lawfully delivered them, if required by defendants, not in expectation of receiving the contract price for the whole, but to enable the separation of the frozen from the unfrozen fruit, and payment for that the sale of which is not prohibited, there can be no doubt. Whether he himself could have separated the unfrozen fruit, and then have required defendants to accept and pay for the unfrozen part of the entire crop contracted for, is a matter of interesting speculation, but unnecessary to decide. However, this may be, hard cases do not enable us to fly in the face of established law.

[9] (c) The trial court found:

"All of the Washington navels, which comprise about one-third of all the oranges, were matured and ready or shipment at least as early as January of 1919, and might have been shipped in that month, and if they had been called for by defendants and packed during that month, the loss from damage by frost would have been insignificant; but defendants neglected to call for delivery of said fruit until the month of March, when the damage resulting from the frost had very much increased. Likewise the greater part of the remaining fruit was matured and ready for shipment at least as early as April, but defendants neglected to call for the delivery of the same until after the first of May, at which time the damage had materially increased, and the loss was much greater on account thereof than it would have been if delivered, packed and shipped earlier."

Relying upon this finding and upon the authority of Bill v. Fuller, 146 Cal. 50, 79 Pac. 592, and Miller v. Hunt, 47 Cal. App. 768, 191 Pac. 75, plaintiff urges that defendants "must stand the loss that resulted" from failure to take the fruit earlier. The findings, however, do not show what that loss is, nor does the proof. Clearly the delay found did not occasion the whole loss and thereby justify the judgment for the total contract price of the fruit. Nor is there any finding that plaintiff demanded that defendants take the fruit earlier than they did. The proof shows beyond cavil that plaintiff at least acquiesced in the fruit being taken when it was, made no protest or demand that it be taken sooner, and himself, though directed by defendants in early March to pick the navels and follow with the other oranges, took until March 29th to finish picking the navels, and then allowed 44 days to elapse after the navels were picked before beginning to pick the other oranges.

It is true defendants made no serious protest at this delay, and the trial court finds that plaintiff complied with defendants' directions as to delivery; but that does not affect this question. Herein is the marked distinction between this case and Bill v. Fuller and Miller v. Hunt et al., in each of which cases the seller insisted that the fruit be taken and the buyer refused to take it. Under the contract, defendants had until long after the times mentioned in this finding to take the fruit. It is difficult to see how they could be charged with the loss on the ground of negligence for not sooner demanding that plaintiff pick and deliver the fruit, when the negligence, if any, is so completely concurred in by plaintiff himself.

It must further be pointed out that the evidence shows beyond question that no one knew certainly to what extent the fruit was frozen until it had passed through the separator, and could not even closely estimate the damage until many weeks after the freeze, when through evaporation of juice from the frost-broken cells the drying disclosed the damage. The horticultural commission on January 5th placed, and until January 25th maintained, a strict embargo on shipments, indeed successfully prohibited shipment of one car of plaintiff's oranges from another point, though no discoverable drying of the fruit had occurred. By plaintiff's own testimony it appears that defendants believed, though mistakenly, that the fruit would fill out again with watering, and that plaintiff agreed to water it. For these reasons it was difficult for either party to know what best to do. In face of these facts, the finding of negligent delay on the part of defendants cannot be supported.

[10] (d) Under the contract defendants had until October 1st to call for delivery of the grapefruit. On August 20th plaintiff sold this fruit to another. The trial court rendered judgment for the difference between the amount received by plaintiff and the contract price. This judgment is proper only under the finding that about June 27th defendants "repudiated said contract and refused to accept any further deliveries of any fruit thereunder," and that plaintiff was "ready, able and willing to deliver" the grapefruit in accordance with the contract and offered to do so, but that defendants "refused to accept or receive the same."

For the finding that plaintiff offered to deliver the grapefruit and that defendants refused to accept or receive it there is no evidence whatever. The finding of repudiation can be upheld only if the failure of defendants to pay for all of the delivered oranges may be deemed to be a repudiation. Under these facts in evidence it clearly cannot. Defendants never evinced an intention to abandon the contract. After the oranges were all delivered and part of them paid for, a controversy arose as to whether under the contract defendants were called upon to pay for the frozen and discarded fruit. There were friendly conversations and letters between the parties looking to a settlement. Heath, Pann, and other witnesses testified positively and clearly to facts which, if true, would show an accord and satisfaction, whereby defendants paid $1,500 for the oranges in one orchard, and plaintiff was permitted to keep those oranges, and was to keep the grapefruit; the payments made for the first deliveries of oranges, frozen and unfrozen, to be received in full consideration for all deliveries of oranges. Plaintiff, though his testimony is not clear, finally denied this settlement, and the court found with him, thereby ending the matter. However, he did keep the grapefruit. According to plaintiff's own testimony —and there is no other upon this subject except that last mentioned—the last conversation respecting settlement was on August 7th, and it ended as follows:

"I said, 'Pann, what is your idea of this?' and he said, 'My opinion is that Mr. Heath don't owe you anything.' I got up and said, 'Good day, gentlemen,' and walked down street." After that, as he says, "I met them occasionally, but never talked to them about any of these matters, and never made any demand on them to pay me before suit was filed."

His other testimony on the subject is:

"Q. Did you ever offer to any of them to pick and make delivery of the grapefruit? A. Oh, repeatedly. The first offer was to Mr. Heath. They were both at Rialto, and frequently were in May, and I said: 'This stuff is dropping bad; it should be picked off.' Heath said they would take every pound of it and pay for every pound. * * * We were not talking about the grapefruit particularly then —it was about the oranges, the whole thing. * * * They did not say they would not take the grapefruit, but I never delivered it to them because I didn't get paid for what I did deliver."

Speaking of the effort at compromise, he said:

"I finally told them—they said that they did not want to take the grapefruit; they were figuring about paying for all the fruit they shipped, and if they would pay for that I was to keep the grapefruit, but they didn't pay for it. In Mr. Pann's office we were trying to compromise, but they did not tell me they would not take the grapefruit."

Later in his testimony:

"Q. Well, then, you never did agree to take the grapefruit? A. No, because it was only part of a tentative agreement that was never carried out, never concluded, never closed."

[11] These facts do not, nor do any facts in evidence, show a repudiation of the entire contract or any refusal by defendants to take the grapefruit. According to the testimony

of plaintiff himself, the reason why he did not deliver the grapefruit was "because I didn't get paid for what I did deliver"—referring to the delivered oranges. Plaintiff made no tender of the grapefruit before selling it, and the buyer's mere failure to pay for the oranges did not warrant plaintiff in treating the entire contract as abandoned and suing for loss of profits. Palm v. Ohio, etc., R. R. Co., 18 Ill. 217.

There is nothing against this view in Jensen v. Goss, 39 Cal. App. 427, 179 Pac. 225, and Minaker v. California Canneries Co., 138 Cal. 239, 71 Pac. 110, cited by plaintiff. In each of these cases the purchaser showed a clear intention to violate the contract, and in each case it was held that rescission was thereby justified. The holding of S. F. Bridge Co. v. Dumbarton L. & I. Co., 119 Cal. 272, 51 Pac. 335, is that the failure to make agreed monthly payments called for by a contract is a substantial breach thereof, justifies the other party in refusing to proceed thereunder, and enables him to maintain an action in quantum meruit for the value of work and labor done. The relief sought by plaintiff here is different from that granted in any of these cases. Here the plaintiff has not rescinded, but, seeking to keep the contract alive for the purpose of recovering lost profits, he sues for the profits which he would have realized had the contract been performed. This he may do only if he has been "prevented" from himself performing—the third of the species of relief for breach of contract pointed out in McConnell v. Corona City Water Co., 149 Cal. 65, 85 Pac. 929, 8 L. R. A. (N. S.) 1171. In the case of Cox v. McLaughlin, 52 Cal. 596, and 54 Cal. 605, it was held that the mere failure to pay an installment due under a contract, while justifying rescission and recovery of the value of the work actually done, does not entitle one to this third species of relief—does not authorize the abandonment of the contract and its performance and at the same time an action to recover the benefits that would have been received had there been performance, which is what the plaintiff here is seeking to do.

Another consideration leads to the same end. As already seen, the delivery of the oranges frozen beyond the degree proscribed by the act of May 3, 1915, was illegal. Defendants were not obliged to pay the contract price therefor. A refusal to do that, the doing of which the law forbade, could scarcely be deemed a repudiation of a legal obligation.

Other points are raised and have been considered, but we deem those passed upon determinative of the appeal.

The judgment is reversed.

We concur: FINLAYSON, P. J.; CRAIG, J.

(60 Cal. App. 92)

## In re REES' ESTATE.

## REES v. TITLE INS. & TRUST CO.

(Civ. 4056.)

(District Court of Appeal, Second District, Division 2, California. Dec. 6, 1922. Rehearing Denied Jan. 5, 1923. Hearing Denied by Supreme Court Feb. 1, 1923.)

**1. Executors and administrators ⇐11—Right to set aside deeds made by decedent held property supporting administration.**

A claim of a right to set aside deeds made by decedent constitutes property of the estate in the nature of real property upon which administration may be had.

**2. Executors and administrators ⇐11—Appointment of administrator discretionary where sole property of decedent is equitable right to set aside deeds.**

It is discretionary with a probate court to appoint an administrator where the only property of a decedent is an equitable claim of a right to set aside deeds made by decedent.

**3. Executors and administrators ⇐11—Appointment of administrator, where only property consisted of equitable claims, held not an abuse of discretion.**

Where deeds made by a decedent were set aside, although the right to appeal existed, a probate court, in appointing an administrator for the estate, on the ground that the right to set aside such deed would support the administration, did not abuse its discretion.

**4. Executors and administrators ⇐18—That widow who has absolute right to general letters of administration has claims adverse to estate does not disqualify her.**

Under Code Civ. Proc. § 1365, giving an absolute right to letters of general administration to decedent's widow or to her nominee, the court, after having exercised its discretion to grant general letters, had no discretion to determine as to whom they should go, and that the widow claimed an interest adverse to the estate did not disqualify her or her nominee to act.

Appeal from Superior Court, Los Angeles County; Bertin A. Weyl, Judge.

Petition by Llewellyn Rees and the Title Insurance & Trust Company, for the appointment of a general administrator in the estate of Lewis Rees, deceased. From an order appointing the Title Insurance & Trust Company,and denying the petition of said Rees, he appeals. Affirmed.

Hearing denied by Supreme Court; MYERS, J., not participating.

W. D. Van Nostran and C. Ibeson Sweet, both of Los Angeles, for appellant.

Ford & Bodkin, of Los Angeles, for respondent.

WORKS, J. This is an appeal by Llewellyn Rees from an order appointing Title Insurance & Trust Company the general administrator of the estate of Lewis Rees, deceased. The determination of the appeal is involved in a somewhat complex chronology of the events leading up to the order from which the appeal is taken. On September 3, 1919, Lewis Rees executed to Mary L. Rees, his wife, a deed conveying certain of his real property; on September 17, 1919, he executed to her an instrument of like character, conveying other, and apparently the remainder, of his real property; on September 19, 1919, the deed of September 17 was placed of record; on March 2, 1920, Lewis Rees died intestate; on June 17, 1920, Llewellyn Rees and John H. Rees, sons of decedent, filed their petition for special letters of administration in the matter of their father's estate, and on the same day the petition was granted; on June 24, 1920, the special administrators commenced an action against Mary L. Rees to cancel the deed of September 17, 1919, and summons was served on the defendant on the day the complaint was filed; on June 25, 1920, Mary L. Rees placed of record the deed of September 3, 1919; on June 29, 1920, the special administrators commenced an action against Mary L. Rees for the purpose of canceling the last-mentioned deed; on June 30, 1920, Llewellyn Rees filed his petition for general letters of administration in the matter of his father's estate; on September 1, 1920, Mary L. Rees filed written objection to the granting of the petition of Llewellyn Rees, the ground of objection being that as Lewis Rees in his lifetime had conveyed all his property to her, he left no estate to be administered upon; on June 8 to 17, 1921, the two actions to cancel the deeds, having been consolidated by stipulation, were tried together; on June 22, 1921, Title Insurance & Trust Company, as the nominee of Mary L. Rees, filed its petition for general letters of administration in the matter of the estate of Lewis Rees, deceased; on July 18, 1921, Llewellyn Rees filed his contest in opposition to the granting of letters to Title Insurance & Trust Company; on August 16, 1921, the trial court rendered its judgment canceling the deeds of September 3 and 17, 1919; on August 23, 1921, Llewellyn Rees filed his amended contest opposing the granting of letters to Title Insurance & Trust Company; on August 31, 1921, Mary L. Rees filed her notice of intention to move for a new trial of the two actions for cancellation; on November 1, 1921, the petitions of both Llewellyn Rees and Title Insurance & Trust Company for general letters of administration came on for hearing, and the court made its order appointing Title Insurance & Trust Company, and denying the petition of Llewellyn Rees. It is from this order that the present appeal is prosecuted.

[1] Notwithstanding the objection of Mary L. Rees to the petition of Llewellyn Rees for general letters, made upon the ground that decedent left no property to be administered upon, the trial court found upon the hearing of the two petitions for general letters that decedent left real property of the value of more than $10,000. This finding is assailed as having no support in the evidence, but we think the support for it is ample. The claim of the right to set aside the two deeds of September, 1919, was property upon which administration might be had (Estate of Daughaday, 168 Cal. 63, 141 Pac. 929); and, laying aside the question whether, in strictness, such a right is real property, it is evident that in the present instance the probate court treated it as such. There was an allegation in both the contest and the amended contest of Llewellyn Rees that decedent left personal property of the value of about $15,000. This allegation was found to be untrue. There can be, therefore, no doubt that the court had in mind the equitable claim to set aside the two deeds when it found that decedent left real property of the value of $10,000. It is to be remembered that the judgment setting aside the deeds had been rendered two and a half months before the making of the order from which the present appeal is taken. This circumstance probably impelled the court to place a value of $10,000 upon the right which was in litigation in the two cases, the pleadings of Llewellyn Rees alleging that the property itself which was the subject of the deeds was of a value of from $75,000 to $100,000. As the claim of the right to set the deeds aside was the only property which the court could have had in mind in making the finding assailed, it, of course, did have that property in mind. The finding was supported by the evidence.

[2] It is the rule that it is discretionary with a probate court to appoint an administrator where the only property of a decedent is such an equitable claim as the special administrators sought to enforce in the present instance. Estate of Daughaday, supra. It is contended under this rule that the court abused its discretion in appointing respondent, for the alleged reason that, being the nominee of Mary L. Rees, respondent is but her agent and creature, and will obey her every behest as administrator, and will act under her control in discharging its trust. It is said that it would have been improper for the court to have appointed Mary L. Rees, the position being taken that she, if appointed, would have become plaintiff, as administrator, against herself individually, as defendant, in the two actions to set aside the deeds. Waiving the contention that respondent, by virtue of its appointment, is under the servility to Mary L. Rees which is attributed to it, we cannot see merit in the point made by appellant. The discretion reposed

in a probate court under the decision in Estate of Daughaday is not as to the person who shall be named as administrator, but as to whether an administrator shall be named at all.

[3] It is plain to us that the discretion was not abused here. As we have already observed, the trial court had pronounced its judgment setting aside the deeds before the appointment of respondent was made. This circumstance might well have impelled the probate court to the view that the claim of right to cancel the instruments was both tangible and valuable, notwithstanding that a right of appeal still existed. The court doubtless felt that the rendition of the judgment removed the claim from the category designated by the Supreme Court in the opinion in Estate of Daughaday, when that tribunal says that—

"It is not within the contemplation of the law that the mere assertion of any claim, however visionary and unsubstantial, shall call for the issuance of letters of administration and to that extent give a form of judicial sanction to unfounded pretensions."

Further, the court had already given "a form of judicial sanction" to the claim by the appointment of special administrators to enforce it, for special administrators may be named only (italics being ours) "to collect and take charge of the *estate* of the decedent, * * * and to exercise such other powers as may be necessary for the preservation of the *estate*." The special administrators having brought the actions for cancellation of the deeds to the successful issue of a judgment in the superior court, the probate department of the court surely exercised its discretion rightly in determining to replace the special administration with a general one.

[4] The court having concluded to issue general letters, it had no discretion to determine to whom they should go. The statute gave the absolute right to letters to Mary L. Rees or to her nominee. Code Civ. Proc. § 1365; In re Dorris, 93 Cal. 611, 29 Pac. 244; Estate of Brundage, 141 Cal. 538, 75 Pac. 175. The fact that Mary L. Rees claimed an interest adverse to the estate did not disqualify her or her nominee to act as administrator, nor deprive her or her nominee of the right to act as such.

"It is admitted that the appellant was not disqualified by reason of his adverse claim to property claimed by the estate. [Citing cases.] Our statute prescribes the grounds of disqualification, and the courts have no right to add to the disqualifications prescribed by the Legislature. The fact of adverse claim is urged by the respondent solely as a justification of the exercise of the discretion of the superior court in favor of respondent, it being claimed that under the law the court was invested with the power to appoint either of the applicants; in other words, that the appointment was in the discretion of the court. The appellant claims that, under the circumstances of this case, he had the absolute right to letters of administration as against respondent, and that the court had no discretionary power whatever. This claim of appellant must, under the statutes and decisions, be sustained." Estate of Brundage, supra.

In a later case dealing with the question here presented, after announcing that section 1365, Code of Civil Procedure, fixes the order in which persons are entitled to letters of administration, the Supreme Court said that—

"The law affords ample remedies to all parties interested in the estate against the acts of any administrator who may be found not to have the best interests of the estate at heart. In the first instance, they will be protected by an adequate bond exacted of the administrator, and in the next, he is subject to prompt removal for any unwarranted failure to recover and preserve the estate's assets." Estate of McCausland, 170 Cal. 134, 148 Pac. 924.

If it be said that the probate court should have considered, in resolving whether general letters should issue, that such letters must at all events issue to Mary L. Rees or her nominee, we are yet of the opinion that the discretion of the court was not abused.

It is also contended by appellant that Mary L. Rees has elected her remedy in defending the suits to cancel the deeds, and that therefore she was precluded from petitioning for letters of administration or from naming another person to make such petition. Without entering into an extended discussion of the point, we conclude that there is no room in the case for the application of the doctrine of the election of remedies. There is, in a legal sense, nothing inconsistent in the two positions taken by Mary L. Rees. If it were proper that general letters should issue in the matter of the estate, she or her nominee was entitled to them, notwithstanding that she was a defendant in the cancellation suits, and that she insisted therein upon the validity of the deeds. Such is the effect of decided cases which we have already cited.

Order affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

(60 Cal. App. 106)

## PEOPLE v. CASDORF et al. (Cr. 637.)

(District Court of Appeal, Third District, California. Dec. 11, 1922.)

1. Indictment and information ⟸110(3)—Sufficient to charge criminal syndicalism in language of statute.

To satisfy the requirements of Pen. Code, §§ 950–952, with respect to certainty as to the offense charged and the particular circumstances thereof, it is sufficient to charge violation of the Criminal Syndicalism Act of 1919 in the language of the statute.

2. Criminal law ⟸1144(18), 1160—Appellate court bound by trial judge's decision overruling motion for new trial, and assumption is that counter affidavits were accepted as true.

The appellate court is bound by the trial judge's decision overruling defendants' motion for new trial as far as any conflict exists between the affidavit in support thereof and the prosecuting attorney's counter affidavit, the assumption being that the judge accepted the latter as containing a true statement of the facts.

3. Criminal law ⟸1144(10)—Prosecutor assumed to have acted in good faith in stating that witnesses admitting certain fact would be arrested.

It must be assumed on appeal from a conviction of violating the Criminal Syndicalism Act of 1919 that the assistant district attorney, in stating in the presence of witnesses that all witnesses admitting membership in a certain organization would be arrested and charged with criminal syndicalism, acted in good faith for the purpose of warning them of the consequence of incriminating themselves, so that they might decline to testify.

4. Criminal law ⟸956(4)—No prejudice shown by affidavit for new trial that appellant's witnesses were rendered less efficient by prosecutor's threat to arrest witnesses.

A statement, in an affidavit supporting a motion for new trial following conviction of violating the Criminal Syndicalism Act, that defendants' witnesses were rendered "less efficient" because of the assistant district attorney's statement in their presence that witnesses admitting membership in a certain organization would be arrested and charged with criminal syndicalism, *held* not to show prejudice to defendants' substantial rights, being a mere conclusion.

5. Criminal law ⟸956(4)—No prejudice shown by statement that witnesses were scared away by prosecutor's statement.

A statement, in an affidavit supporting a motion for new trial, that witnesses were scared away by the prosecutor's statement that witnesses admitting a certain fact would be arrested and charged with the offense charged against defendants, *held* not to show prejudice to the latter's substantial rights, in the absence of any statement of the names of the witnesses and what their testimony would be.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

J. A. Casdorf and Earl Firey were convicted of violating the Criminal Syndicalism Law, and they appeal. Affirmed.

R. W. Henderson, of Bakersfield, E. S. Smith, of Centralia, Wash., and Austin Lewis, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. [1] The first point made by appellants is that the trial court should have sustained the demurrer to the indictment on the ground that it did not conform to the requirements of sections 950, 951, and 952 of the Penal Code, "in that there is uncertainty as to the offense charged and the particular circumstances of the offense charged." It is admitted, however, that they were accused in the language of the statute, in that:

"They were, and each of them was then and there willfully, unlawfully, feloniously and knowingly a member of an organization, society, group and assemblage of persons known and designated as 'The Industrial Workers of the World,' sometimes known and referred to as the I. W. W. and sometimes known and referred to as the 'One Big Union,' which said organization, society, group and assemblage of persons was then and there organized and assembled to advocate, teach and abet criminal syndicalism."

This question has been recently considered by this court in the case of People v. Roe, 209 Pac. 381, wherein the charging part of the indictment was in the identical language of that before us, and it was held to be sufficient to so follow the language of the statute. We may refer also to People v. Steelik, 187 Cal. 361, 203 Pac. 78, and People v. Taylor, 187 Cal. 378, 203 Pac. 85, cited in the Roe Case, wherein the same doctrine is enunciated. The question must be deemed settled adversely to the contention of appellants and no further discussion is called for.

It is urged that the evidence is insufficient to support the verdict. In this connection the particular contention is that the character of the organization after the enactment of the Criminal Syndicalism Act of 1919 (Stats. 1919, p. 281) was not shown to have been within the inhibition of the law. There is a claim that the organization, in compliance with public sentiment as embodied in said statute, changed its purposes and modified its methods, and that the evidence of what was advocated and practiced by the society related entirely to the old organization and not to it in its present form. In this appellants are in error. It is true that a large portion of the voluminous transcript is taken up with a recital of what the organization taught and practiced prior to 1919,

but our examination of the record has convinced us that it reveals sufficient basis for the implied finding of the jury that in February, 1922, defendants were members of "an organization, * * * which said organization, society, group and assemblage of persons, was then and there organized and assembled to advocate, teach and aid and abet criminal syndicalism" as that term is defined in the statute. Indeed, the evidence of the character of said organization in the case at bar is substantially the same as in People v. Roe, supra, and we may refer to that decision as a complete answer to this contention of appellants.

[2] The only other point upon which reliance is had is disclosed by the following affidavit of E. S. Smith used on the motion for a new trial:

"E. S. Smith being first duly sworn, upon his oath says: That he is one of the attorneys for the defendants above named; That 10 witnesses for the defense in the above-entitled case, Walter Smith, P. Beasley, B. Kyler, A. E. Anderson, Thos. O'Mara, W. Rutherford, Chas. B. La Rue, Tom Zanger, H. M. Edwards and J. Nash, were arrested before they left the courtroom and shortly after leaving the witness stand; that some of said witnesses were chained together just outside the courtroom and were marched down the corridor in the presence of several of the jurymen while said trial was in session; that after the first two witnesses, P. Beasley and Chas. B. La Rue, were arrested, in the absence of the jury but in the presence of most of the above-named witnesses and other prospective witnesses, Mr. J. R. Hughes of the district attorney's office, in open court made the statement that all witnesses who would thereafter take the stand in this case and admit they were paid up members of the Industrial Workers of the World in good standing, would be arrested and charged with criminal syndicalism; that in order to properly present defendant's case and explain to the jury the character and nature of the organization known as the Industrial Workers of the World it was necessary to use as witnesses members of the said organization; that by reason of the arrest of witnesses P. Beasley and Chas. B. La Rue the other witnesses above named were intimidated and terrorized so as to render them less efficient as witnesses and other prospective witnesses were scared away; that this affiant believes that the above facts rendered it impossible for the defendants to receive due process of law and equal protection and that they did not so receive. Further affiant sayeth naught except that the above facts are true as your affiant verily believes."

It may be stated that on the hearing of said motion Markham Johnson, a deputy district attorney of Sacramento county, filed the following counter affidavit:

"That he is a deputy district attorney of the county of Sacramento, state of California, duly appointed, qualified and acting as such; that he assisted on behalf of the plaintiff in the presentation of the above-entitled cause of the People of the State of California v. J. A. Casdorf and Earl Firey.

"That in reply to the affidavit filed herein by E. S. Smith, one of the attorneys for the defendants herein, this affiant denies that 10 witnesses for the defense who appeared to testify in the above-entitled cause, to wit: P. Beasley, B. Kyler, A. E. Anderson, Thos. O'Mara, W. Rutherford, Chas. B. La Rue, Tob Zanger, H. M. Edwards and J. Nash, or any, or either of them, were arrested before they left the courtroom of the above-entitled court, and—or shortly after they left the witness stand; and in this connection, affiant avers the truth and fact to be that none of said above-named witnesses were arrested in the courtroom, or shortly after they left the witness stand, but they and each of them were arrested for the commission of a known felony by deputies of the office of the sheriff of the county of Sacramento, state of California, and that said arrests and each of them were made outside of the above-entitled courtroom and without the presence of the jury that was sworn to try the said above-entitled cause.

"And this affiant denies that said arrests, or any of them was for the purpose of intimidating, coercing or terrorizing any of said witnesses, and avers that said arrests did not intimidate, coerce or terrorize any of the witnesses called by said defendants, or either of them, and this affiant further avers that each and every witness called on behalf of said defendants and each of them did appear and was fully examined by counsel for said defendants.

"Affiant further avers that the acts and conduct of said deputies sheriff were not within the presence or hearing of any of the jurors sworn in the above-entitled cause, and were done in absolute good faith and in the performance of their sworn duty as officers of the law.

"This affiant further avers that he fully believes that said defendants received and each of them received a full, fair and complete trial in said cause, and therefore asks this Honorable Court to deny said motion for a new trial."

[3] We must assume that the trial judge accepted the affidavit of the deputy district attorney as containing a true statement of the facts and we are bound by his decision as far as any conflict exists between said affidavits. There is no denial, however, of this important statement in Mr. Smith's affidavit:

"That after the first two witnesses, P. Beasley and Chas. B. La Rue, were arrested, in the absence of the jury but in the presence of most of the above-named witnesses, and other prospective witnesses, Mr. J. R. Hughes, of the district attorney's office, in open court made the statement that all witnesses who would thereafter take the stand in this case and admit they were paid up members of the Industrial Workers of the World in good standing, would be arrested and charged with criminal syndicalism."

[4, 5] The propriety of such remark may be debatable, but we must assume that the assistant district attorney acted in good faith and his purpose was to warn the wit-

nesses of the consequence of incriminating themselves, so that upon that ground they might decline to testify if they so desired. But, at any rate, no prejudice to the substantial rights of the defendants was shown. That those who testified were rendered "less efficient" as witnesses is, of course, a mere conclusion of the affiant and should be disregarded. Likewise, the statement that "other witnesses were scared away" can be accorded no decisive significance in the absence of any statement of the names of the witnesses and what their testimony would be.

No error appears of sufficient gravity to warrant an interference with the verdict, and the judgment and order are therefore affirmed.

We concur: FINCH, P. J.; HART, J.

---

60 Cal. App. 79

## HENGEHOLD v. NATIONAL CREAMERY & PRODUCE CO. (Civ. 3631.)

(District Court of Appeal, Second District, Division 2, California. Dec. 5, 1922.)

**1. Brokers ⟸94—Authority to sell eggs held limited by written proposal of principal.**

Where a broker employed to sell eggs was given by his principal a written proposal containing the terms of the sale to be accepted by the buyer, the agent's actual authority was limited by the terms of that proposal, and he could not consent to any change thereof, so that an alteration of the proposal by the buyer with the broker's consent, but without authority from the seller, destroyed its integrity as the seller's contract.

**2. Brokers ⟸94—Broker held not to have ostensible authority to change written contract.**

Where a seller had had no previous dealings with the buyer, the latter could claim no implied authority on the part of the broker to vary the terms of the proposal given by the seller to the broker for presentation to the buyer.

**3. Brokers ⟸103—Principal not estopped to disavow alteration by broker of which he had no knowledge.**

Lack of knowledge by a seller of the change made in the proposition submitted by him to the buyer through a broker forecloses any claim of estoppel or ratification by him.

**4. Alteration of instruments ⟸23—Plaintiff held not entitled to recover on contract as it existed before alteration.**

A buyer of goods, who altered the seller's proposal after it had been accepted without authority by the buyer's father and delivered to the seller's broker, cannot recover from the seller for breach of the contract on the theory it became a binding contract when first delivered to the broker, since he had repudiated the acceptance of that contract by his father, and especially where he based his action upon the contract as altered.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Charles A. Hengehold, doing business under the fictitious name of Co-operative Grocery Company, against the National Creamery & Produce Company, a corporation. Judgment for plaintiff, and defendant appeals. Reversed.

Chas. M. Easton, of Los Angeles, for appellant.

Edward M. Selby, of Los Angeles, for respondent.

WOOD, Justice pro tem. This action is for damages for breach of an alleged agreement by defendant to deliver certain eggs to plaintiff. Judgment went for plaintiff. Defendant appeals. Various points are raised. Only one need be considered, for it is determinative: Was there a contract of sale between the parties?

One Sherod, the representative of a brokerage firm, knowing that defendant had these eggs in storage, telephoned and received from defendant a price on the eggs and authority as broker to sell them. No terms as to time of delivery or of payment were specified. Later Sherod communicated with defendant, saying he thought he had a buyer, giving the name of plaintiff and requesting that an agreement be mailed to Sherod for acceptance. Defendant thereupon prepared, executed, and transmitted to Sherod, in duplicate, a proposal to sell, directed to plaintiff and with a form for plaintiff's acceptance. The proposal was complete and definite. It provided, among other things, for shipment on plaintiff's order at any time before December 1, 1918, and for payment by sight draft attached to bill of lading. Up to this time plaintiff had not agreed to buy the eggs, though he and Sherod apparently had talked about them. On August 6th Sherod called upon plaintiff. After agreeing upon the price to be paid for the eggs, plaintiff went into another part of the store, leaving Sherod with plaintiff's father, who, so far as the record shows, had no authority to sign agreements for plaintiff. The father signed the acceptance on both copies, writing "Co-operative Grocery Ass'n, by F. G. Hengehold," wrote a check payable to defendant for $129 upon account of the contract—just why does not appear, for the proposal did not call for it—handed one copy of the signed instrument to Sherod, and then called the plaintiff. Plaintiff objected to the provision for December 1st delivery. At his suggestion his father, under the acceptance and over the signature to one of the instruments, inserted the words, "Time of delivery ex-

tended to December 31, 1918," and handed the check to Sherod. Thereupon Sherod, according to evidence which, under the findings, the trial court must have adopted and deemed an assent to the interlineation, wrote on the margin opposite it: "O. K. Sherod. Rect. paid $129 August 6—18." Plaintiff kept the altered copy. Sherod transmitted the other to defendant with the check. Defendant had no knowledge that its written proposal had been altered until some time after December 1st, and after it had sold the eggs to other parties. The record contains no evidence from which facts contrary to those just recited may be inferred.

[1] Whatever at the beginning may have been Sherod's implied authority as a broker to fix time of delivery and payment, even indulging the rash presumption that under it he had implied power to make on August 6th a contract under which his principal would be obliged to deliver the eggs to plaintiff and have payment deferred at the latter's option as late as December 31st, it is clear that defendant's written proposal, transmitted to its agent for the buyer's acceptance, fixed the agent's actual authority in these respects and limited any implied authority that he might theretofore have had. Sherod was without actual authority to make or consent to the change made by the interlineation. The unauthorized alteration destroyed the integrity of the instrument as defendant's contract. Walsh v. Hunt, 120 Cal. 46, 52 Pac. 115, 39 L. R. A. 697.

[2] No question of ostensible agency is involved, because defendant had no communication or transaction with plaintiff directly. Indeed, he had no dealings with plaintiff except this one through Sherod, and did nothing that would lead plaintiff to believe that Sherod was defendant's agent, except to place in Sherod's hands the form of contract signed by defendant. The implication of this is a denial, not a grant of authority in the agent to change his principal's contract. Harris v. San Diego Flume Co., 87 Cal. 526, 25 Pac. 758; Walsh v. Hunt, supra. By the proposal itself plaintiff was placed upon inquiry. If the proposal as presented did not suit plaintiff, he should have ascertained whether Sherod had power to consent to the change. He could not rely upon the agent's statements or assumption of authority. Blum v. Robertson, 24 Cal. 140; Davis v. Trachsler, 3 Cal. App. 554, 86 Pac. 610; Pease v. Fink, 3 Cal. App. 371, 85 Pac. 657.

[3] Lack of knowledge by defendant of the change in the proposed contract forecloses any claim of estoppel or ratification. Dean v. Bassett, 57 Cal. 640; Lindow v. Cohn, 5 Cal. App. 388, 90 Pac. 485.

[4] Plaintiff's counsel suggests that the proposal, when it was accepted and signed by plaintiff's father and given to Sherod without change, constituted a contract. This cannot be, because plaintiff had not authorized his father to sign for him and immediately repudiated any contract in that form. Furthermore, this action is based upon a contract as evidenced by the altered instrument.

There having been no contract between plaintiff and defendant, there was no foundation for this action, and the judgment must be reversed. It is so ordered.

We concur: FINLAYSON, P. J.; CRAIG, J.

60 Cal. App. 215

## SOUTHERN TRUST & COMMERCE BANK v. SAN DIEGO SAV. BANK. (Civ. 3970.)

(District Court of Appeal, Second District, Division 1, California. Dec. 22, 1922. Hearing Denied by Supreme Court Feb. 16, 1923.)

**1. Banks and banking ⟸130(1)—Ways in which bank may incur liability for deposit misappropriated by fiduciary stated.**

A bank may incur liability for deposits misappropriated by a fiduciary by violating its contract, express or implied, to pay the owner of the fund in strict conformity thereto, by appropriating the fund, with or without the fiduciary's consent to the payment of the latter's debt to it, or by assisting the fiduciary to accomplish the misappropriation with knowledge, actual or constructive, that the fraud is being or about to be perpetrated.

**2. Banks and banking ⟸116(6)—Knowledge of cashier's intent to misappropriate fund of ward's estate held not imputed to bank.**

A bank cashier's knowledge of his intent to convert to his own use money belonging to the estate of his ward but deposited to and withdrawn from his personal account in the usual course of business, was not knowledge which he would be presumed to have communicated to the bank, so as to render it liable to the ward's estate for the amounts so withdrawn; the bank occupying no fiduciary relation to such estate.

**3. Banks and banking ⟸154(8)—Negligence of bank directors in investigating conduct of cashier misappropriating funds of ward's estate held not shown.**

Evidence *held* to support an implied finding that a bank's board of directors were not negligent in failing to make further investigation than they did of reports that the cashier, who misappropriated a fund belonging to his ward's estate, but deposited to and withdrawn from his personal account in the usual course of business, was using liquor frequently and was interested in race horses, so as to render the bank liable to the estate.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by the Southern Trust & Commerce Bank, as administrator of the estate of John Wood, against the San Diego Savings Bank. From parts of a judgment favoring defendant, plaintiff appeals. Affirmed.

See, also, 45 Cal. App. 294, 187 Pac. 435.

Glen H. Munkelt and Wright & McKee, all of San Diego, for appellant.

Sweet, Stearns & Forward, of San Diego, for respondent.

CONREY, P. J. Appeals from stated parts of a judgment of the superior court of San Diego county in an action to recover judgment for the amount of certain trust funds of an estate, which funds were deposited in defendant bank by one E. M. Barber, guardian of the estate.

The complaint is in 21 counts, but relates to only 10 transactions. There are two counts for each transaction except one, which is set forth in three counts. The court gave judgment for the plaintiff on its first and second counts, and in favor of the defendant on all of the other counts. The plaintiff appeals from that part of the judgment which runs in favor of the defendant. There is also an appeal by the defendant, but counsel for defendant admit that the judgment against defendant should be affirmed, because it is conceded that the funds were, in that instance, paid to the defendant, at the time when they were embezzled by the guardian.

By its findings the court determined that on March 20, 1914, and for several years prior thereto, and until the month of May, 1916, E. M. Barber was cashier of the defendant bank; that as such cashier said Barber had exclusive charge of the tellers and clerks, and that all of said tellers and clerks took their orders from him as cashier; that as such cashier he had control and custody of the bank's money and accounts, subject to the direction of the president of the bank and the bank's board of directors, of which board the said Barber was a member; that from the 7th day of January, 1914, down to the month of May, 1916, said Barber was also the guardian of the person and estate of John Wood; that John Wood died on the 2d day of May, 1917, and that the plaintiff is the duly appointed and qualified administrator of his estate. The specifications of insufficiency of the evidence to justify the findings of the court do not challenge any of the foregoing findings of fact.

Upon the third and fourth causes of action the court found, and there is now no contention to the contrary:

"That on or about the 29th day of June, 1914, the said E. M. Barber received a certificate of deposit from the Farmers' National Bank of Corning, Iowa, for the sum of $8,271.12 payable to E. M. Barber, guardian. That the funds represented by said certificate of deposit were the funds of John Wood. That the said E. M. Barber indorsed said certificate of deposit and placed the same to his personal credit with the defendant, San Diego Savings Bank, and that said E. M. Barber deposited the said $8,271.12 in his personal account with said defendant bank for the purpose and with the intention of embezzling, misappropriating, and converting the said sum, and the whole thereof, to his own use, and that the said sum was by said E. M. Barber embezzled, misappropriated, and converted to his own use. * * * That the said sum of $8,271.12 so deposited to the personal account of said E. M. Barber with the said defendant, and so embezzled and converted to the use of said E. M. Barber, has never been paid to said John Wood, or to any one authorized to receive the same for him."

But the court further made the following findings, concerning which, and each of them, appellant specified and now contends that the evidence is insufficient to justify the same:

"That it is not true that the said defendant San Diego Savings Bank with knowledge of the reasons and purposes for which said sum was deposited in the personal account of said E. M. Barber, and, with knowledge that said E. M. Barber intended to withdraw the said sum from his personal account for his own use and benefit, permitted the said E. M. Barber to withdraw the said sum of $8,271.12 from his personal account, and allowed the said sum to be converted to the uses of said E. M. Barber. But, on the contrary, the court finds that the said certificate of deposit was received in the usual course of business, and was deposited by said E. M. Barber in the usual course of business of said bank, and without any knowledge whatever on the part of said defendant bank, and without any notice at all on its part of the reasons or purposes for which the said sum was deposited in the personal account of said E. M. Barber, and with no knowledge or notice that the said E. M. Barber intended to withdraw said sum for his own use or benefit. * * * That said defendant never had any knowledge that the same or any part thereof was embezzled or converted to the use of said E. M. Barber, or was never paid to the said John Wood, or to any one authorized to receive the same for him. That it is not true that the said sum of $8,271.12, which was withdrawn as aforesaid, or any part or portion thereof, was used by said E. M. Barber to pay his indebtedness to the defendant San Diego Savings Bank, or to pay any indebtedness of said E. M. Barber to said defendant, or that said defendant bank received any benefit whatever from the said sum of $8,271.12, or from any part or portion thereof."

On the remaining causes of action the findings of fact are similar to those last above set forth, with the exception that in some instances the moneys of John Wood received by Barber were deposited to an account in the name of E. M. Barber, guardian of John Wood; whereas, in the remaining instances, the money, in the form of checks or drafts to the order of E. M. Barber, guardian, was deposited to the personal account of Barber. Appellant contends that in the case of the Iowa certificate of deposit, and in certain other instances, respondent bank received the benefit of these moneys in this, that the trust funds were used to make good overdrafts of Barber on his personal account. It was shown that from time to time checks issued by Barber against his personal account, when the balance to his credit was not sufficient to meet them, were carried as cash for a week at a time (a little more or less) and not charged to his account until the account showed credits sufficient to meet them. But appellant was unable to prove, and the evidence does not show, the definite fact that at any time the funds of John Wood were used to meet any such deficit in Barber's bank account. The evidence, therefore, was sufficient to justify the court in its finding that the funds of John Wood were not used to pay any indebtedness of Barber to the defendant bank, other than in the one transaction wherein the court gave judgment in favor of the plaintiff.

[1] Appellant does not contend any officer of the bank, other than Barber himself, had actual knowledge of his misuse of these trust funds. In other words, the bank was without knowledge of his misappropriation of the funds, and was without knowledge of his intention to misappropriate said funds, unless the fact that he himself was a director, and was cashier of the bank, and had charge, custody, and control of its money and accounts, as hereinbefore stated, is sufficient to charge the bank with knowledge of the dishonest intentions and acts of the said E. M. Barber, concerning the funds received by him as guardian of the estate of John Wood.

"There are three ways in which a bank may incur liability and be compelled to make good deposits that have been misappropriated by the fiduciary: (1) By a violation on its part of the contract, express or implied, between it and the owner of the fund. The reason for the bank's liability is based upon the general principle that the bank cannot discharge its obligation to a depositor except by payment in strict conformity to the contract of deposit. (2) By appropriating the fund, either with or without the fiduciary's consent, to the payment of the latter's debt to the bank. The reason for the bank's liability is based upon the general theory that the owner of a fund may follow it into the hands of and recover it from any person who has not innocently given value therefor. The action for money had and received is an appropriate form of action in this class of cases. (3) By assisting the fiduciary to accomplish the misappropriation, the bank having knowledge, actual or constructive, that the fraud is being or about to be perpetrated by the fiduciary. The reason for the bank's liability is that it knowingly makes itself a party to a fraud, and must make good the loss that results from the misappropriation." L. R. A. 1915C, note, p. 519.

[2] It is manifest that the defendant in this action is not liable under either one of the first two conditions last above stated. The bank paid the demands of the depositor on presentation of his checks, in strict conformity to the contract of deposit, and did not appropriate any of the trust money to the payment of Barber's indebtedness to the bank, except in the one instance to which we have referred. It only remains to determine whether or not the defendant, by reason of Barber's knowledge of his own dishonest purposes at the time when he drew out the money from the bank, was chargeable with that knowledge, and thereby made itself a party to the fraud.

To put the matter concretely, let us take the item wherein it appears that Barber drew his check as guardian, payable to his own personal order, for $500. He marked the check "Bard loan" (but there was no such loan), and drew out the money. Since it has not been accounted for in any other way, we may say at that very time he intended to and did embezzle that sum of $500. As guardian he was not under obligation to keep the fund on deposit in the bank. In the ordinary course of business the bank was bound to honor his checks. If, on the stated facts, any liability exists, it must rest upon the theory that the bank itself was aware of the depositor's wrongful intention, and was therefore bound to withhold the payment to which otherwise he was entitled.

To the general rule of law that a principal is presumed to have the same knowledge as his agent, counsel for appellant admit that there is an exception to the effect that, where the agent has an interest adverse to that of his principal, it will not be presumed that he has communicated his knowledge to his principal. No doubt that is the law. But counsel for appellant seek to apply to this case a limitation to that exception, which limitation is that, where the principal is a corporation, the corporation is bound by the knowledge of its managing officer, even though such officer has an interest adverse to his principal, and that this is true where such managing officer is the only one acting for the corporation. In support of this contention they refer to McKenney v. Ellsworth, 165 Cal. 326, 132 Pac. 75; Williams v. Hasshagen, 166 Cal. 386, 137 Pac. 9; National Bank of San Mateo v. Whitney, 181 Cal. 202, 183 Pac. 789, 8 A. L. R. 298. These decisions must be read in the light of the fact that in each case the matter involved was a financial transaction wherein the bank was a directly interested party. Thus in the McKenney Case the president of the bank, and who conducted its affairs, held a note made to him by the defendant for $7,500. The payee transferred this note to the bank, for value and before maturity, without indorsing on the note, or otherwise informing any other officer of the bank, that he had received from the defendant $5,000 to be applied on this note. Holding that the bank had notice of this defense, the court said:

"The familiar rule that a principal is bound by the knowledge of his agent, acquired in the course of the agency, rests upon the presumption that the agent will communicate to the principal the facts learned by him, as it is his duty to do. But, says the appellant, where an agent of a corporation 's dealing with the corporation in a transaction in his own behalf, it will not be presumed that he will communicate to his principal facts affecting the transaction. Bank v. Burgwyn, 110 N. C. 267, 17 L. R. A. 326, 14 S. E. 623; McDonald v. Randall, 139 Cal. 246, 72 Pac. 997. This is, no doubt, the general rule regarding the imputing to a principal of notice of facts known to an agent, who is, in the particular transaction in question, acting in an interest adverse to that of his principal. But the rule is not without exceptions. If the agent is in fact acting for his principal in the transaction, even though he may have an opposing personal interest, 'it is his duty, notwithstanding his interest, to communicate to his company (principal) any facts in his possession, material to the transaction, and the law will therefore presume, in favor of third persons, that he made such communication.' Bank of Pittsburg v. Whitehead, 36 Am. Dec. 186, note; Le Duc v. Moore, 111 N. C. 516, 15 S. E. 888."

In the case at bar the defendant did not occupy any fiduciary relation to the estate of Wood. Defendant was simply the debtor of Barber as guardian, or of Barber personally, on a contract to pay him so much money on demand. The depositor's act of demanding and receiving the money from the bank might prepare him for committing the intended crime, but it was not a part of the act of embezzlement. When he applied to his own use the money so withdrawn, he ceased to act for the bank. The manner in which the guardian should keep his trust funds, or how he should dispose of them, were not matters in which the bank had any duty to investigate, or any interest to protect. Therefore the knowledge which Barber had, of his own dishonest intentions or plans, was not knowledge which he would be presumed to have communicated to the defendant.

In that one transaction in this case wherein, as we have seen, the judgment is in favor of the plaintiff, the act of embezzlement consisted of the payment to defendant of funds of the estate of Wood, in satisfaction of indebtedness of Barber to the defendant. There the defendant is chargeable with knowledge of the facts known to the cashier, because in the unlawful act itself he represented the defendant. It therefore became his duty to the defendant, his principal in that transaction, to inform it that the money offered in payment to the bank was stolen money, and it will be presumed, in such case, that this duty was performed. On the other hand, in a transaction to which the bank is not a party, the bank officer does not owe to the bank any duty of communication, and the presumption that such communication has been made does not arise. In the matter now under consideration, the misconduct of E. M. Barber was a violation of his duty to the trust estate. It was that alone, and in it he alone was guilty. We have examined the decisions rendered in other jurisdictions, to which counsel refer. In nearly all of them the bank was a party in interest, which received a benefit from the misappropriation of the trust funds. This was in Lowndes v. City Nat. Bank, 82 Conn. 8, 72 Atl. 151, 22 L. R. A. (N. S.) 408, from which counsel for

appellant have quoted at great length. And even there the court was careful to point out that a bank does not undertake to supervise and safeguard a trust account, or to look after the appropriation of such funds when withdrawn. The liability there enforced was distinctly based upon the principle that—

"A bank may not actively and knowingly participate in a misappropriation of trust funds. It may not become an active co-operating agency to that end, and by such co-operation directly contribute to the consummation of the wrong."

[3] Finally it is contended by appellant that the defendant bank had constructive knowledge of Barber's misappropriations, and is therefore liable. This point is based upon evidence proving that during the period of these defalcations, and for some time prior thereto, the said E. M. Barber had so conducted himself that he should have been an object of suspicion and investigation on the part of the bank; that he was using liquor frequently, was interested in race horses, and that thereby he had attracted the attention of at least two directors of the bank, and others, to the fact that he was unworthy the trust of bank cashier. That he had thus conducted himself is a fact about which there is no doubt. But it does not appear that these matters had been disregarded by the bank so far as they were brought to the attention of the officers. Mr. Gilmore, president of the bank, had noticed that some of Barber's checks were temporarily carried as cash items before they were entered against his account. "He would take the items up shortly after I spoke to him about them. It might be several days afterward." Gilmore denied that he had any suspicion that Barber was drinking and never heard that he was in the habit of visiting saloons or was living beyond his means. He never followed up Barber's accounts. Mr. Sefton was vice president of the bank and its principal stockholder. "I had not heard during these years that Mr. Barber was living beyond his means, playing the races, etc. No one had spoken to me about his living beyond his means, or that he was playing the races. I heard rumors to the effect that he was drinking quite heavily. I also heard rumors to the effect that he was running around saloons a great deal, but I never saw him what I would consider under the influence of liquor. I heard one report to the effect that he was running with women." Mr. Sefton at one time became disturbed about these matters to such an extent that he employed a firm of detectives and had Barber "shadowed" night and day for a period of over 30 days. The result was that he received a report in detail showing that there was absolutely nothing that would justify the rumors. "I further at that time had three reports that had been made, one in regard to a woman, and two in regard to drinking, run down in detail, and they were found to be absolutely false." This was about the year 1914, which would be contemporaneous or prior to most of the dates covered by the present action. Said witnesses denied that during the time in question they ever heard of anything irregular in Barber's accounts.

In view of the foregoing evidence, the court was not bound to decide that the board of directors of respondent bank were negligent in the performance of their duties, and that but for such negligence Barber could not have carried out his embezzlements. Assuming, without deciding, that negligence on the part of the board of directors of the defendant bank in relation to the integrity of their cashier would have any force in supporting the claimed liability of the defendant bank in this case, we are not permitted here to assume that such negligence existed. The implied finding of the court is to the contrary, and that finding is supported by the evidence showing what was done by the officers upon whom the responsibility rested. They did use some care, and they did make some investigation. The fact that they did not investigate further and actually discover the facts which doubtless would have caused them to remove Barber from his position as cashier proves an error of judgment. But it does not necessarily prove negligence. The president or directors of a moneyed institution are not required by law to adopt a system of espionage in relation to their officers. "Should any circumstance transpire to awaken a just suspicion of their want of integrity, and it be suffered to pass unheeded, a different rule would prevail if a loss ensued; but, without some fault on the part of the directors, amounting either to negligence or fraud, they cannot be liable." Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662, 674.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

60 Cal. App. 202

## NEWELL v. McDONALD et al. (Civ. 3671.)

(District Court of Appeal, Second District, Division 2, California. Dec. 21, 1922. Hearing Denied by Supreme Court Feb. 16, 1923.)

**1. Appeal and error ⊜705 — When storage charges recovered by sheriff within statutory maximum, there can be no reversal in absence of the findings.**

Where the amount allowed for storage charges in an action on an indemnity bond given a sheriff attaching an automobile did not exceed the maximum allowed by law to be paid a keeper, that part of the judgment cannot be reversed in the absence of the findings from the record.

**2. Sheriffs and constables ⊜147—That sheriff's agent was insubordinate in refusing to release property until payment of charges concerned only the sheriff.**

Where sheriff notified to release an attached automobile notified garage with which he had stored it and which refused to release the automobile until payment of its storage charges, and the sheriff ratified and affirmed this stand, the fact that such refusal may have been insubordinate conduct concerned no one but the sheriff, and did not concern sureties on indemnity bond.

**3. Attachment ⊜193—Sheriff within rights in demanding payment of storage charges before releasing attached property.**

Under Civ. Code, § 3057, giving an attaching officer a lien on the attached property, and Pol. Code, § 4295, prohibiting county officers from performing services without prepayment of fees, a sheriff demanded nothing more than the statute authorized him to require in refusing to release attached property until payment of storage charges.

**4. Sheriffs and constables ⊜149—Sheriff held entitled to recover attorney's fees on indemnity bond.**

Under an indemnity bond given to secure a sheriff against liability from all damages, expenses, costs, and charges, and all loss and liability by reason of the attachment of property, the sheriff was entitled to reasonable attorney's fees incurred in defending an action brought by one claiming the attached property.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by D. B. Newell against R. McDonald and another. From a judgment for plaintiff, defendants appeals. Affirmed.

Emmons, Aldrich & Heck, of Bakersfield, for appellants.

Edward F. Brittan, of Bakersfield, for respondent.

CRAIG, J. The plaintiff, the sheriff of Kern county, prosecutes this suit against R. McDonald and R. McDonald, Jr., on an indemnity bond executed by these defendants as sureties. The action in connection with which the bond was given was entitled Dormitzer v. F. M. Meigs and Consolidated Chemical Company. Dormitzer has since died, and W. G. Sylvester has been appointed administrator of his estate. In that action, after an attachment had been procured by the plaintiff on October 2, 1917, one W. S. Meigs filed a third party claim asserting ownership of the automobile which was the subject of the litigation. The indemnity bond signed by the McDonalds as sureties was to secure the sheriff against liability "from all damages, expenses, costs, and charges, and against all loss and liability, which either said sheriff his heirs, executors, or administrators, shall sustain, or in any wise be put to, for or by reason of the attachment, seizing, levying, taking, or retention by said sheriff in his custody under said attachment of the said property claimed as aforesaid." In the case at bar, after a trial, the court rendered judgment for the plaintiff in the sum of $1,880.68 and costs. The main facts were stipulated. These, in so far as it is necessary to recite them for the purposes of this appeal, are that the plaintiff, as sheriff, by virtue of a writ of attachment issued in the action of Dormitzer v. Meigs et al., levied upon and held possession of the automobile which was the subject of the suit; that W. S. Meigs, not a party to the action last referred to, served a written verified claim, pursuant to section 689 of the Code of Civil Procedure, upon the sheriff, claiming the right to possession of the automobile and demanding that the sheriff release it from the attachment; that upon receipt of said verified claim the sheriff notified Dormitzer of the filing of said claim, and that thereupon Dormitzer, as principal, and R. McDonald and R. McDonald, Jr., as sureties, executed and delivered to the sheriff, in order that the sheriff should retain possession of said automobile, a bond of indemnity in the sum of $2,000; that the sheriff thereupon retained possession of said automobile and held the same under and by virtue of said writ of attachment; that thereafter W. S. Meigs sued Newell, as sheriff, and his sureties for possession of the automobile or $1,000, the alleged value thereof, and damages; that on January 28, 1920, judgment was entered in that action for the delivery of said automobile, or, in case that could not be made, for $1,000, the value thereof, and also $1,350 damages for the unlawful detention of the car and for $23.25 costs; that the sheriff paid this judgment for damages and costs, and also $87.55 added costs for storage to the date of judgment and $100 attorney's fees incurred in the defense of the action; that the defendants refused to pay any of the above sums except the amount of $108 which they tendered the sheriff on January 23, 1918, as payment in full for all costs and damages accrued to November 26th (the

date on which the sheriff had instructed the keeper to release the car). It was further stipulated that, prior to the trial of the case of Meigs v. Newell et al., T. N. Harvey, the attorney for Dormitzer in the original action, gave the sheriff written notice to release the car from the attachment; that the sheriff in turn wrote to the Bakersfield garage instructing them to release the automobile; this the Bakersfield garage refused to do until costs of storage were paid, and so notified the sheriff, who then gave the same information to Harvey.

Aside from the stipulated facts, the evidence showed that, prior to the date set for the trial of the action of Dormitzer v. Meigs, T. N. Harvey became a judge of the superior court of Kern county, and was therefore disqualified to appear as attorney in that action; that Newell notified the McDonalds of said disqualification, and that, unless they employed other counsel, the sheriff would do so; that the judgment above described was duly and regularly entered in the last-named action; and that the sheriff notified the McDonalds of its entry, and that the time for appeal had not elapsed, and that if they wished to appeal they could select counsel for that purpose. The evidence shows that the sheriff notified Harvey, while acting as the attorney for the plaintiff in the attachment proceeding, that the storage charge was due and must be paid before he would release the car from the attachment, and also the sheriff notified the plaintiff Dormitzer to the same effect. Without reciting the detail of the matter further, it may be said that there is evidence to the effect that the sheriff gave the defendants ample notice of each step that was taken by him after the undertaking here sued upon was executed, and that they failed to defend the original action further or to pay the sheriff his fees and expenses in order that the attachment might be released and further charges be avoided. It also appears that the tender of $108 by defendants did not include cost of storage up to the date of tender.

[1] The record contains evidence contrary to some of both the stipulated facts and those above recited and not stipulated, but such evidence does no more than to create a conflict whose merits will not be reviewed on appeal. As to the reasonableness of the storage charges it must be apparent that, as a mere computation shows that the amount fixed by the trial court did not exceed the maximum allowed by law to be paid a keeper, to wit, $3 per day, and appellant has not seen fit to include the findings in the record, no reversal can be predicated upon that part of the judgment.

[2, 3] The stipulation admits that Newell "did levy upon and seize and take possession of and hold possession of a certain Peerless automobile," etc., that the bond herein sued upon was executed "for the purpose of causing said sheriff to retain possession of the said automobile," and again, from the foregoing and other parts of the stipulation of facts, appellants have concluded their right to question the fact that the possession of the car by the Bakersfield garage was the possession of the sheriff. It appears that the sheriff directed his agent to release the automobile, but the Bakersfield garage did not in fact give up possession or actually comply with such order. This may have been insubordinate conduct, but that would be a matter of concern to no one except the sheriff and the Bakersfield garage; it demanded payment of storage charges, etc. The sheriff ratified and himself affirmed the stand taken by the garage. There can be no question but that in so doing he demanded nothing more than the statute authorized him to require. Cases cited by respondent amply sustain this proposition. Civ. Code, § 3057; Pol. Code, § 4295; Perrin v. McMann, 97 Cal. 52, 31 Pac. 837; Robinett v. Connolly, 76 Cal. 56, 18 Pac. 130.

[4] The sheriff was entitled to recover for reasonable attorney's fees under the provision heretofore quoted from the bond sued upon. Also the court had authority to determine that $200 was such a fee. Tunstead v. Nixdorf, 80 Cal. 647, 22 Pac. 472.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

---

60 Cal. App. 120

## DUNCAN v. WOLFER et al. (Civ. 3966.)

(District Court of Appeal, Second District, Division 1, California. Dec. 11, 1922. Rehearing Denied Jan. 8, 1923. Hearing Denied by Supreme Court Feb. 8, 1923.)

**1. Mortgages ⇐42—Statute does not prescribe form of trust deed to secure payment of notes.**

Civ. Code, § 865, providing that the grantee or devisee of real property subject to a trust acquires a legal estate therein as against all persons except the trustees and those lawfully claiming under them, does not contain any directions concerning the form of a trust deed intended to secure the payment of notes.

**2. Mortgages ⇐331—Trust deed held to confer power on trustee to sell and convey title.**

A deed, conveying property in consideration of an indebtedness to the grantee to have and to hold in trust to enforce the payment of the debt, with provisions giving the trustee power to sell in case of default, was in the customary form for a trust deed to secure the payment of debt, and authorized the trustee to sell, and pay the debt; the contention that the habendum clause could not control the granting clause, and that therefore the deed was in form an absolute deed, intended as a mortgage,

which must be foreclosed by action, being unsound.

**3. Mortgages ⟸309(1) — Quitclaim deed by trustee under two deeds held not to release first trust deed.**

Where the same company was trustee under first and second deeds of trust, a quitclaim deed by it reconveying to the grantor without warranty all the estate and property described in the second trust deed did not release the first deed of trust.

**4. Mortgages ⟸25(1)—Purchaser under trust deed can reconvey to debtor and take back trust deed for part of the price.**

Where property was sold under a trust deed after the original debtor had conveyed it subject to the trust deed, the purchaser from the trustee could agree to reconvey it to the debtor for a stipulated price, part of which was represented by a note secured by a new trust deed, and the new trust deed would be valid even though the original debtor's purchase inured to the benefit of his subsequent grantees.

**5. Estoppel ⟸47—Title, subsequently acquired under trust deed excepted from conveyance, does not inure to grantee.**

Where a warranty deed conveyed land expressly subject to an existing trust deed, a title, subsequently acquired by the grantor from the purchaser at the trustee's sale, did not inure to the benefit of the grantees.

**6. Mortgages ⟸374—Recitals in trust deed of compliance with conditions held sufficient.**

Recitals in a trustee's deed, showing compliance with all the conditions prescribed by the trust deed for a valid sale, are sufficient.

**7. Mortgages ⟸353—Stipulation for advance notice of trustee's intention to sell held personal covenant only.**

Where a trust deed, which had previously stated the terms and conditions under which the trustee could sell for nonpayment of the note secured thereby, stated at the end that no action should be taken thereunder to sell the property until six months' notice of intention to sell had been given, the latter clause must be construed as a personal covenant only, otherwise it would be inconsistent with the earlier terms of the deed, and the earlier terms would control, under Civ. Code, § 1070.

**8. Appeal and error ⟸761—Objection to want of affidavit required by uncited statute held insufficient.**

In a suit to quiet title, where defendants claimed under a trustee's sale, a contention by plaintiff, on appeal from judgment for defendant, that evidence was not given of the making of a moratorium affidavit, which was supported by no reason or authority, and which contained a citation apparently of some statute, but so deficient as not to show what statute was intended, does not require reversal.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action to quiet title by S. H. Duncan against William Wolfer and others. Judgment for defendants, and plaintiff appeals. Affirmed.

James M. Gammon, of Los Angeles, for appellant.

Ward Chapman, L. M. Chapman, and Joseph Musgrove, all of Los Angeles (Fred O. McGirr, of Los Angeles, of counsel), for respondents.

CONREY, P. J. Plaintiff brought this action to quiet title to a parcel of land in the city of Los Angeles. Defendants, by their answer, disputed the plaintiff's title. In addition thereto, certain claims of title were asserted by the defendants. The court entered judgment determining that the defendant Title Insurance & Trust Company is the legal owner of said real property, as trustee under a certain trust deed given to secure an indebtedness in favor of the defendant Vogel; that the defendant Albert B. Jones is the owner of the property subject to said trust deed and subject to a described lease in favor of the defendant Frank Fisher. The plaintiff appeals from the judgment.

It is agreed that on June 12, 1911, William Wolfer was the owner of said real property. On that day Wolfer and his wife executed a deed of trust, granting the property to Title Insurance & Trust Company as security for the payment of a promissory note of the same date, due three years after date, executed by the grantors to J. L. Hancock, in the principal sum of $15,500. It was stated in this deed that in consideration of said indebtedness and for the purpose of securing payment thereof, the grantors did thereby "grant, bargain, sell, convey and confirm" unto the party of the second part the described property, "to have and to hold the same upon the trusts, hereinafter expressed, to wit." Then followed a statement of the terms of the trust, with provisions giving to the trustee power to sell the property in case of default by said debtors. On the same day the same grantors made a second deed of trust to Title Insurance & Trust Company, on the same property, to secure a note of that date in the sum of $2,500, payable to Isobel Loomis Hill. The provisions of this trust deed were in like form as the Hancock trust deed. Both deeds were recorded, at the same time on June 30, 1911. On September 16, 1913, on payment of the Hill indebtedness, the trustee quitclaimed and reconveyed to William Wolfer, "without warranty," all the estate and property described in said Hill deed of trust and by said deed of trust granted to the trustee.

By deed of date June 21, 1911, recorded June 30, 1911, Wolfer and wife granted the same property to Telford, who subsequently granted it to Dobson, who thereafter, on August 20, 1912, granted the same property to Philip L. Wilson by deed recorded August 28, 1912. The three deeds last mentioned

contained declarations to the effect that they were subject to each of said trust deeds of June 12, 1911.

By deed dated November 11, 1916, recorded November 15, 1916, Philip L. Wilson and his wife, Maud N. Wilson, granted the property to A. E. Brown, stating therein that the conveyance was subject to the Hancock trust deed. By deed of trust of the same date, and recorded at the same time Brown conveyed the property to Title Guarantee & Trust Company as security for a note of the same date executed by Brown to Maud N. Wilson, in the sum of $4,500. It was provided therein that this trust deed was subject to the Hancock trust deed. The Wilson trust deed conveyed the property "in trust, however, with power of sale * * * to have and to hold the same to the party of the second part and to its successors and assigns * * * upon the trusts and confidences hereinafter expressed, to wit."

There were then set forth the terms of the trust, with provision for power to sell in the event of default in the payment of the debt. Since no other differences have been pointed out, we shall assume that this deed was in like form as the Hancock trust deed, excepting only the differences shown by the clauses which we have quoted.

On the 20th day of February, 1918, pursuant to notice given in accordance with the Hancock trust deed, the Title Insurance & Trust Company, as trustee under that deed, offered said real property for sale at public auction, and sold the same to H. Oscar Vogel, he being the highest and best bidder therefor, for the sum of $18,125.17. Thereupon, pursuant to that sale, the trustee granted the property said Vogel, by deed of the same date, recorded March 20, 1919. By deed of the same date, also recorded March 20, 1919, H. Oscar Vogel conveyed the property to William Wolfer. By trust deed dated February 1, 1919, recorded March 20, 1919, Wolfer and wife granted the property to Title Insurance & Trust Company as security for a note in the sum of $12,000, dated February 1, 1919, and due three years after date, payable to Herman O. Vogel. By deed dated November 19, 1919, recorded December 30, 1919, Wolfer and wife deeded the property to Kenneth McLennan. McLennan thereafter executed a lease to Eva I. Lufkin, who later assigned that lease to defendant Fisher. Subsequent to the execution of the lease, McLennan conveyed the property by deed of grant to defendant Albert B. Jones.

On December 28, 1918, pursuant to notices given and sale made under the terms of the Wilson trust deed, Title Guarantee & Trust Company executed a deed purporting to convey the property to the plaintiff S. H. Duncan. This is the deed under which the plaintiff claims title, contending that this title is superior to that of the defendants in whose favor judgment has been entered. From the foregoing recital of facts (and assuming that the reconveyance of September 16, 1913, by the Title Insurance & Trust Company to William Wolfer, operated only to restore the title acquired by the company under the Hill trust deed, and did not affect the trustee's title acquired by the Hancock trust deed), it appears that the title acquired by Herman O. Vogel through the trustee's sale under the Hancock trust deed is superior to the title claimed by the plaintiff as purchaser from the trustee under the Wilson trust deed; unless it be held that, as contended by the plaintiff, the Hancock trust deed was only a mortgage given to secure the indebtedness of Wolfer to Hancock.

Appellant contends that the Hancock trust deed should be construed to be only a mortgage whereby a lien was imposed on the property as security for the payment of the Hancock note; that as a mortgage it could not be enforced except by judicial proceedings in foreclosure and a decree ordering sale to be made, subject to the debtor's right of redemption; that from and after June 12, 1918, the right to foreclose was barred by the statute of limitations, and the mortgage had ceased to be a lien upon the property described therein; that thereafter the Wilson trust deed had acquired priority, and consequently that the plaintiff became the owner of the land by virtue of the trustee's deed to him pursuant to valid proceedings for the enforcement of that trust deed.

Counsel for appellants say that the Hancock trust deed failed to vest title in the trustee, and failed to confer upon the trustee any power of sale, because the granting clause preceding the habendum clause of the trust deed was in the terms of an unqualified grant without the words "in trust with power of sale," or their equivalent; that the premises contain[illegible] the granting clause are irreconcilable with the habendum clause, which provided that the Title Insurance & Trust Company, to whom the grant had been made unconditionally in the premises, was "to have and to hold the same upon the trusts hereinafter expressed, to wit," etc.; that the authorities are to the effect that where the habendum is irreconcilable with the premises, the premises must prevail; that since, under this construction, the trust deed did not differ from any other deed in the form of a grant deed, and since it further appeared therein that it was given as security for a debt, therefore the case comes under the rule of those decisions which hold that where a deed in the form of a deed of grant is made as security for the payment of a debt, the instrument is a mortgage and can be enforced only by process of foreclosure.

[1] Counsel for appellant rely upon certain Code provisions and decisions to which we now briefly refer. We cannot agree that section 865 of the Civil Code contains any directions concerning the form of a trust

deed. It only defines the rights of a grantee or devisee of real property that is subject to an existing trust. It relates to the situation where the trustor, having first created the trust, conveys or devises the same property to other persons. The words of the section are:

"The grantee or devisee of real property subject to a trust acquires a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them." MacLeod v. Moran, 153 Cal. 97, 100, 94 Pac. 604.

Parks v. Gates, 32 Cal. App. Dec. 725, cited by appellant, was superseded on rehearing by a judgment of the Supreme Court, wherein it was held that—

"Under the rules of construction the whole instrument must be read together to determine the effect of a deed, and the habendum may be resorted to as a limitation upon the estate granted." Parks v. Gates, 186 Cal. 151, 154, 199 Pac. 40, 41.

[2] The other decisions referred to under this head in the brief for appellant are not more in point than the Code section and the Court of Appeal decision to which we have referred. The Hancock trust deed contains, in a form which for many years has been customary, the provisions of a trust deed creating an express trust for the purpose of securing the payment of a debt, and with adequate powers of sale in the event of default made by the trustors in payment of their debt. The rule that the trustee, by complying with the requirements of the trust deed as set forth therein may pass title to a purchaser at the trustee's sale, is thoroughly established by decisions in this state. Koch v. Briggs, 14 Cal. 256, 73 Am. Dec. 651; Herbert Kraft Co. v. Bryan, 140 Cal. 73, 80, 73 Pac. 745.

The other contentions of appellant, to which we have referred in connection with his claim that the Hancock trust deed should be construed as a mortgage, all depend upon the question raised as to the nature of that deed. They necessarily fail when it is determined that that instrument was a deed of trust, carrying with it the powers and consequences which, as we think, sustain the title acquired by the purchaser at the trustee's sale.

[3] Appellant contends further that the deed of reconveyance made by Title Insurance & Trust Company to William Wolfer, on payment of the Hill indebtedness, passed the title back to Wolfer free from the Hancock trust deed, because the Title Insurance & Trust Company was the grantee in both deeds, and in its deed of reconveyance did not specifically reserve its rights under the Hancock trust deed. But the reconveyance shows on its face that it was limited, and intended to be limited, as a reconveyance of the estate conveyed to the trustee under the Hill trust deed, upon payment of the indebtedness secured thereby. This being so, it did not in any way affect the rights conferred or the title conveyed by the Hancock deed of trust, any more than if the latter document had been a conveyance to a different trustee.

[4] It will be noted that, although the purchase price named in the sale from the trustee to Vogel was $18,125.17, the sale was followed by a deed from Vogel to Wolfer and a trust deed back from Wolfer, for the benefit of Vogel, to secure an indebtedness of $12,000. In this connection, the evidence shows that these transactions were pursuant to an arrangement made between Vogel and Wolfer whereby Wolfer paid over to Vogel the difference between those two sums and gave Vogel a note, to be secured by said new trust deed, in the sum of $12,000. Appellant claims that the sale was in effect a sale to Wolfer, and not to Vogel, and that by reason thereof it should be held that, if any title passed by that deed, it was a title vested in Wolfer free from any further effect of the Hancock trust deed; and that thereupon the trustee under the Wilson trust deed became vested with a complete title, no longer subject to any prior claim under the Hancock trust deed. But this result could not follow unless it can be said that, by virtue of the facts stated, the sale itself was not a genuine sale. This argument might have some plausibility if Wolfer had advanced the entire amount of the debt then due to Vogel, for then it might be claimed that the debtor had paid the debt, and that under those circumstances there was no power of sale, but only a duty of the trustee to reconvey to the trustor. But it is clear that at the time of the trustee's sale, the full sum bid by Vogel was then owing to him. He had the right to make a contract whereby, upon acquiring the title, he would be able to dispose of it on suitable terms. Unquestionably, then, Vogel had the right to sell and convey the property to Wolfer or to any other purchaser, and to accept in consideration thereof, either in whole or in part, an obligation secured by a deed of trust of the land thus conveyed by him. Under this view of the case, the property should be held subject to the Vogel deed of trust, even if it were determined that the beneficial ownership thus conferred upon Wolfer inured to the benefit of the plaintiff.

[5] Since the title of defendant Jones, derived by him from McLennan, rests upon the deed of November 19, 1919, from Wolfer to McLennan, its validity depends upon Wolfer's ownership of the property (subject to the Vogel trust deed) at the last-mentioned date. Plaintiff claims as successor to the title granted by Wolfer to Telford on June 21, 1911. He contends that, even conceding the validity of the trustee's deed to Vogel, the grant by Vogel to Wolfer ipso facto passed to the plaintiff the title thus acquired. This contention is based upon section 1106 of the Civil Code, which reads as follows:

"Where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title, or claim of title thereto, the same passes by operation of law to the grantee, or his successors."

In reply it is sufficient to call attention to the fact that the deed of Wolfer to Telford was by its terms made subject to the Hancock trust deed. The fact was thus recognized that Wolfer was not conveying to Telford a title "in fee simple," as against the title conveyed by the Hancock trust deed. The subsequent sale and deed by the trustee cut off the equity of redemption, which was all that Wolfer had, and all that he could convey. It results that at the time when Vogel conveyed to Wolfer, the plaintiff had no remaining interest in the property. It was the plaintiff's equitable interest only that, while it survived, could draw to it any title acquired by Wolfer.

[6] The Hancock trust deed provided that if default be made in payment of the debt, the trustee should have power to sell the property on written demand by the creditor, "but without the necessity of making demand on the parties of the second part for the payment of any of said sums * * * in the following manner, namely," then stating the manner of giving notice of sale and of conducting the same. The recitals of the trustee's deed to Vogel show compliance with all of these conditions and directions, and that is sufficient. Savings & Loan Society v. Deering, 66 Cal. 281, 5 Pac. 353; Roberts v. Colyear, 179 Cal. 669, 180 Pac. 937.

[7] But at the end of the trust deed is found the following separate paragraph:

"It is expressly agreed by and between the parties hereto that no action shall be taken under the terms of this trust deed to sell the property covered hereby until the makers of the note secured hereby, or their successors in interest, shall have been given six months written notice in advance of the intention to cause any such sale to be made."

Appellant contends that the sale was invalid because there was no proof that this six months' written notice had been given. It does not appear that this point was brought to the attention of the court below in connection with appellant's objection to the introduction of the deed in evidence, and it is without merit. The stipulation is only a personal covenant. It is not a limitation on the power of the trustee to sell and convey. Unless so construed, it is inconsistent with the earlier terms of the deed, which declare the conditions under which sale may be made, and provide that on default by the debtor and demand by the creditor on the trustee to make the sale, the trustee shall sell the granted property after first publishing notice for six weeks. The earlier terms control. Civ. Code, § 1070.

[8] Counsel for appellant next suggests that evidence was not given of the making of a "moratorium" affidavit, to show that the property was not the property of an alien enemy, and that for this reason the deed was inadmissible in evidence. No reason or authority is presented in support of this contention. The citation, apparently of some statute, is so deficient that we are unable to ascertain what statute, either federal or state, was intended. If counsel intended to refer to chapter 106 of the "Trading With the Enemy Act," adopted October 6, 1917 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3115½a–3115½j) we have not been able to learn what provision thereof sustains the contention made.

The judgment is affirmed.

We concur: SHAW, J; JAMES, J.

---

60 Cal. App. 1

## HUTCHINSON v. MILLER & LUX, Inc.

(Civ. 4293.)

(District Court of Appeal, First District, Division 2, California. Nov. 28, 1922.)

**1. Highways ⟸197(4)—Automobilist observing lanterns at excavation in daytime held not entitled to assume there would be a red light there when he returned after dark.**

An automobile driver, observing common lanterns hanging to balusters leading from the sides to a traveled space near the middle of a road across which an excavation extended while passing such point in the daytime, *held* not entitled to assume in returning after dark that there would be a red light at the place.

**2. Highways ⟸197(6)—Violation of statute as to sufficient headlights on motor vehicle held negligence per se if contributing proximately to accident.**

Violation of a statute, such as St. 1917, p. 397, § 13(d), requiring that headlights of motor vehicles give sufficient light to reveal any person or substantial object on the road ahead for at least 150 feet, is negligence per se if it contributes proximately to an accident.

**3. Evidence ⟸470—Opinions not admissible where jury or court are equally capable of forming opinion.**

Opinions are not admissible where the jury or court acting as such are equally capable of forming an opinion from the facts stated.

**4. Evidence ⟸571(6, 8)—Jury not authorized to disregard expert opinion of only witness testifying as to speed of motor car or power and equipment of lights.**

In determining the speed of a driver's motor car, or the power and adjustment of his lights, affecting an issue as to his contributory negligence, the jury could not disregard the expert opinion evidence of the only witness who testified on the subject.

**5. Trial ⊂=296(4, 5)—Modification of correct requested instructions not cured by other instructions.**

Where correct requested instructions on contributory negligence as to negligent driving of automobile were modified by changing the words "proximately contributed to" to read "proximate cause of," thus making the instructions refer to self-inflicted injury, and not contributory negligence, the error was not cured by other correct instructions on contributory negligence by intoxication.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Geo. W. Hutchinson, as administrator of the estate of Harry Hutchinson, deceased, against Miller & Lux, Incorporated. Judgment for plaintiff, and defendant appeals. Reversed.

Edward F. Treadwell, of San Francisco (Joseph C. Sharp, of San Francisco, of counsel), for appellant.

C. K. Bonestell, of Fresno, and Kitt Gould, of Clovis, for respondent.

STURTEVANT, J. Harry Hutchinson was killed in an automobile accident, and the plaintiff, as administrator, commenced the above-entitled action to recover damages. A judgment was awarded the plaintiff in the trial court; the defendant made a motion for a new trial, its motion was denied, and the defendant has appealed under section 953a of the Code of Civil Procedure.

In its answer to the plaintiff's complaint the defendant denied many of the allegations contained in the complaint, and then it set forth an affirmative defense, the contributory negligence of plaintiff's decedent.

Early in the day on the 20th of April, 1919, plaintiff's decedent, Harry Hutchinson, and his friend, Joe Russell, left their homes at Clovis and went to Firebaugh. While at that place two Mexican boys engaged Hutchinson to drive the party from Firebaugh north to a ranch known as Holland Farm. They started before dark, and while it was yet light they passed a point in the road where an excavation was being made for the purpose of inserting a concrete culvert. The excavation was two miles from Firebaugh, and extended entirely across the road. There was a traveled space in about the middle of the road. From each side balusters 2x4 had been put up on 2x4 posts leading from the property line out to the traveled space just mentioned. The traveled space was very rough, but could be traveled if one exercised care, and Hutchinson drove slowly at about 10 miles per hour over the spot. As they went out they observed common lanterns hanging to the balusters, but the lanterns were not lighted. After passing the excavation the party went on five miles farther to the Holland Farm, where the two Mexican boys got out of the car, and then Hutchinson and Russell started to return to Firebaugh, where they expected to attend a dance. Russell testified that as they returned on the road they were constantly looking for the place where the lanterns and excavation had been seen. The night was dark, and there was no moonlight. They were riding in a Ford car, which was equipped with common Ford lights, and Hutchinson drove at about 20 miles an hour. The witness Russell was the only eyewitness to the accident. Some other persons came after the accident had happened, but they did not see the accident. He testified that they did not see the excavation until they were within 10 or 12 feet of it; that the lights of a Ford shine down a straight road like that about 20 or 30 feet, and it would be all darkness beyond that. He further testified that the lanterns on the balusters were not lighted. As the car hit in the excavation it was turned over to the right; Hutchinson was killed instantly, and the witness was considerably dazed. There was some testimony that the decedent and Russell had taken some drinks of intoxicating liquor during the day. All of the foregoing testimony was developed in the presentation of the case for the plaintiff.

At the end of the plaintiff's case the defendant moved the court to grant a motion for a nonsuit, and specified, as a ground of its motion, the contributory negligence of the plaintiff's decedent. The motion was denied, and the defendant thereupon introduced testimony on some other matters connected with other branches of the case. But no testimony was introduced by the defendant which conflicts with the testimony quoted above.

The defendant's theory concerning contributory negligence covered three separate propositions: (1) That the decedent was under the influence of intoxicating liquor at the time of the accident, and that his intoxication proximately contributed to the accident; (2) that, well knowing the dangerous condition of the road, the decedent negligently drove his car, and thus proximately contributed to the accident; and (3) that at the time of the accident the decedent was guilty of contributory negligence in driving after dark in a car which was equipped with lights which did not comply with the provisions of the Motor Vehicle Act (St. 1915, p. 397). Relative to the first element of the defendant's case, evidence was introduced by the defendant on the subject of intoxication. Thereafter the trial court instructed the jury, giving certain instructions which are not numbered, but which we have numbered by the use of the Roman numbers.

I. "You are instructed that the plaintiff cannot recover if the negligence of the decedent proximately contributed to the injury which caused his death."

II. "You are instructed that at the time of the said injury it was illegal to drive a motor vehicle on a public highway by a person while under the influence of intoxicating liquor to such an extent that he cannot properly operate or drive the same."

III. "If you find that at the time of the accident the decedent was under the influence of intoxicating liquor to such an extent that he could not properly drive or operate said car, and that that fact proximately contributed to the accident, then you will find a verdict in favor of the defendant."

By its verdict the jury found against the defendant on the issue of intoxication, and no question is presented in this appeal thereon.

[1] Contending that the decedent encountered a known danger in a reckless manner, and cannot recover, the appellant cites and relies on such authorities as Buckingham v. Commary-Peterson Co., 39 Cal. App. 154, 178 Pac. 318. The respondent replies:

"The deceased was not looking for dangers at the time. What he was looking for was the red light which he had every reason to suppose would be at this place to warn him that he was approaching it."

But the answer to that reply is:

"Under all the circumstances and conditions existing, and with which he was perfectly familiar, he had no right to so assume." Murray v. Southern Pacific Co., 177 Cal. 1, 8, 169 Pac. 675.

[2] At the time of the accident it was provided by law (St. 1917, pp. 382, 397):

"The headlights of all motor vehicles upon the highway shall give sufficient light to reveal any person, vehicle, or substantial object on the road directly ahead of such motor vehicle for a distance of at least 150 feet. * * *"

[3, 4] It is the settled rule in this state that the violator of a statute is guilty of negligence per se if such violation contributes proximately to the accident. The portions of the record relied upon by appellant sustaining the attack based on the statute above quoted are to be found in the testimony given by the witness Russell, the only witness who testified on the subject. He was riding with deceased at the time of the accident. His testimony on these matters was as follows:

"Q. And you know that the lights were turned on before you got to the warehouse? A. Yes, sir. Q. And the car was equipped with electric lights, of course? A. Yes; common Ford lights. Q. Now, then, you say as you were riding along you were looking for these lights on this place? A. Yes, sir. Q. And you knew the place was there? A. Yes, sir; I knew the place was there. Q. And so did Mr. Hutchinson? A. Yes, sir. Q. How far do the lights on a Ford, down a straight road like that, shine? A. About 20 or 30 feet. Q. How is that? A. About 30 feet. Q. It would be all darkness beyond that? A. Yes, sir. Q. That is your judgment. How fast were you traveling down that piece of road? A. About 20 miles an hour. Q. Did you have any speedometer on your car? A. No, sir."

The respondent's reply to this attack by the appellant is to the effect that, when the witness Russell testified that the lights shone 20 or 30 feet, and that the car was going 20 miles an hour, he was giving expert evidence, and that expert evidence is not necessarily binding on the jury. It is true that in some instances expert evidence is not binding on the jury. McLean v. Crow, 88 Cal. 644, 649, 26 Pac. 596. It is also true that there are cases in which expert evidence is necessary to the determination of the issue (Houghton v. Dickson, 29 Cal. App. 321, 155 Pac. 128), and it is likewise true that not every opinion is necessarily expert evidence, and that many opinions are received from witnesses other than the expert witness (22 C. J. p. 530, § 612). Under the latter rule, witnesses who stood by and saw the movement have been allowed to testify regarding the speed of moving vehicles. Kramm v. Stockton Electric R. Co., 22 Cal. App. 737, 754, 136 Pac. 523. However, it is also true that the opinions of a witness are not admissible where the jury, or the court acting as such, are equally capable with the witness of forming an opinion from the facts stated. Raymond v. Glover, 122 Cal. 471, 476, 55 Pac. 398; Spencer v. Collins, 156 Cal. 298, 307, 104 Pac. 320. But in the instant case it is quite impossible to conceive that the jury could determine the speed of the decedent's car, or the power and adjustment of his lights, if the jury disregarded all of the evidence in the record on those subjects.

[5] From what we have stated above, it becomes very clear that the rights of the defendant in the instant case hung wholly upon the second and third theories concerning contributory negligence; that the condition of the record so far as the evidence is concerned, was shown and the foregoing attacks were made by the respondent in making its motion for a nonsuit. However, the respondent did not offer any additional testimony, nor did he seek to cure any of the foregoing defects. Neither were the defects cured by any testimony thereafter introduced by the appellant. When the record stood in that form, and as the defendant closed its case, the defendant prepared and asked the court to give instructions which the court modified and then gave as follows:

III. "You are instructed that at the time of the accident involved in this case the law required that at all times, during the period from a half hour after sunset to a half hour

before sunrise, every automobile while on a public highway shall carry at the front at least two lighted lamps showing white or yellow lights visible under normal atmospheric conditions at least 500 feet in the direction toward which such automobile is faced, and that such headlights upon all motor vehicles upon the highway shall give sufficient light to reveal any person, vehicle, or substantial object on the road directly ahead of such motor vehicle for a distance of at least 150 feet, and shall also give sufficient side illumination to reveal any person, vehicle, or substantial object 10 feet on the side of such motor vehicle at a point 10 feet ahead of the lamps."

IV. "You are instructed that, if the automobile of the decedent was not equipped at such time and place with the lights described in the last instruction, that the same was illegally operated by the decedent, and such illegal operation as a matter of law constituted negligence, and, if the same proximately contributed to (was the proximate cause of) the said injury, the plaintiff cannot recover."

(Trial court crossed out "proximately contributed to" and inserted parenthesis).

V. "You are instructed that, if you find that the decedent would have been able to have seen the obstruction within time to stop or slow down if his motor vehicle had been equipped with lights of such a character that they gave sufficient light to reveal a substantial object on the road directly ahead of such motor vehicle for a distance of at least 150 feet, and that the car of the decedent was not equipped with such lights (and that the failure to have it so equipped was the proximate cause of the accident), then you are instructed to find a verdict in favor of the defendant."

(Trial court inserted parenthesis.)

It is not claimed that instructions III, IV, and V in the form requested were improper in any respect, and no legal objection has been called to our attention. In the form requested they were instructions on contributory negligence, and concretely applied the law to the case on trial. In the modified form the instructions were not on contributory negligence, but became instructions on the subject of self-inflicted death. The respondent suggests that, as all instructions are to be read together, instruction No. I helps out the meaning of instructions III, IV, and V. We do not agree with the suggestion. Instructions Nos. I, II, and III can be said to assist each other because all deal with contributory negligence. But they do not assist III, IV, and V, which deal with self-inflicted injuries. As the jury was instructed it might well assume, and by reason of its verdict it doubtlessly did assume, that intoxication was the only element of contributory negligence which it was called upon to determine. To have a fair trial the defendant was entitled to have the jury fully and fairly instructed on all of the issues of and concerning contributory negligence, and it prepared and requested such instructions. In legal effect, some of those instructions were refused.

The judgment should be reversed; and it is so ordered.

I concur: NOURSE, J.

---

60 Cal. App. 187

## GUSCETTI v. DUGAN et ux. (Civ. 4360.)

(District Court of Appeal, First District, Division 2, California. Dec. 20, 1922. Hearing Denied by Supreme Court Feb. 15, 1923.)

**1. Cancellation of instruments ⟸24(2)—Consideration received for deed held so small it need not be returned before rescission.**

Where the only consideration received by grantor for the conveyance of a two-family apartment house consisted of a few meals furnished to him, the agreement for his support being oral and unenforceable, and the cash payment having been applied to the expense of preparing the deed, the failure of the grantor's administratrix to tender a return of the consideration before rescinding the conveyance for mental incapacity, as required by Civ. Code, § 1691, is immaterial, since the maxim, "De minimis non curat lex," applies.

**2. Cancellation of instruments ⟸22—Demand and refusal held sufficient notice of intention to rescind.**

Where the complaint to set aside a deed for mental incapacity alleged that the defendants had refused upon demand to deliver possession of the property to plaintiff and to account to plaintiff for the rents, which allegations were undenied, a judgment for plaintiff will not be reversed on the ground that no notice of intention to rescind was given, since no specific form of notice is required.

**3. Deeds ⟸211(1)—Evidence held to sustain finding grantor was of unsound mind.**

Testimony by several witnesses as to facts warranting a conclusion the grantor was of unsound mind, in connection with the execution of a deed conveying his property practically without consideration to grantees, whom he had known for only a few weeks, *held* to warrant the trial court's finding that the grantor was of unsound mind, so as to be subject to rescission under Civ. Code, § 39.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action to set aside a deed by O. L. Guscetti, administratrix of the estate of Louis A. Bassi, sometimes known as Louis Bassi, deceased, against John Dugan and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Hearing denied; WILBUR, C. J., dissenting.

John J. O'Toole, of San Francisco, for appellants.

Louis Ferrari, of San Francisco, for respondent.

LANGDON, P. J. This appeal is by the defendants from a judgment declaring null and void a certain deed purporting to convey title to certain real property in San Francisco, Cal., from plaintiff's intestate to defendant John Dugan. Said judgment also directed the said defendant to convey to plaintiff, as administratrix, all his right, title, and interest in said real property and awarded to the plaintiff the rental value of the premises from the date of the deed until the surrender of possession.

In the early part of April, 1919, Louis A. Bassi, since deceased, was the owner and in possession of the real property in controversy. He was at that time a man between 60 and 70 years of age, whose closest living relatives were a sister and her daughter. The sister had been living in the northern part of the state for about 2 years. The property in controversy consisted of a lot of ground in San Francisco, Cal., upon which was situated a flat or two-family dwelling place. Bassi was living in one room of this flat. The upper flat was rented, and the lower one was to let. The defendant John Dugan, and his wife lived a few blocks away from the Bassi property. Mrs. Dugan had never met Bassi prior to the first part of April, 1919, at which time, hearing that his flat was for rent, she went to see it. She found Bassi engaged in cleaning up the premises and discussed with him the renting of the flat. He asked her if she would allow him to keep a room in the flat and if she would furnish him board. He asked her to talk the matter over with her husband, stating that he would call at her home the next day for her decision. He called the next day and was told by Mrs. Dugan that the arrangement was satisfactory to Mr. Dugan. Mrs. Dugan asked the amount of rental of the flat and was told: "If you take care of me and leave me in the house, I will fix that up later." Bassi then commenced certain repairs and improvements in the flat in accordance with the requests of Mrs. Dugan. She cleaned up the room which he was occupying and placed in it some of her own furniture. Bassi called at her home for two or three weeks for his breakfasts and sometimes for his suppers during the time the repair work was being done. He had been suffering from some stomach disease for some time and was restricted in his diet. Mrs. Dugan testified that about a week after her first conversation with Bassi he said to her: "I know I can always make my home with you and I will deed you the flats for taking care of me." Nothing was done about the matter, however, and on April 27, 1919, Mrs. Dugan and her husband moved into Bassi's flat. On May 1, 1919, Bassi went to the hospital and remained there until his death on May 26th. On May 12th, while in the hospital and just before submitting to a surgical operation, he executed a deed conveying the property in question to John Dugan. At the time of the execution and delivery of the deed, Dugan and a notary public whose services he had secured were present in the room with Bassi. Bassi signed the deed and asked Dugan for some money. Dugan handed him $10, which was immediately handed to the notary in payment of his services in preparing the deed. It is conceded that no consideration, other than what appears from the foregoing recital of facts, passed from the defendants to deceased.

The plaintiff, as administratrix of the estate of Louis Bassi, deceased, brought this action to cancel and annul the deed to defendant John Dugan, alleging:

That "on the 13th day of May, 1919, and for several days prior thereto, the said Louis A. Bassi was infirm in mind and body and was of unsound mind to such an extent that he was unable to understand the nature of an act in signing or executing any instrument; that on the 13th day of May, 1919, the defendant John Dugan and Jane Doe Dugan, well knowing the said Louis A. Bassi was of unsound mind, as aforesaid, procured an instrument in writing in the form of a deed conveying or purporting to convey to said John Dugan all the real property hereinabove described."

The action was dismissed as to Mrs. Dugan, she not being a grantee in the deed.

The trial court found:

That "on the 13th day of May, 1919, and for several days prior thereto, the said Louis A. Bassi, sometimes known as Louis Bassi, was infirm in mind and body and was of unsound mind to such an extent that he was unable to understand the nature of an act in signing or executing any instrument."

[1] The first contention of appellant is that the plaintiff did not plead nor prove any rescission of the contract; that, as it was found that a cash consideration of $10 was paid by John Dugan, and that said John Dugan also promised, orally, to maintain and support Bassi for the remainder of his life, it was incumbent upon the plaintiff to restore everything of value which her intestate had received under the contract. Reliance is placed upon section 39 of the Civil Code, providing that a conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission, and also upon section 1691 of the Civil Code, providing that a party rescinding a contract must do so promptly and restore to the other party everything of value which he has received from him under the contract, or must offer to restore the

same, upon conditions that such party shall do likewise.

We think that, under the peculiar facts in evidence and as found by the court in this case, the plaintiff has done all that is required of her. The $10 which was handed to Bassi by Dugan was to pay the fee of the notary public in drawing the deed, and was so used. Bassi received no benefit from this. The breakfasts and occasional suppers which were furnished to him for two or three weeks before he went to the hospital were furnished at first under an indefinite agreement that Bassi would "fix it up later," and that Mrs. Dugan would never be sorry for what she did for him. Apart from the fact that the oral promise to support Bassi for the remainder of his life, which the court has found was made by Dugan, was unenforceable because such a promise is required to be in writing, it does not appear from the findings just when such promise was made. Plainly, from the evidence, it had not been made at the time Mrs. Dugan started to provide Bassi with his breakfasts; so in the beginning such meals could not have been furnished in execution of such promise. For it appears from the evidence that at first these meals were furnished under Bassi's vague promise to "fix it later." If anything was furnished to Bassi in execution of Dugan's promise to maintain him for life, it could have been, at most, but a few meals. Mrs. Dugan testified that the first suggestion of conveying the property in return for maintenance was made by Bassi about a week after she had met him, and Dugan's promise of maintenance must have been made some time later. Within a month from the date of the first meeting of Bassi and Mrs. Dugan, he was in the hospital and defendant admits that he paid none of Bassi's expenses at the hospital. Therefore, under any view of the evidence, Bassi received from the defendant, in execution of the promise to maintain him for life, merely meals for a few days, which meals consisted of soft-boiled eggs and stewed fruit, according to Mrs. Dugan's testimony. The amount involved is so negligible that we think plaintiff's neglect to offer to return the value of these meals need not concern us here under the maxim, "De minimis non curat lex."

[2] It is also contended by appellants that the plaintiff failed to prove that she had given notice to defendant of her intention to rescind. However, the complaint alleges that the defendants have refused, upon demand, to deliver possession of the property in controversy to plaintiff, and that said defendants have also refused, upon demand, to account to the plaintiff for the rents of said property. These allegations were not denied. No specific form of notice of an intention to rescind is required, and we apprehend that the rights of the defendants were fully satisfied by any notice which would convey to them, within a reasonable time, the idea that the plaintiff wished to cancel the deed and recover the property. No contention is made that the plaintiff did not act promptly upon discovering the facts.

[3] The only other point raised by the appellants is based upon a contention that the evidence is insufficient to warrant the finding that Bassi was of unsound mind at the time he made the deed. We shall not discuss this matter at length. It is sufficient to say that the testimony was conflicting, but that the record does include the testimony of several witnesses which would warrant the finding of the trial court. Added to this there is the force of circumstances so unusual as to suggest, in themselves, a departure from the normal and natural course of human actions. It is true, as contended by appellants, that the circumstances surrounding the transaction are insufficient, alone, to justify a finding of mental unsoundness, and one is at liberty to dispose of one's property in an unusual and unexpected manner without the imputation of mental incompetency. However, the circumstances of this case take on a special significance when viewed in connection with the testimony of plaintiff's witnesses, some of whom had known Bassi for many, many years, as to his weakened and abnormal mental state.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

---

60 Cal. App. 154

## In re HAMON'S ESTATE. (Civ. 388!.)

(District Court of Appeal, Second District, Division 2, California. Dec. 15, 1922. Hearing Denied by Supreme Court Feb. 13, 1923.)

**1. Trusts ⇐262—Evidence held to sustain finding trustee was negligent in making a loan.**

Evidence that the land mortgaged to secure a loan made by a trustee was arid land, which it was practically impossible to irrigate, and that the trustee made the loan upon the statements of one man, whom she knew, and a written report by three strangers, two of whom were the former owners of the land who had conveyed it to a dummy for the purpose of securing the loan thereon, *held* to sustain the trial court's finding that the trustee was negligent in making the loan, and was therefore bound to make good the loss.

**2. Trusts ⇐179—Trustee must use at least care of ordinarily prudent person.**

A trustee must use at least the degree of care which an ordinarily prudent person would use in connection with the transaction involved.

**3. Wills ⊂612(5)—Gifts over contained in separate paragraph fixing time of possession relates to death before possession.**

Where the sixth clause in a will made an absolute gift of half of the residue, a separate paragraph in the eighth clause that, if the donee died without issue, his share should go to another, grammatically and logically applies to the main subject-matter of the section in which it was contained, which related to the time for the payment of the share to the donee.

**4. Wills ⊂439—Object of construction is to ascertain testator's intent.**

In all cases the single object of inquiry in determining the construction of a will is to ascertain the intent of the testator.

**5. Wills ⊂612(1)—Statute that clear devise or bequest is not limited by other words not equally clear held applicable.**

Where the sixth section of a will gave half of the residuary estate absolutely to a nephew, while the eighth section provided that the share of the estate should be paid to the nephew upon his marriage or his attaining the age of 30 years, and, if he died without issue, should be paid to another, the provision of Civ. Code, § 1322, that a clear and distinct devise or bequest cannot be affected by any other words not equally clear and distinct is relevant, so that the provision for gift over cannot apply after the nephew reached his thirtieth birthday, and became entitled to his share.

**6. Wills ⊂612(1)—Later clause held not irreconcilable with earlier.**

A later clause in a will, providing that the share of a nephew in the residue should be paid to him on his marriage or on his thirtieth birthday, and if he died without issue, should be paid to another, was not irreconcilable with an earlier clause, giving the nephew an absolute interest in the residue, so as to be within Civ. Code, § 1321, providing that, where there are irreconcilable provisions in a will, the latter must be adopted.

**7. Wills ⊂441—Circumstances held immaterial in determining construction.**

Where there were no circumstances showing a reason why testatrix should prefer her niece over her nephew, but the niece was already married, while the nephew was young and still unmarried, the circumstances afford no aid in construing a provision for payment of the nephew's share to the niece on his dying without issue, so that Civ. Code, § 1318, requiring examination of the circumstances to construe a doubtful will, is of no aid.

**8. Trusts ⊂327—Trustee can be required, in proceedings for accounting, to pay over money to persons entitled.**

In proceedings by a trustee for a final accounting, the court had authority to require the trustee to pay over to the beneficiary the amount of a loan negligently made by the trustee upon insufficient security, and to require the beneficiary to assign the mortgaged property to the trustee.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

In the matter of the estate of Mary A. Hamon, deceased. Fron a judgment sustaining objections of Percival James Langdon against the report of Ada Miriam Parker, as trustee under the will, the trustee appeals. Affirmed.

Tanner, Odell & Taft, of Los Angeles, for appellant.

D. H. Laubersheimer, of Los Angeles, for respondent.

CRAIG, J. The appellant, Ada Miriam Parker, was appointed executrix of the will of Mary A. Hamon, and also a trustee to receive certain property devised thereunder and to manage it as directed by the will. The will was probated and in due time the court made its final decree of distribution by which one half of the property was distributed to Ada Miriam Parker individually, and the other half, consisting of $3,695.14 in cash and small items of personal property, to her as trustee for Percival James Langdon. She loaned the money held in trust upon real estate security. A more detailed statement will be made of this transaction later. However, this mortgage was subsequently foreclosed and the appellant, at the foreclosure sale, as trustee, bought the property for $5,079.57, being the full amount of the principal, interest, judgment, and costs. The trustee reported to the court under section 1699, Code of Civil Procedure, and prayed for her discharge. Thereupon Langdon appeared, and filed objections to the report on the ground that the real estate security was valueless, and also of alleged negligence on the part of the trustee in making the loan. Upon the hearing the trial court sustained the objections to the report, and ordered the mortgage representing the loan to be reassigned to Ada Miriam Parker, and directed that she pay the cash legacy received by her as trustee, with interest, to the beneficiary Langdon. Findings of fact were made, and judgment rendered as above indicated, and from this judgment the trustee Ada Miriam Parker appeals.

[1] The first ground of appeal, and the one most strongly urged, is that the evidence is insufficient to justify the findings that said trustee was grossly and willfully negligent in making said loan, in that she did not exercise ordinary care and diligence in the execution of her trust, or in ascertaining the value, character, or location of said land prior to making said loan; * * * that said land had no commercial or market value at the time said loan was made; nor had it any commercial or market value since; that said trustee could have ascertained the value, character, and location of said land prior to making said loan had she exercised any or

ordinary care or diligence in the execution of her trust, and similar findings concerning the trustee's purchase of the property at the foreclosure sale. The facts relating to this matter as they appear without substantial conflict are as follows: One Muncy was the first person to speak to the trustee, Mrs. Parker, concerning the loan; he informed her that J. P. Grantz and Mildred Grantz desired a loan upon a plot of ground consisting of 320 acres in Kern county. From Muncy, whom she had known for a period of 30 years, the trustee secured her principal information concerning the property. In one part of her testimony she said, "I took Mr. Muncy's word for it." She also received reports of three other persons, Ryder, Smith, and Boxrund, but she knew nothing of these men except what Muncy told her. She did not talk with Mr. Grantz until after the loan was made. A written report was made by Ryder, Smith, and Boxrund, stating that the land in question was "arable, fertile soil, and all tillable," and placing an appraised value at $25 per acre upon it. Grantz made a written application for the loan, in which he stated that the land was of a cash value of $25 per acre. The papers were approved by the trustee's attorney, and she testified that she relied upon his judgment, as well as upon that of Muncy's. Grantz furnished a certificate of title showing ownership in him and Mildred Grantz, his wife. Mrs. Parker made no investigation concerning Ryder, Smith, Boxrund, or Grantz. She testified that after the loan was made Grantz paid some interest, and then sold the land to one Knowles, who assumed the mortgage and kept up the interest for a time.

It appears from the evidence that previous to the making of the loan Muncy had purchased the land for $5 per acre from a railroad company. Witnesses called by Langdon testified that the land is typical mesa desert land, covered by sagebrush, yucca, greasewood, etc.; that it is impossible to place water on it by a practical pumping lift; that it was unimproved and had never been tilled; that it was not worth more than $2.50 per acre at the time the loan was made, and that the value was the same at the date of the hearing. One witness testified that the land was practically worthless, and that its only value would be for speculative purposes.

Before loaning the money Mrs. Parker was informed by Muncy where the property was located. Although it does not appear that she knew the true situation, it was shown at the hearing that Muncy and Ryder were the original purchasers of the land; that Grantz was practically only a dummy in the transaction. The deed was taken in his name, and he executed a mortgage, and immediately deeded the property in blank and delivered the deed to Muncy. Smith, one of the men who made the written report to Mrs. Parker, testified on the trial that it is very difficult to borrow money on raw desert land without water, and that in commercial circles such property is not considered a good security.

[2] It can hardly be doubted that Muncy and his associates misled the trustee and induced her to loan a substantial sum of money on commercially valueless property. To any one at all informed concerning conditions in the desert region of this state it would be known that land situated as this was without water or any practical way of securing it, has little or no market value, and is not to be regarded as safe security for a loan without at least the lender subjecting it to a most careful scrutiny. A trustee must use at least the degree of care which an ordinarily prudent person would in connection with the transaction involved. Pomeroy's Eq. Juris., § 1070. The trial court was justified in concluding that ordinary prudence would have prevented the making of this loan, and that the trustee did not exercise reasonable care and diligence, and was therefore bound to make good the loss which would accrue to the trustee's estate.

The appellant further contends that the trial court erred in directing the trust money to be given to Langdon in absolute ownership. It is claimed that under the will of Mary A. Hamon, Langdon received only an estate analogous to a fee, terminable upon his decease without issue; that his estate is a contingent one unless and until he marry and have issue.

The sections of the will involved are the sixth and eighth. They are as follows:

"Sixthly, I give, devise and bequeath to my nephew, Percival James Langdon, and to my niece, Ada Miriam Parker, all the rest, residue and remainder of my estate, being the money on hand or in the bank, and all mortgages due me, to be divided equally between them, share and share alike."

"Eighthly. It is my wish and desire that the share going to my nephew Percival James Langdon, shall be paid to him on the day of his marriage, or on his 30th birthday, in case he is not married before the age of thirty years, and it is my further wish and desire that at my death the share coming to my nephew Percival James Langdon, shall be placed in the hands of a trustee hereinafter named, and the same put at interest, and the interest paid semiannually by said trustee to said Percival James Langdon up until the date of his marriage, or in case he is not married, until his 30th birthday, when in either case the entire share coming to said Percival James Langdon shall be paid to him without reservation of any kind whatsoever."

While the will is not free from ambiguity, the intent of the testator is expressed with reasonable clearness, as follows: That after disposing of certain specific articles the residue of the testator's estate is directed to be divided equally between Langdon and Mrs. Parker; that the legacy to Langdon be not delivered to him until his marriage or ar-

rival at the age of 30 years; that upon the happening of either of these events he should receive all of his share without reservation; and, lastly, that should he die before marriage and the birth of issue, or before his thirtieth birthday, his share should go to Mrs. Parker.

[3] Two elements were contemplated by the testator: First. The interest bequeathed Langdon. This is designated in the sixth clause of the will and again in the latter part of the eighth clause. Second. The time of delivery of the legacy. This is found in the eighth clause, and in a separate paragraph of the same clause it is provided:

"If said Percival James Langdon dies without issue, his share is to go to my niece," etc.

Grammatically and logically this qualification applies to the main subject-matter of the section in which it is contained. As so read, it must be held to constitute a provision for the disposition of the legacy in question in the event of Langdon dying without issue before the occurrence of the events giving him the right to receive the legacy.

The most extreme construction that can be placed upon this sentence by way of qualifying Langdon's estate is that, even though he might marry, should he die before his thirtieth birthday without issue, the legacy would go to Mrs. Parker. Having given an absolute estate, it will not be presumed that any later words were intended to qualify it further or in any particular not clearly expressed or necessarily implied. It must be supposed that the testator associated the idea of the birth of issue with marriage. There is no logical connection between the consideration of birth of issue and the event of Langdon reaching his thirtieth birthday. If it be held that Langdon's estate is defeasible to this extent it would avail the appellant nothing, because it was stipulated during the trial that he had arrived at his thirtieth birthday. Upon the occurrence of this event his estate became absolute regardless of the birth of issue.

[4] The legal principles governing the construction of these sections of Mary A. Hamon's will are not in serious doubt. It is elementary that in all such cases the single object of inquiry is the intent of the testator. After considering various sections of our Civil Code bearing upon the matter, and in interpreting a will where the words "dies without issue" were pivotal in the determination of its meaning, the Supreme Court in the Estate of Carothers, 161 Cal. 588, 119 Pac. 926 concludes that the "only rule * * * applicable to such expressions is that the intention of the testator is the primary object of search." Estate of Tooley, 170 Cal. 164, 149 Pac. 574, Ann. Cas. 1917B, 516, is clearly distinguishable from the instant case. In the former the provision of the will made no statement of the estate devised, except that, having given "all my property" to Mattie Tooley, it directed that, "if at her death she has neither husband nor children," it should be divided among other heirs. The case of the Estate of Carothers, 161 Cal. 588, 119 Pac. 926, is apparently more nearly in point. By the will the testator devised his farm to his wife and son William "during the lifetime of my said wife, and at her death said land with all the improvements and proceeds thereof vests absolutely in and is the property of said William, that in case said William dies without issue his property herein specified becomes the property of John, and at his death goes to Elizabeth." It was there held that, upon the prior death of the wife, the son William did not become vested with an unconditional and unqualified fee, but that the fee was limited upon the condition of his dying at any time without issue, and that upon his so dying subsequent to the death of the wife the property would pass to John and Elizabeth, successively.

It must be noted that the language which apparently vests the estate absolutely in William is directly qualified. As the opinion puts it, the words vesting the property absolutely are *immediately followed*, however *as part of the same sentence, separated only by a comma*, by the words:

"*That in case said* William P. Carothers dies without issue his property herein specified becomes the property of John Thomas Carothers, and at his death goes to Elizabeth Witherspoon." (Italics ours.)

[5, 6] In the will being interpreted by us the estate to Langdon is devised absolutely in the sixth section, and the provision directing that it shall go to some one else if he dies without issue is contained in an entirely different and distinct section. Thus, while in the Estate of Carothers the entire clause being construed was not "a clear and distinct" bequest, in the instant case we have such a bequest of an absolute estate to Langdon. Hence section 1322 of our Civil Code providing that "a clear and distinct devise or bequest cannot be affected * * * by any other words not equally clear and distinct," is relevant. Had the language limiting the estate devised to William been totally disconnected from that giving him an unqualified estate, and had such qualifying language upon a consideration of both words and context been susceptible of a construction which would have permitted the provision for an absolute estate to stand, it is apparent that the estate devised to William P. Carothers would have been held an absolute one. Certainty is perferred to uncertainty. Mary A. Hamon left no uncertainty in her devise of an absolute ownership of one-half of the residue of her estate, including the money here involved, to Langdon. That residue was bequeathed to Mrs. Parker and to him share and share alike. The most that can

be said of the clause in the other section involved is that it creates an uncertainty as to whether the testator intended the words "dies without issue" to refer to death before the testator, or death before Langdon's marriage, or before his thirtieth birthday, or to death at any time. To hold that it means death at any time would place a higher value on uncertainty than upon certainty as a goal in interpretation. Nor is this a case within the scope of section 1321, Civil Code, in which it is provided that where there are irreconcilable provisions in a will, the latter must be adopted. These provisions are not irreconcilable.

[7] We are not unmindful of the provision of section 1318 of the Civil Code that in the case of uncertainty arising upon the face of a will as to the application of any of its provisions the circumstances under which the will was made are to be looked to in ascertaining the intention of the testator. The circumstances shown by this record are of no great value. There is nothing to indicate that Mary A. Hamon had a greater affection for one of her residuary legatees than for the other. Mrs. Parker was already a married woman; hence the reason which constrained the testator to attach a provision concerning marriage to her legacy to Langdon would have no place in her bequest to Mrs. Parker, and its absence indicates nothing. These two legatees were related in the same degree to their deceased ancestor. There is some authority for the proposition that, where a primary legatee is unmarried, and an absolute legacy is followed by a limitation over, if the legatee die without issue, there is a presumption that the testator means the limitation to refer to death at any time. However, this inference is less strong where the primary legatee is young than where he is advanced in age. In the former event there would be more reason to suppose that the testator anticipated the likelihood of the legatee marrying and having issue before the termination of the particular estate, and therefore the presumption would be more probable that death without issue was intended by Mary A. Hamon to have reference to Langdon reaching his thirtieth birthday, for he was apparently less than 24 years of age. On the whole, there is nothing in the circumstances tending to indicate any different intention on the part of the testator than that which is shown by the wording of the will itself.

[8] Another ground upon which appellant assails the judgment is the claim that the court had no jurisdiction to make the order that Langdon assign the mortgage to the trustee and deliver the assignment to the clerk of the court, and that thereupon the trustee pay to Langdon the amount which the court found was due him. It is asserted that the power of the court was limited to finding the facts and settling the account as to its amount and the items that should be credited or not credited to the trustee, as shown by the report. McAdoo v. Sayre, 145 Cal. 344, 78 Pac. 874, construing the same Code section here under consideration, expressly holds that the court upon final settlement at the termination of the trust has power to direct the trustees to turn over the property to the persons found to be entitled thereto. The same decision goes on to say that, not only has the court such authority, but it is its duty to make all orders necessary to entirely invest the beneficiary with possession, title, and all required evidences of title to the property determined to be rightfully his upon distribution of the trust estate. Cases cited by the appellant not in accord with McAdoo v. Sayre were decided before the enactment of section 1699, Code of Civil Procedure, under the authority of which the appellant asked the court to grant her discharge.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

---

60 Cal. App. 180

## PEOPLE v. NAVARRO. (Cr. 1039.)

(District Court of Appeal, First District, Division 2, California. Dec. 18, 1922.)

**1. Prostitution ⊂=4—Knowledge of pimp held proved.**

Testimony showing that prosecutrix committed acts of prostitution while cohabiting with accused at his solicitation and connivance was sufficient evidence, in prosecution for pimping, that accused had knowledge of her prostitution.

**2. Prostitution ⊂=4—Compensation for soliciting held proved.**

Though accused did not receive any money from a prostitute, evidence that he stood at the door of her room and received the money from men who entered, without giving any of it to her, was sufficient to prove that he solicited and received compensation for soliciting for a prostitute.

**3. Prostitution ⊂=4—Evidence held to sustain charge that accused lived on earnings of a prostitute.**

Evidence that accused appropriated all the earnings of a prostitute, although he used some of the money to pay for her room rent and to purchase some meals for her, was sufficient to sustain the charge that he lived on the earnings of a prostitute; it not being necessary to show that the money so received was used solely to pay his own expenses.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Antonio Navarro was convicted of pimping and he appeals. Affirmed.

Nathan C. Coghlan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John R. Riordan, Deputy Atty. Gen., for the People.

NOURSE, J. The defendant was convicted of the crime of pimping as denounced by the Act of February 8, 1911 (Stats. 1911, p. 10). This act provides in part:

"Any male person who, knowing a female person to be a prostitute, shall live or derive support or maintenance, in whole or in part, from the earnings or proceeds of the prostitution of such prostitute * * * or who shall solicit or receive compensation for soliciting for such prostitute, shall be guilty of a felony. * * *"

The information upon which defendant was tried was framed in two counts; the first charging him with soliciting and receiving compensation from the prosecutrix for soliciting for her prostitution knowing her to be such, and the second charging him with living and deriving support and maintenance in whole or in part from the earnings of such prostitution. The jury found the defendant guilty upon both counts.

The appeal is from the judgment upon the grounds: (1) That the facts failed to establish the allegation of the first count that the defendant solicited and received from the prosecutrix compensation for soliciting for her as such prostitute; (2) that the evidence is insufficient to support the allegation of the second count that the appellant did "live and derive support and maintenance in whole or in part from the earnings and proceeds of the prostitution" of the prosecutrix; (3) that the evidence is insufficient to prove that the prosecutrix was a prostitute or that the appellant knew her to be such.

[1] Upon the third proposition the testimony of the prosecutrix while under examination by appellant's counsel is as follows:

"Q. Are you a prostitute? A. No, I am not; but while I was with him I was. Q. While you were with him you were? A. Yes, sir."

Other testimony was offered to show that during all the time the acts complained of were committed appellant and the prosecutrix were living together and that the acts of prostitution were committed by her at his solicitation and connivance. His knowledge of her prostitution cannot be doubted.

[2] As to the first proposition, the point is that the appellant did not actually receive from the hands of the prosecutrix any compensation for his work in soliciting for her. The point is that the appellant stood at the door of her room and demanded and received the money from the men who entered without handing any of it over to her. The evidence is ample to support the allegation contained in the first count of the information.

[3] As to the second proposition, the evidence is that prior to the time when the appellant and the prosecutrix entered into their relation he had been engaged in the business of driving a jitney bus from which he obtained his support and maintenance. The prosecutrix testified that when he went to live with her he abandoned this occupation and was engaged solely in soliciting for her; that he appropriated to himself all the earnings of the prosecutrix, which were unquestionably proceeds of her prostitution. It was shown that, during the period of their cohabitation, the appellant paid the room rent and purchased some meals for the prosecutrix and himself. It was not necessary to show that the money he received from her was used solely to pay his own living expenses.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

---

60 Cal. App. 149

## BELL et al. v. SAGE et al. (Civ. 2562.)

(District Court of Appeal, Third District, California. Dec. 15, 1922. Rehearing Denied Jan. 13, 1923. Hearing Denied by Supreme Court Feb. 13, 1923.)

**1. Chattel mortgages ⟸61—Affidavit of good faith without design to defraud creditors not acknowledgment.**

The affidavit required by Civ. Code, § 2957, that a chattel mortgage is made in good faith and without design to hinder, delay, or defraud creditors, does not constitute a due acknowledgment of execution entitling the mortgage to be recorded; the statute also requiring that the mortgage be acknowledged or proved and certified.

**2. Vendor and purchaser ⟸231(13)—Reading of record is actual notice whether lawfully recorded or not.**

The reading of the record of an instrument by an intending purchaser is actual notice to him, whether it is lawfully recorded or not.

**3. Chattel mortgages ⟸150(1) — Record of mortgage acknowledged by only one mortgagor is constructive notice of execution by him only.**

Under Civ. Code, § 1161, requiring that the execution of an instrument be acknowledged by the person executing it before recording it, the record of a chattel mortgage acknowledged by

only one of two or more mortgagors is constructive notice of its execution by him only.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by T. W. Bell and Charles Le Roy, copartners, doing business as Bell & Le Roy, against Mrs. M. G. Sage, formerly Mrs. M. G. Wilson, F. J. Newman, and others. From part of a judgment for plaintiffs, defendants Newman and another appeal. Reversed with directions.

Charles F. Metteer, of Sacramento, for appellants.

Fred J. Harris and Thomas B. Leeper, both of Sacramento, for respondents.

FINCH, P. J. The defendants Newman and Rumsey appeal from that part of the judgment of foreclosure of a chattel mortgage entered herein which directs them to surrender possession of an automobile truck and orders the same to be sold.

The chattel mortgage covered the truck and other personal property. At the time the mortgage was executed, the defendant Myron E. Sage was the sole owner of the truck. He and Mrs. M. G. Wilson joined in the execution of the mortgage. All the parties to the mortgage made the affidavit required by section 2957 of the Civil Code. Mrs. Wilson duly acknowledged her execution of the mortgage, and the same was recorded. Sage did not acknowledge the execution of the instrument. Thereafter Sage sold the truck to appellants. The court found that appellants purchased the truck for value and without actual notice of the mortgage, but that they had "constructive notice thereof by reason of said mortgage being recorded." The facts are undisputed, and the only question presented by the appeal is whether appellants were charged with constructive notice of the mortgage.

[1] The affidavit accompanying the mortgage recites that the parties (naming them), "each being duly sworn, each for himself, doth depose and says: That the aforesaid mortgage is made in good faith, and without any design to hinder, delay or defraud any creditor or creditors," and is signed by all of the parties, including Sage. Respondents contend that this is a sufficient acknowledgment by Sage to entitle the mortgage to be recorded. Section 2957 of the Civil Code provides:

"A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, unless: 1. It is accompanied by the affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay, or defraud creditors; 2. It is acknowledged or proved, certified, and recorded in like manner as grants of real property."

The affidavit in this case was drafted in strict compliance with the first requirement of section 2957, and contains nothing which is not thereby required. To hold that such an affidavit constitutes a due acknowledgment would be to ignore the second and additional requirement of the statute that the mortgage must be acknowledged or proved and certified. Clearly, Sage's affidavit was not an acknowledgment of his execution of the mortgage. Adlard v. Rodgers, 105 Cal. 327, 332, 38 Pac. 889; Talcott v. Hurlbert, 143 Cal. 4, 6, 76 Pac. 647.

[2, 3] Respondents maintain that since the mortgage was properly recorded by reason of Mrs. Wilson's acknowledgment, the effect was to give constructive notice of its execution by Sage, citing 1 C. J. 779, Shaw v. Poor, 23 Mass. (6 Pick.) 86, 17 Am. Dec. 347, and Palmer v. Paine, 75 Mass. (9 Gray) 56. In Shaw v. Poor, decided in 1827, the instrument there considered was acknowledged by but one of two grantors and was recorded. The court held that the record was at least presumptive evidence of notice of the conveyance by the grantor who had not acknowledged the execution thereof. This conclusion was apparently based upon the presumption that any one would examine the records before purchasing real estate and that the record of the defectively acknowledged deed, if read, would constitute actual notice. The reading of the record of an instrument by an intending purchaser is actual notice to him, whether it is lawfully of record or not. Parkside Realty Co. v. MacDonald, 166 Cal. 426, 431, 137 Pac. 21. In Palmer v. Paine the court said:

"The purpose of registration is notoriety, and, if it is so acknowledged by any one party to it, it is rightly registered, and then it is regarded as constructive notice to all the world as the deed of all other parties, as if acknowledged by them."

In that case, however, the controversy was between the parties to the instrument, and the court said:

"Registration is not necessary to pass title; as between the parties, the title passes by the deed."

The statutes of Massachusetts now provide that "the acknowledgment of a deed shall be by the grantors or one of them." Hayden v. Peirce, 165 Mass. 359, 43 N. E. 119. Several other states have enacted similar statutes, and decisions based on such statutes are not authority here, where no such provision exists.

In Webb on Record Titles, § 58, in commenting on the decision in Shaw v. Poor, it is said:

"Acknowledgment is in truth a matter of but little consequence, and could, by statute, be properly dispensed with entirely; but so long as its requirement is retained, the courts should

be consistent in their construction of the law; and this decision is not in harmony with the well-established judicial construction of the registry acts. * * * The theory on which one is charged with constructive notice of a recorded deed of which he has no actual knowledge whatever is that the law of record has been fully complied with, in matters of form as well as substance, as it is by force of the law alone that the notice arises. That the record of a deed from A. to B. should be held constructive notice of a conveyance of a separate tract or parcel by C. to B. * * * because this matter is also embraced in the instrument, does violence to the settled rules of interpretation which the courts have almost uniformly applied to the registration law."

The question under consideration seems never to have been decided in this state, although it has been held that the record of an instrument acknowledged by only one of the persons executing it is constructive notice to subsequent purchasers from the one so acknowledging. Spect v. Gregg, 51 Cal. 198; Fresno Canal, etc., Co. v. Rowell, 80 Cal. 114, 22 Pac. 53, 13 Am. St. Rep. 112.

Section 1161 of the Civil Code provides:

"Before an instrument can be recorded, * * * its execution must be acknowledged by the person executing it."

Of course, the singular includes the plural, and where there are several grantors the acknowledgment of one of them is effective only as to his own grant and not as to those of the other grantors, in the absence of special statutory provision, and the record thereof is constructive notice only of the conveyance of the one who made the acknowledgment. Webb on Record Titles, § 58. All of the decisions cited or discovered, with the exception of the early Massachusetts cases, support the rule as stated by the author. The statute of Illinois relating to chattel mortgages provides that "such instruments shall be acknowledged before a justice of the peace or the county judge where the mortgagor resides." In Snite v. Gehrke, 189 Ill. App. 382, the court held that "where a chattel mortgage is not acknowledged by one of the mortgagors, it will not be effective as against the claim of a third party." In People v. Donegan, 226 N. Y. 84, 123 N. E. 71, four persons executed a deed and all acknowledged it, but the acknowledgment of one of them was defective. The law provided that "a conveyance may be recorded on being duly acknowledged by the person executing the same." The court said: "As to the grantor whose acknowledgement was defective, the record would not be notice to subsequent purchasers." In Lancaster v. Flowers, 198 Pa. 614, 48 Atl. 896, it was held that "a deed by W. and wife of his property, acknowledged by her, but not shown by it to have been acknowledged by him, is not good as against a subsequent purchaser for value, without notice." In Hall v. Redson, 10 Mich. 21, in construing a statute requiring two witnesses to the execution of a deed to entitle it to record, the court said:

"We are all of opinion * * * that when a deed from several grantors is recorded, as to only a part of whom it is properly executed and witnessed, the record can only be evidence of the deed as to those parties by whom it has been properly executed, and whose execution of it has been duly witnessed, so as to entitle it to record had they been the only grantors named. In other words, a defective execution or attestation as to one grantor, cannot be aided by a perfect execution and attestation as to other parties. To hold otherwise would be to defeat the manifest object of the registry laws, and to open a wide door to fraud."

See, also, Bradley v. Walker (Super. Ct.) 17 N. Y. Supp. 383; Id., 138 N. Y. 291, 33 N. E. 1079; Coal Creek Min. Co. v. Heck, 15 Lea (Tenn.) 497; Duke v. Markham, 105 N. C. 131, 10 S. E. 1017, 18 Am. St. Rep. 889; and Sanders v. Pepoon, 4 Fla. 465. While the decisions bearing directly upon the question under consideration are not numerous and text-writers have generally omitted the discussion thereof, it is believed that the conclusion reached is supported by both reason and the weight of authority. In the absence of statutory provision, the record of a chattel mortgage would not constitute notice for any purpose. When the terms of the statute are complied with, the record becomes conclusive notice, often contrary to the fact. Where a mortgagee claims the benefit of such conclusive presumption which the law creates in his behalf, it is not unreasonable to hold him to a substantial compliance with the law which he invokes.

The part of the judgment appealed from is reversed, with directions to the trial court to enter judgment on the findings in favor of appellants, adjudging that the title to said automobile truck is vested in them free and clear of all claims, liens, and incumbrances in favor of the plaintiffs by reason of said chattel mortgage.

We concur: HART, J.; BURNETT, J.

60 Cal. App. 170

## PEOPLE v. DEASES. (Cr. 646.)

(District Court of Appeal, Third District, California. Dec. 16, 1922. Hearing Denied by Supreme Court Feb. 13, 1923.)

**Burglary ⟸42(3)—Evidence held sufficient to convict.**

Evidence that accused was seen near the premises of the prosecuting witness shortly after the burglary, and his arrest in possession of the property stolen a short time after the burglary, *held*, in view of other circumstances, to be sufficient to sustain conviction of burglary in the second degree.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Francisco Deases was convicted of burglary in the second degree, and he appeals. Affirmed.

A. H. Carpenter, of Stockton, for appellant.
U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was convicted of burglary in the second degree, and he appeals from the judgment sentencing him to the state prison. The only point made on the appeal is that the evidence is insufficient to justify the finding of the jury. The point is entirely without merit. The argument of appellant seems to proceed upon the theory that the possession of the stolen property a short time after the alleged commission of the offense is the only evidence of his guilt. This theory is entirely untenable. The evidence shows that a short time after the alleged commission of the offense the defendant was arrested while attempting to pawn a watch which was taken from the premises described in the information. His explanation of how he came into possession of said watch is the same as is usually given under such circumstances, namely, that he purchased it from a stranger. We may add, that there were certain circumstances connected with his explanation which stamp it as unreasonable and incredible, and no doubt the jury rejected it, as they had a right to do, as wholly unworthy of belief. In addition to the foregoing, the defendant was seen near the premises of the prosecuting witness within a short time of the commission of the said offense, and was positively identified by four witnesses who were unimpeached. There was also evidence that the defendant voluntarily stated to the deputy sheriff and jailer that he was guilty, and wanted to plead guilty and get out of jail as quick as possible; that he, the defendant, "went in this Jap's room, right on the side of Holt station and stole a watch and chain, and $2.50 in United States money, a pair of cuff buttons, that then he came to town and spent the money, and then after that he tried to sell the watch somewhere." In fact, the record shows the guilt of defendant beyond any question and there is no merit in the appeal.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

60 Cal. App. 171

## PHIPPS et al. v. WESTERN PACIFIC DEVELOPMENT CO. et al. (Civ. 3971.)

(District Court of Appeal, Second District, Division 1, California. Dec. 18, 1922. Hearing Denied by Supreme Court Feb. 15, 1923.)

**1. Pleading ⟸34(4)—On demurrer complaint construed most strongly against pleader.**

Under rule that, when opposed by demurrer, complaint must be construed most strongly against pleader, it may be inferred from allegation in complaint to enjoin selling of remaining lots of addition free from restrictions that plaintiffs "or" their predecessors in title purchased from, etc., that none of plaintiffs were original vendees of any of defendants.

**2. Injunction ⟸118(1)—Complaint to enjoin selling lots free from restrictions held subject to demurrer for indefiniteness.**

Complaint of subsequent purchasers of part of the lots of an addition to enjoin replatting of the unsold lots, so as to make them smaller and eliminate part of the streets and parkways, and selling them free from restrictions, while sufficient as to the matter of replatting, because of allegations of the streets and parkways having been included in the "laying out" of the tract, and of a map of the tract being filed and recorded, *held* subject to demurrer for indefiniteness as to the other relief, in not showing that the restrictions alleged to be on the printed copies of the map alleged to have been shown to purchasers were on the recorded map, or that plaintiffs in purchasing from original purchasers had notice of or relied on such restrictions.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Margaret R. Phipps and others against the Western Pacific Development Company and others. From an adverse judgment, plaintiffs appeal. Affirmed.

Robert Brennan, of Los Angeles, for appellants.

Van Lee Hood and C. E. McDowell, both of Los Angeles, for respondents.

JAMES, J. In this action demurrers of defendants to the complaint of the plaintiffs were sustained. Plaintiffs declined to avail themselves of the leave given to amend, and judgment was thereafter entered against

them. From that judgment appeal was taken.

Under the condition of the case as it appears from the foregoing statement, the question as to the correctness of the court's ruling in sustaining the demurrers is alone presented. The demurrers presented both the general ground as to the insufficiency of the facts stated to constitute a cause of action and various particular and special grounds of uncertainty, and alleged misjoinder of parties plaintiff and misjoinder of causes of action. We think that the grounds of uncertainty are those which require particular consideration. Briefly summarized, the cause of action attempted to be set forth in the complaint was one wherein the plaintiffs, as owners of lots in a tract of land which had been subdivided by the Western Pacific Development Company, defendant, asserted the right to have preserved the lots in the dimensions originally platted, and to have left the streets and ways in the same position and width, including parkways established, as they existed at the time the tract was laid out.

[1] It was alleged that after selling two-thirds of the lots contained in the tract defendants proposed to replat the unsold portion, and by such replatting change the dimensions of such unsold lots, making them narrower in width, closing a portion of one of the streets, and eliminating some of the portions platted for parkways. Sufficient was alleged to show that all of the named defendants were so connected together as to make them responsible under the cause of action claimed. It was shown by the allegations of the complaint that the plaintiffs were the owners of lots in said tract, but it was not shown as to whether they were original purchasers or subsequent vendees. The disjunctive form of allegation was used in that connection by such allegations as "the plaintiffs or their predecessors in title purchased from," etc. Keeping in mind the rule that, when opposed by a demurrer, the complaint must be construed most strongly against the pleader, it may well be inferred that none of the plaintiffs purchased their lots from any of the defendants as the original vendees.

[2] This court recently had before it a case involving the question as to the enforceability of restrictions contained in deeds as between vendees, and in that decision the law applicable to the general subject of equitable easements was fairly stated and the leading authorities cited. See McBride et al. v. Freeman et ux., 39 Cal. App. Dec. 532.[1] What is said in that case has applicability to the controversy here, except that the parties involved in this action are subsequent vendees on one side and vendors or their privies on the other. We have no doubt at all from our examination of the law applicable to like situations that, where an owner of a tract of land subdivides the property under a general plan of improvement, records a map showing the sizes of the lots, with streets delineated thereon, also ground reserved for parks, and sells the land upon the representation of conditions as the plat exhibits them, he will be estopped from resubdividing portions which may remain in his hands so as to change the arrangement in a way detrimental to those who have purchased from him, or to their vendees. In such a case it will be held that the purchasers of lots have an equitable easement in the whole to the extent that such conditions as are mentioned shall not be varied or changed. This is a general statement which may suffer modification in the presence of other facts, such as those showing waiver of the easement right by acquiescence in changes made. But it must be shown that the recorded maps, taken in connection with the attendant circumstances, are such as to give notice of the intent of the subdividing owner to preserve the established conditions for the benefit of the lot owners. Plaintiffs in paragraph IV of their complaint allege that the Western Pacific Development Company in 1906 "caused the said tract to be laid out with winding streets, with circular and oval parks at the intersection of streets and midway of the blocks, with blocks and lots irregular in size and shape, all lots having a frontage of approximately 100 feet, and caused many of said parks to be improved and embellished with trees," etc., "and thereupon during the year 1906 caused to be prepared a map or plat of said tract, and filed and recorded the same in the office of the recorder of Los Angeles county on the 23d day of January, 1906, in Map Book 9, p. 10, the said tract as shown on said map consisting of about 356 acres divided into lots, blocks, parks, and streets, and is located," etc. It is next alleged in the same paragraph:

"That thereafter, and before the time when any of the plaintiffs or their predecessors in title purchased any lot in said tract from any of the defendants, said defendant, Western Pacific Development Company, caused to be printed and published a copy of said map or plat on which were shown the winding streets and parks and the irregular blocks and lots, as original and attractive features of said tract. The varying length of the boundaries of the several lots was shown, and the price at which each lot was to be sold was stated, and there appeared on each lot or block a letter indicating which of the restrictions printed on said map should apply; the restrictions printed thereon being as follows: 'Restrictions: A. Houses to cost not less than $10,000. House lines to be placed 100 feet back from front property line. B. Houses to cost not less than $7,500. House lines to be placed 100 feet back from front property line. C. Houses to cost not less than $5,000. House lines to be placed 75 feet back from front property line. D. Houses to cost not less than $3,500. House lines to be placed 50 feet back from front prop-

[1] Hearing granted by Supreme Court, opinion in which is published in 215 Pac. 678.

erty line. On all lots except corners, houses must be placed 15 feet from side lines. On corner lots, houses must be placed at least 25 feet from side property line on said street.' About 50,000 copies of said map were printed and the same were used in soliciting each and every purchaser of lots in said tract, and a copy was shown or given to each such purchaser, until about December, 1920. A copy of said map, marked 'Exhibit A,' is hereto attached and made a part hereof."

It is then alleged that the development company caused to be prepared and used in the transfer of "all lots or parcels of land in said Brentwood Park a standard form of contract of sale and a standard form of deed containing restrictive covenants and reference to that certain plat or map mentioned in paragraph IV hereof." Whether the matter alleged to have appeared upon the printed copy of the map, including restrictive clauses, appeared upon the map alleged to have been recorded, cannot be told definitely from the allegations made. The exhibit alleged as "A" and attached to the complaint appears to have been a copy of the printed map, and not of the recorded map. As to what the "standard form of contract of sale" was cannot even be surmised, and as to what restrictive covenants were meant to be referred to, where it is alleged that there was used a "standard form of deed containing restrictive covenants," is likewise uncertain. As to the printed maps which were used in connection with the original sales of lots, it cannot be presumed that they were seen or relied upon by subsequent purchasers. We cannot presume that subsequent purchasers had any representation upon which they were warranted in relying, except the recorded map, and that map, we must conclude, showed nothing more than the parks laid out "with blocks and lots irregular in size and shape, * * * having a frontage of approximately 100 feet," as is expressed by the allegation quoted first from paragraph IV.

One of the purposes for which injunction was sought was to prevent the defendants from selling or conveying lots free from restrictions, as it is alleged they were threatening to do. The restrictions referred to were those appearing upon the printed map, which was alleged to have been delivered to original purchasers and which was used by solicitors. It appears, it is true, in the first paragraph of the complaint, that plaintiffs purchased their lots "upon the conditions, representations, and statements, and relying upon the promises, conditions, representations, and statements made by the defendants or some of them as hereinafter described." But the conditions as they were thereinafter described were not such as to show that the subsequent purchasers had any notice of or relied upon the important restrictive conditions of which they claimed the benefit. Under the allegation as to the parkways and streets having been included in the "laying out" of the tract, and the allegation following that a map of the tract was "filed and recorded" in the office of the county recorder, it may, we think, be fairly said that a cause of action was stated authorizing some of the relief sought. However, the demurrers were specific and pointed as to the matters of uncertainty which have been adverted to, and there seems to be no escape from the conclusion that the points so made were well taken. Plaintiffs might have amended and cleared up the uncertainties, but they evidently felt satisfied with the sufficiency of their complaint and allowed the judgment to go as stated.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

---

(60 Cal. App. 192)

## CURRIE et al. v. TITLE INS. & TRUST CO. et al. (Civ. 3877.)

(District Court of Appeal, Second District, Division 2, California. Dec. 20, 1922.)

1. Deeds ⟸176 — Action to quiet title as against restrictive provisions based on acts of grantor held not improper.

An action against a corporation to quiet title to land as concerns certain restrictive provisions in a deed given by such corporation to plaintiff's grantor, which is based on the fact that the corporation has conveyed away its reversionary interest, and therefore lost its interest in the property, is not barred under the rule that a change of conditions will not sustain an action to quiet title as against restrictive provisions in a deed, since such action is based, not on the changed conditions, but on the acts of the grantor.

2. Contracts ⟸236—Contractual obligations do not disappear as a result of changed conditions, but may be modified.

Contractual obligations do not disappear as the result of a change in circumstances, though they may disappear through additional agreements and the voluntary transfer of one's contractual rights.

3. Deeds ⟸145—Restrictive provisions in deed held condition which inured to the benefit of the grantor, and not covenants inuring to the benefit of the grantor's successors in interest of adjoining lots.

Where a deed to a lot which was one of a number sold under certain restrictions by a common grantor provided it was "made and accepted upon the following conditions subsequent," and then enumerated certain restrictions as to the use and occupation of the property, and provided further "any violation of any of said conditions shall work a forfeiture of the title thereof to the said party of the

first part, its successors or assigns," *held* that, since the deed did not disclose that the land conveyed was a part of a larger tract, the balance of which the grantor still retained, or that the restrictions were intended for the benefit of other lands, or that their benefit was to inure to and pass to other lands, and contained no designation of the land which was to be dominant tenement, such restrictive provisions are conditions subsequent, and not covenants, and inured to the benefit of the grantor only and not to him as owner of the surrounding lots.

**4. Covenants ⊜79(3)—Provisions in deed for reversion to grantor upon breach of restrictive provisions, if treated as covenants, held to create easements in gross.**

Provisions in a deed for reversion of the property to the grantor upon a breach of restrictive provisions relative to the occupancy of the land, if treated as covenants rather than conditions, *held* to create easements in gross which inured to the benefit of the grantor, and not to the owners of adjoining lots also subject to the same restrictions.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action to quiet title by Jay E. Currie and another against the Title Insurance & Trust Company and another. From a judgment for plaintiffs, the named defendant appeals. Reversed.

Otis H. Castle, of Los Angeles, C. Elvon Musick and H. C. Allen, Jr., both of Pasadena, and Farrand & Slosson and Leonard B. Slosson, all of Los Angeles, for appellant.

Hibbard & Kleindienst, of Los Angeles, for respondents.

CRAIG, J. In this action the plaintiffs seek a decree quieting their title to real property. The complaint is in the ordinary form of such actions. The answer of the Title Insurance & Trust Company admits plaintiff's ownership, but alleges as a defense that the title is subject to certain conditions or restrictions contained in the deed by which the defendant corporation transferred its title to plaintiff's predecessor in interest, one W. H. Hay. The clause relied upon is in the language ordinarily used in similar transactions. It begins, "This deed is made and accepted upon the following conditions subsequent," then follows a provision against the use of a building erected thereon for certain business purposes, the erection of oil derricks, dwelling houses under a certain cost, and the occupation, etc., of the premises by any person of African descent. The paragraph concludes as follows:

"And that a violation of any of said conditions shall work a forfeiture of title thereof to the said party of the first part, its successors or assigns."

It is alleged in the answer that before plaintiffs acquired any interest or title in the property defendant corporation was the owner of all the lots in any tract of which plaintiff's property is a part; that the corporation thereafter conveyed all of said lots to divers persons; that in all of the conveyances there was inserted conditions or restrictions substantially the same as those in the deed to Hay; further, that these conditions or restrictions were placed on all of the lots "for the equal benefit of each and every lot within said tract and in pursuance of a general scheme for the development and improvement of said tract and said lots." Plaintiffs demurred generally, and the trial court sustained the demurrer without leave to amend, and judgment was entered for the plaintiff.

[1, 2] At the outset the appellant challenges the right of respondent to maintain an action to quiet title, even though it be conceded for the purpose of the discussion of this phase of the case that the corporation has ceased to possess the right to relief by injunction or forfeiture. As authority for this contention we are cited to Strong v. Shatto, 45 Cal. App. 29, 187 Pac. 159. Our attention is called to the following language used in that opinion:

"But the rule does not go to the extent of permitting parties whose land is subject to the legal restraint of such limitations to bring action to quiet their title against such contractual obligations, because of changed conditions. Contractual obligations do not disappear as circumstances change. It is only the granting of equitable relief, and not the binding force of the restrictive covenant, that is affected by a change in the conditions."

The change in the instant case, if there is one, is not due to a change in conditions concerning the property, but to one in the ownership of the property; a change which is the result of contract. It is not an alteration in conditions, but one of title. While contractual obligations do not disappear as the result of a change in circumstances, such obligations may disappear through additional agreements and the voluntary transfer of one's contractual rights. The language quoted by appellant was directed toward the claim of the plaintiff in that case that, because the property had so changed that it had become more valuable for business than for residence purposes, a court of equity should quiet title of lot owners against the conditions subsequently imposed by their contracts. It was not claimed that the grantor of the property had lost his right of re-entry by reason of any act of his own, contractual or otherwise, but only because conditions with which he had nothing to do had changed. In the instant case the plaintiffs seek to have their title quieted as against the defendant corporation. On the issue presented by that defendant's answer the plaintiffs assert that the corpo-

ration has conveyed away its reversionary estate, and therefore has lost its entire interest in the property. The complaint alleges that the corporation still claims to possess its former estate, which would constitute a cloud upon plaintiffs' title. If the plaintiffs' theory of the case is correct, the defendant corporation would not only be denied relief, should it institute an action for re-entry or injunction, but in addition it has divested itself of all property right and reversionary interest in the land as completely as though such right had never been possessed, which was the fact in Werner v. Graham, 181 Cal. 174, 183 Pac. 945, in which a decree quieting title was upheld.

[3] The restrictive provisions in this deed are in the form of conditions, and not covenants. It is clearly stipulated that the deed is made and accepted upon certain express conditions subsequent which are that certain things shall not be done, and, if done, the title to the property shall revert. The grantor retained to himself and his heirs and assignees the reversion. Civ. Code, §§ 768 and 1046; Johnston v. Los Angeles, 176 Cal. 479, 168 Pac. 1047; Werner v. Graham, supra.

If these restrictive provisions were intended as covenants, easements in gross might be created as well as easements appendant. In this regard the instant case is directly within the scope of that part of the opinion in Werner v. Graham, in which the court passed upon the existence of a servitude in favor of lots which the grantor, the subdivider of the tract, still owned when he sold the lot whose title was sought to be quieted and to which lot he had given a quitclaim deed. In discussing that question the opinion reads:

"The situation in this respect is that one, the owner of a tract of land, sells a portion of it, exacting of the grantee restrictive provisions as to its use, but without a word indicating that the land conveyed is part of a larger tract, the balance of which the grantor still retains, or that the restrictions are intended for the benefit of other lands, or that their benefit is to inure to or pass with other lands, and without any description or designation of what is an essential element of any such servitude as is claimed, namely, the land which is to be the dominant tenement."

This language fits the facts shown in the record before us, both in that there is nothing in this deed indicating that the land conveyed is a part of a larger tract, the balance of which the grantor still retains, or that the restrictions are intended to benefit other lands or to pass with them, and further that no other lands are described or mentioned as the dominant tenement. It is true that in the instant case the answer avers that after conveying the lot in question the defendant conveyed all of the other lots in the tract to other persons with similar restrictions, and that these restrictions and conditions were placed thereon for the benefit of each lot in the tract and as a part of a general scheme for the improvement of the entire tract, but these allegations fall far short of stating that the deeds to the various lots contained any stipulation that the restrictions in them were a part of a general plan to improve the tract and the other lots therein and for the benefit of such tract and lots. These matters may all have been in the mind of the grantor and yet be of no avail to impose a servitude on the lots conveyed unless the grantee also joined in the plan and gave his consent to the interchange of servitudes involved. This very point is the one which was controlling in the determination of Werner v. Graham. What was there said was not obiter dicta. The Supreme Court stamped it as "the crux of the present case." In distinguishing Alderson v. Cutting, 163 Cal. 504, 126 Pac. 157, Ann. Cas. 1914A, 1, from the one then under consideration, it said:

"The difference between such a case and the one at bar is that here there is no language in the instruments between the parties, that is, the deeds, which refers to a common plan of restrictions or which expresses or in any way indicates any agreement between grantor and grantee that the lot conveyed is taken subject to any such plan."

It then holds that this difference is material; that it is not the intent of the original owner that governs in such cases, but the joint intent of himself and grantees; and as an additional reason for its decision it is said that each deed must be construed as of the date it was given, and hence that mutual servitudes cannot have been created where the only restriction contained in any deed refers to the particular lot thereby granted. The opinion further points out that, even though each grantee understood that the restrictions were exacted as a part of a general scheme the result would be the same, since the deeds constitute "the final and exclusive memorials" of the understanding of the parties.

The language of the Supreme Court to which we refer was directly applicable to the issue involved. Deeds containing building restrictions had been made by the subdivider of a tract of 132 lots. Some of the instruments were executed before and some after the one to the lot whose title was sought to be quieted. The same restrictions were placed in each of the deeds. In selling the lots the grantor had represented to the purchasers that he was exacting the same restrictions from all. The respective purchasers impliedly consented thereto and relied thereon and fully appreciated the fact that the imposition of the restrictions were a part of a general plan. In view of the decisive and certain language and unanswerable reasoning used, and of the complete consideration given the subject by the Supreme Court in the Werner v. Graham Case in passing upon

this exact question, we need not consider the matter further. As we interpret the authorities and apply them to the facts presented, the restrictive provisions were conditions and not covenants.

[4] But, even though we should class them as covenants, it must be held that they were intended to create easements in gross. In either event they inured to the grantor, the Title Insurance & Trust Company and its assigns, and not to the owner of certain lots of land and the various successors in interest of such lot owners.

The judgment is therefore reversed.

We concur: FINLAYSON, P. J.; WORKS, J.

---

(60 Cal. App. 177)

## PEOPLE v. ROGERS et al. (Cr. 640.)

(District Court of Appeal, Third District, California. Dec. 18, 1922.)

**1. Criminal law ⇐1178—Question of constitutionality of statute for joint trial raised below considered, though not argued, as involving fundamental right.**

Constitutionality of Pen. Code, § 1098, as amended by St. 1921, p. 90, providing for persons jointly charged with an offense being jointly tried, unless the court in its discretion orders otherwise, having been raised below, as shown by the record, should be considered on appeal, though the case was not argued; as, if the Legislature transcended its authority, it would be necessary to hold that defendants had been denied a fundamental right by refusal of separate trials.

**2. Criminal law ⇐622(1)—Statute for joint trial not unconstitutional.**

No provision of the Constitution is violated by Pen. Code, § 1098, as amended by St. 1921, p. 90, providing for joint trial of persons jointly charged with an offense, unless the court in its discretion orders otherwise.

**3. Criminal law ⇐1144(13)—In absence of complete record of testimony, conviction presumed justified.**

The trial judge's certificate showing that all the testimony is not in the record, it will be presumed on appeal that there was sufficient competent evidence to justify the conviction.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Sylvester Rogers and A. Johnson were convicted of robbery, and appeal. Affirmed.

J. S. Daly and Arthur H. McCurdy, both of Sacramento, for appellants.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The appellants jointly with one William Fleming were informed against by the district attorney of Sacramento county for the crime of robbery, alleged to have been committed on the 12th day of April, 1922, in said county, upon the person of one Floyd McBride, it being alleged that said defendants by means of force and fear took from the possession and in the immediate presence of said McBride one open face watch and one watch chain of the value of $30 and of the personal property of said McBride. The appellants were jointly tried for and convicted of the crime so charged and took an appeal from the judgment of conviction.

The cause was regularly placed upon the calendar of the December, 1922, term of this court for hearing and argument, and the attorneys of record for the appellants duly notified of that fact. On the day upon which the case was called for hearing, no one appeared for the appellants, and, consequently, the cause was not orally argued before this court. No briefs had been filed in the case and the cause, upon being called for hearing, was submitted by the Attorney General upon the record. No briefs have since been filed in behalf of the appellants.

We have examined the record with care and have discovered no reason for disturbing the verdict. It appears fom the record, however, that, immediately after judgment of sentence was pronounced, one of the counsel for the appellants gave oral notice of an appeal from the judgment and at the same time stated that there was but one question involved in the case which he desired reviewed on appeal, to wit, the constitutionality of that portion of section 1098 of the Penal Code, as amended by the Legislature of 1921 (Stats. 1921, p. 90), providing that "when two or more defendants are jointly charged with any public offense, whether a felony or a misdemeanor, they must be tried jointly, unless the court order special trials." In this case an application was made for separate trials of the three defendants, but, the court, after stating that there was no showing upon which the claim for separate trials could justly be made and no such showing having been offered by counsel, denied the request for separate trials, and ordered the appellants to be tried jointly.

[1, 2] Undoubtedly if it were necessary to hold that the Legislature, in clothing trial courts with the power or discretion of determining whether persons jointly charged with the same public offense should be tried separately or jointly, had transcended its constitutional authority, we would be required to hold that a fundamental right of the defendants had been denied them in the order of the court refusing them separate trials. The question is one, therefore, which should be considered, notwithstanding that the appellants have failed to argue the case before us, either orally or by way of briefs, the record,

as seen, showing that the question was raised in the court below. As stated, there are no briefs on file herein and counsel have not otherwise attempted to support the suggestion that said provision of the Penal Code is in conflict with the Constitution. Our opinion is, however, that there is no provision of the Constitution with which said section conflicts. To the contrary, we think that the section vests the trial courts with a wise and proper discretion in the matter of determining whether in any case where two or more parties are jointly charged with the same offense they shall be tried jointly or separately.

A similar point was urged in the recent case of People v. Ralph J. Anderson et al., (Cal. App.) 211 Pac. 254. Speaking of section 1098 of the Penal Code, as amended by the Legislature of 1921, it was there said:

"* * * The court may, in its discretion, order separate trials of two or more defendants jointly charged with a felony, but is not bound or required to do so upon the mere request of any defendant. We presume that if there were circumstances in a particular case which would render it peculiarly proper or only just that there should be accorded to several defendants so charged separate trials, and such circumstances were in an appropriate legal way brought to the attention of the trial court, the question whether such court, in denying separate trials, had abused its discretion might be a proper subject of review. In the instant case, though, there is no showing which presents a reviewable question. The mere request of the defendants for separate trials and the order refusing the application constitute all there is of the record upon that question, and obviously, upon such a showing this court cannot say whether there was or was not an abuse of discretion in the making of the order complained of."

It is true that the question of the constitutionality of the provision referred to was not considered in the Anderson Case. But we assumed, from an examination of authorities from other jurisdictions in which the precise question was considered, that the constitutional validity of the provision could not be questioned. The following are the cases which we then examined: Commonwealth v. Borasky et al., 214 Mass. 313, 316, 101 N. E. 377, and other cases therein cited; Commonwealth v. James, 99 Mass. 438; U. S. v. Ball et al., 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. Ed. 300, 303; Lee Dock et al. v. U. S., 224 Fed. 431, 140 C. C. A. 125; U. S. v. Marchant, 25 U. S. (12 Wheat.) 480, 6 L. Ed. 700. Those cases hold that whether two or more persons charged jointly with a felony shall be tried together or separately is discretionary with the trial court. We have not examined the foregoing authorities for the purpose of determining whether therein they were dealing with statutes which, like ours, expressly vest a trial court with the power of requiring defendants jointly charged to be jointly tried. In Commonwealth v. James, 99 Mass. 438, however, the Supreme Court of that state declares: "The general rule is, that persons jointly indicted should be tried together," from which language it is to be inferred that there was no statute covering the subject and that it was therein intended to declare the general rule in the absence of statutory regulation of the matter. But in either case the decisions referred to would be directly pertinent to the proposition in hand here and would seem to negative the suggestion that the section of our Penal Code referred to is unconstitutional.

[3] The evidence presented by the record is incomplete. The certificate of the judge of the trial court shows that only certain portions of the testimony were requested by counsel for the defendants to be transcribed for the purposes of the appeal and only such portions of the testimony as were requested by counsel for the appellants to be transcribed are to be found in this record. In view of the certificate of the judge showing that all the testimony brought out at the trial is not in the record before us, the presumption is that there was sufficient competent testimony to justify the verdicts.

The judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

190 Cal. 352

## Ex parte MORCK. (Cr. 2542.)

(Supreme Court of California. Jan. 24, 1923.)

**Robbery ⊂=30—Court can impose sentence of 25 years for attempt to commit robbery.**

Under Pen. Code, § 664, providing that a person convicted of an attempt may be punished by imprisonment for a term not exceeding one-half of the longest term of imprisonment prescribed for a conviction of the offense attempted, and section 671, providing that, where an offense is made punishable by imprisonment for a term not less than a specified number of years, and no limit to the duration of the imprisonment is declared, the court may sentence the offender to imprisonment for life or for any number of years not less than that prescribed, the judge has discretion to sentence one convicted of attempted robbery for any term which in his opinion would be a just and fair punishment, the maximum penalty for robbery being imprisonment for life, and a sentence to imprisonment for 25 years was valid.

In Bank.

Application by Andrew Morck for a writ of habeas corpus prayed to be directed to the warden of San Quentin Prison to secure the release of petitioner from custody. Writ denied.

Andrew Morck, in pro. per.

PER CURIAM. The petitioner asks for a writ of habeas corpus, alleging that he is serving a sentence in the state prison at San Quentin for an attempt to commit robbery. He does not allege the term of his sentence, but alleges that he has already served, counting allowance for good credits, more than 9 years, and asserts "that 9 years constituted more than his half life at the time of his commitment." The case of People v. Sama (Cal. Sup.) 207 Pac. 893, decided June 16, 1922, held that, under the provisions of sections 664 and 671 of the Penal Code, the trial court had authority to sentence a defendant for an attempt to commit robbery for any term of years which in its opinion would be a just and fair punishment. It appears from a previous application of the petitioner (In re Morck, 180 Cal. 384, 181 Pac. 657) that he was sentenced for the term of 25 years. This sentence was valid. People v. Sama, supra.

The petition for the writ is denied.

WILBUR, C. J., and KERRIGAN, WASTE, MYERS, LAWLOR, LENNON, and SEAWELL, JJ., concur.

190 Cal. 353

## Ex parte SPAGNOLI. (Cr. 2543.)

(Supreme Court of California. Jan. 25, 1923.)

**Criminal law ⊂=103—Jurisdiction of police court to commit woman to industrial farm may be shown by evidence dehors the record.**

That the record of a police court committing a woman to the industrial farm for women does not show that she was over the age of 18 years does not entitle her to discharge on habeas corpus, as, in California, jurisdiction of an inferior court may be shown by evidence dehors the record.

In Bank.

Original application by Ernest B. D. Spagnoli for a writ of habeas corpus for Helen Von. Petition denied.

E. B. D. Spagnoli, of San Francisco, in pro. per.

PER CURIAM. Petitioner applies for a writ of habeas corpus on behalf of Helen Von. The police court of San Francisco committed Helen Von to the California industrial farm for women in Sonoma county. Petitioner claims that it nowhere appears upon the records of the police court that Helen Von was over the age of 18 years and claims that in the absence of such affirmative showing she must be released, notwithstanding the fact that she may be over 18 years of age, The point is not well taken. In this state jurisdiction of an inferior court may be shown by evidence dehors the record. Jolley v. Foltz, 34 Cal. 321; Kane v. Desmond, 63 Cal. 464, 466; Ferguson v. Basin Consolidated Mines, 152 Cal. 712, 715, 93 Pac. 867; Gardella v. County of Amador, 164 Cal. 555, 561, 129 Pac. 993.

Petition denied.

WILBUR, C. J., and LAWLOR, LENNON, WASTE, SEAWELL, KERRIGAN, and MYERS, JJ., concur.

---

190 Cal. 374

## JACOBUS et al. v. BRERO et al.
(S. F. 10222.)

(Supreme Court of California. Jan. 31, 1923.)

**1. Evidence ⟸265(2)—Proof of defendant's admission held to support finding.**

Testimony that defendant admitted that the automobile which struck plaintiff was that driven by defendant's brother was sufficient to support a finding to that effect.

**2. Appeal and error ⟸1010(1)—Finding conclusive when supported by any evidence.**

The question whether or not an automobile was operated at a negligent rate of speed was one for the trial court to determine under all the circumstances, and its finding is conclusive on the Supreme Court, where there is any evidence to support it.

**3. Municipal corporations ⟸819(7)—Evidence held to support finding of pedestrian's freedom from contributory negligence.**

In an action for injuries to a pedestrian struck by an automobile while crossing a street, evidence *held* sufficient to support a finding that she was not negligent.

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Caroline Heiner against Joseph Brero and another, in which Henrietta Jacobus and another, executors, were substituted for the original plaintiff. From a judgment for plaintiffs, the defendant Eugene Brero appeals. Affirmed.

Cooley, Crowley & Lachmund, of San Francisco, for appellant.

John D. Willard, of San Francisco, and John W. Coleberd, of South San Francisco, for respondents.

WILBUR, C. J. [1] While crossing the state highway in Redwood City, Cal., the plaintiff, Caroline Heiner, was struck and knocked down by an automobile. She brought this action against the defendants, who are brothers, to recover the damages suffered by her, and judgment was rendered against both the defendants. Eugene Brero alone appealed.

The appellant contends that the evidence is insufficient to justify the finding that the car which struck the plaintiff was one driven by his brother Joseph. It is a sufficient answer to this contention to say that a witness testified that the appellant admitted that the car which struck the plaintiff was that driven by his brother.

It is next contended that the defendant Joseph Brero was not acting as the agent of the appellant in driving the car. The claim is that the defendants were engaged in a joint enterprise of conveying a party of friends to Alma on a family picnic. The appellant owned both machines, the guests were his, and the evidence justified the conclusion that the defendant Joseph was driving the car for his brother, the appellant.

[2] It is contended that the evidence is insufficient to justify the finding that the defendant Joseph was negligent in the operation of his car. There was sufficient evidence, if believed by the court, to justify the conclusion that the machines were traveling at an excessive rate of speed. The question of whether or not the machine was operated at a negligent rate of speed was one for the trial court to determine under all the circumstances, and the finding of the trial court upon that subject is conclusive upon us, where there is any evidence to support it.

[3] It is contended that the plaintiff was guilty of contributory negligence as a matter of law. In that regard she testified as follows:

"On the evening of the accident I went from my home to my son's house, and he was not home, and his wife and I went from there down the sidewalk on the west side of the road until I came opposite the Chilcott place, and then I crossed over. I got off the sidewalk curb to be certain that there were no automobiles coming that could hurt me, and went past, and I stood there, and I saw three lights away down south, and I thought, now I can make it, and I hurried over, as I had done often, and I watched, and I found that he came at a terrible speed, but I got over on the further part of the road so I felt now I am safe—they will go in back of me, but as I came to the part between the black part and the sidewalk they were right down on me, and I thought, 'My God!' and I took a step or two, and it hit me

on my hip and threw me and knocked me out completely. That is all I know. * * * When I refer to the part of the highway not the black part, I mean the macadam where the dirt and gravel is. When I was struck I was in the middle from the black part and to the sidewalk, because when I stepped off the black part I knew they were coming, but I thought I was safe—they will go in back of me."

Under this evidence the court was justified in finding that the plaintiff was not negligent.

Judgment affirmed.

We concur; LENNON, J.; SEAWELL, J.; WASTE, J.; MYERS, J.; KERRIGAN, J.; LAWLOR, J.

---

190 Cal. 369

## MARTIN v. HILDEBRAND et al.
(S. F. 9802.)

(Supreme Court of California. Jan. 31, 1923. Rehearing Denied March 1, 1923.)

**1. Homestead ⊜107—Prior liens on homestead property not affected by sale on execution.**

Since the proceedings authorized by Civ. Code, §§ 1245, 1246, 1248, 1249, 1251, 1252, 1254–1257, for subjecting homestead property to execution, are not made dependent on the existence or nonexistence of liens thereon, and the buyer on execution sale takes only the interest of the judgment debtor at the time of the levy, prior liens on the property are unaffected by the sale, the interest acquired by the purchaser being that of the homestead claimant freed only from the burden of the homestead.

**2. Homestead ⊜128—Conveyance after levy of execution does not deprive judgment creditor of right to have property sold.**

A homestead claimant's conveyance of the property after levy of execution thereon does not deprive the judgment creditor of his right under Civ. Code, § 1245 et seq., to have it sold; the transferee taking it subject to prior valid liens, of which the execution is one from the time it is levied.

**3. Homestead ⊜200—Where it was admitted that homestead was worth more than amount of exemption, and could not be divided, court properly refused to appoint appraisers.**

Where it was admitted, at the hearing of an application under Civ. Code, § 1245 et seq., for the appointment of appraisers of a homestead on which execution had been levied without result, that the property exceeded in value the amount of the homestead exemption, and could not be divided without material injury thereto, the court properly refused to appoint appraisers, and erred in refusing to direct the sheriff to proceed with the execution, though section 1254 provides for the determination of such facts from the appraisers' report, and in directing the issuance of, and refusing to vacate, an alias writ of execution.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Application by George J. Martin for the appointment of appraisers to value a homestead on which execution had been levied and returned unsatisfied, opposed by Ernest H. Hildebrand and others. From the orders denying the application, refusing to direct the sheriff to proceed with the execution, and directing the issuance and refusing to recall an alias writ of execution, plaintiff appeals. Reversed in part and remanded.

John H. Crabbe, of San Francisco, for appellant.

Stoney, Rouleau, Stoney & Palmer and Paul A. McCarthy, all of San Francisco, for respondents.

KERRIGAN, J. The plaintiff having recovered a judgment for some $800 against George H. Chiossi, one of the defendants herein, a writ of execution was issued thereon, and on September 24, 1920, levied upon real property of said defendant and his wife, consisting of a lot of land 25 feet wide by 127½ feet deep, situate in the city and county of San Francisco, upon which was a two-story and basement dwelling house. These persons had theretofore declared a homestead upon said premises, and the sheriff accordingly made his return to that effect, and that he was unable to satisfy the judgment. Within 60 days from the date of the levy the plaintiff, acting under the provisions of sections 1245 et seq. of the Civil Code, made application to the court for the appointment of persons to appraise the value of the homestead, setting up in his application the facts required by section 1246 of said Code, namely, that an execution had been levied upon the homestead, describing it, and that its value exceeded the amount of the homestead exemption, etc. This was served upon the homestead claimants. At the time appointed for the hearing thereof they made no appearance, but the defendants Hildebrand and Lettich appeared, having theretofore filed a so-called answer to said application. At the hearing they conceded the filing of said answer to be unauthorized, but requested that it be considered as an affidavit of the facts therein stated. In said answer or affidavit the allegations contained in the application for appointment of appraisers were not denied, but certain facts were alleged therein and offered as a ground for the denial of the application, the burden of which was that said Hildebrand and Lettich were now the owners of said real property, having taken a conveyance thereof since the levy of said execution; that at the time of the levy it was incumbered by liens ranking

prior to the homestead, the sum of which, added to the homestead exemption, was far in excess of its value—which, however, was conceded to be superior to $5,000—so that a sale thereof could not produce anything to be applied to the satisfaction of the plaintiff's judgment. Upon those grounds they urged that the application for the appointment of appraisers should be denied. At this hearing the facts set up in the plaintiff's application were not disputed, and it was also tactily admitted, and the hearing conducted upon the theory, that the premises were of such a nature that they could not be divided and a part thereof to the value of the homestead exemption set off. Such evidence as was received was directed to the questions of the amount and priority of the liens upon the property in an effort by said defendants to sustain their contention that its sale would not bring an amount sufficient to leave anything applicable to the payment of the plaintiff's judgment.

The application before the court was, as we have seen, for the appointment of appraisers; and the sections of the Code relating to this matter and above referred to provide (Civ. Code, § 1246) the facts to be stated in the application; (section 1248) for service of notice of the hearing upon the homestead claimant; (section 1249) that upon the hearing the court may, upon proof of service and of the facts stated in the application, appoint three appraisers, who (section 1251) "must view the premises and appraise the value thereof, and if the appraised value exceeds the homestead exemption they must determine whether the land claimed can be divided without material injury"; their report (section 1252) must be in writing, and must show the appraised value, and their determination upon the matter of a division of the land; (section 1254) if from the report it appears to the judge that the land claimed exceeds in value the amount of the homestead exemption, and that it cannot be divided, he must make an order directing its sale under the execution. At such sale no bid must be received unless it exceeds the amount of the homestead exemption. Section 1255, Civ. Code. If the sale be made (section 1256) the proceeds thereof to the amount of the homestead exemption must be paid to the claimant, and the balance applied to the satisfaction of the execution, and section 1257 provides that the money paid to the claimant is entitled for six months thereafter to the same exemption against legal process and the voluntary disposition of the husband which the law gives to the homestead.

[1, 2] It will thus be seen that in the proceedings authorized by the Civil Code for subjecting homesteaded property to execution there is nothing making them dependent upon the existence or nonexistence of liens upon the property. And, since upon an execution sale the buyer takes only the interest of the judgment debtor at the time of the levy of the execution (Knight v. Fair, 9 Cal. 117; Woods v. Kellerman, 3 Cal. App. 422, 89 Pac. 358), if the property is incumbered with prior liens they would be unaffected by the sale (23 Corp. Jur. 493). Nor would the fact that subsequent to the levy of the execution the homestead claimant had conveyed the property deprive the judgment creditor of his right to have it sold, since the execution is a lien upon the property from the time it is levied (Summerfield v. Stockton Milling Co., 142 Cal. 529, 76 Pac. 243); and the transferee takes subject to prior valid liens. There is, of course, nothing in the nature of an execution sale against homesteaded property different from one against property upon which no homestead exists in so far as it affects existing liens, the only difference created by the sections of the Code cited being in the requirements, first, of certain additional steps to be taken to procure the sale; second, of a minimum bid; and, third, in the disposition of the proceeds. The interest acquired by the purchaser at such sale is the precise interest of the homestead claimant, freed, however, from the burden of the homestead. See, also, the case of White v. Horton, 154 Cal. 103, 97 Pac. 70, 18 L. R. A. (N. S.) 490, which was a sale of homesteaded property subject to the prior lien of a mortgage, and in which the question of the disposition of the proceeds of the sale, and how the amount bid would be affected by the existence of prior valid liens, was considered.

[3] We think it follows that, under the circumstances appearing upon the hearing of the application for the appointment of appraisers, it would have been the duty of the court to grant said application, except that the facts which it would have been the function of the appraisers to find and report upon were, as we have seen, admitted at such hearing, thus rendering it an idle act to require a report to be made.

It appearing, then, to the court that the real property exceeded in value the amount of the homestead exemption, and that it could not be divided without material injury, it was its duty to make an order directing its sale under the execution. Civ. Code, § 1254.

During the pendency of the proceedings under consideration the plaintiff applied to the court for an order directing the sheriff to proceed with the execution, basing his application upon the ground that the homestead had been abandoned. This application was considered in connection with that for the appointment of appraisers, and resulted in the denial of both applications, but the court on December 31, 1920, did direct that an alias writ of execution should issue. The plaintiff subsequently moved to recall this alias writ, and to return to the sheriff the

writ of September 24 for further proceedings thereunder. This, also, the court refused to do. It is from these orders that the plaintiff has appealed.

In the light of what we have said we think it follows that the court should have granted the plaintiff's motion for an order directing the sheriff to proceed with the sale of the premises, for at the time it was made the necessity for the appointment of appraisers and the making of their report no longer existed, and the plaintiff was entitled to have the property sold; said sale to be made subject to whatever incumbrances were upon the premises at the time of the levy of the writ of September 24, 1920, and the sheriff directed to accept no bid unless it exceeded the sum of $5,000, and that, of the amount so bid, $5,000 should be paid to the grantees of the homestead claimants, the surplus, if any, to be applied pro tanto in satisfaction of the plaintiff's judgment, and the balance in excess thereof, if any, to said grantees of the homestead claimants. As to the order that an alias writ of execution should issue, the plaintiff had not moved for such an order, and it was not the order to which he was entitled. The court therefore erred in its making, as also in its subsequent order refusing to vacate it. Both said orders are therefore reversed, except with respect to that part of the first of them refusing to appoint appraisers, and the cause is remanded to the trial court for further proceedings in accordance with the views herein expressed.

We concur: WILBUR, C. J.; LENNON, J.; WASTE, J.; MYERS, J.; LAWLOR, J.; SEAWELL, J.

---

190 Cal. 376

## Ex parte McLAIN. (Cr. 2513.)

(Supreme Court of California. Feb. 1, 1923.)

**1. Constitutional law ⊂⊃62—Power of Legislature to enact laws cannot be delegated to subordinate body.**

The power conferred upon the Legislature to make laws cannot be delegated by it to the highway commission.

**2. Bridges ⊂⊃30—Arrest for violation of highway commission's declaration as to rate of speed over bridge held unlawful.**

An arrest and conviction for violation of the California highway commission's declaration of the rate of speed that a motor vehicle shall travel over a bridge, pursuant to Motor Vehicle Act, § 22(a), as amended by St. 1919, p. 220, § 13, is unlawful, because, viewed as an attempt to legislate, the declaration is without authority and void, and, if accepted as a rule or regulation, the statute has fixed no penalty for its violation.

**3. Constitutional law ⊂⊃62—Legislature may delegate determination of facts upon which its own action depends.**

For the proper enforcement of its laws, the Legislature may delegate a power to an officer, board, or commission, to determine some fact or state of things upon which the law makes, or intends to make, its own action depend, but in such cases the distinction between the legislative and administrative function must be recognized and enforced.

In Bank.

Application for habeas corpus by Fred F. McLain, directed to the Sheriff of Los Angeles County, for release from custody. Petitioner discharged.

David R. Faries, J. Allen Davis, and William B. Gilroy, all of Los Angeles, for petitioner.

Thos. Lee Woolwine, Dist. Atty., of Los Angeles, for respondent.

WASTE, J. This is an application for release on a writ of habeas corpus. It appears from the petition that the petitioner was convicted and ordered imprisoned for the alleged violation of the provisions of the Motor Vehicle Act.

The essential facts are that the petitioner operated and drove an automobile over and upon a certain bridge, a portion of Colorado street, a public highway in the city of Eagle Rock, and between certain signs or limit markers erected and standing at each extremity thereof, at a rate of speed of 28 miles per hour, in violation of an order of the California highway commission, fixing the maximum rate of speed of vehicles traveling over said bridge and between the limit markers at 15 miles per hour. For this offense he was arrested, found guilty, and sentenced to imprisonment in the county jail.

It appears that, prior to the arrest and conviction of the petitioner, the California highway commission, by virtue of authority assumed by it under the provisions of section 22 (a) of the Motor Vehicle Act (Stats. 1919, pp. 220, 221) established a speed limit of 15 miles per hour for all vehicles traveling over this particular bridge, and caused to be erected signs marking the location and limits of the highway to which such rate of speed applied. By section 1 (4) of the Vehicle Act (Stats. 1919, p. 193), for the purposes of the act, the word "highway" is made to include any bridge intended or used by the general public for the passage of vehicles. Section 22 (a), above referred to, provides, in substance, that any person operating or driving an automobile on the public highways shall operate and drive the same in a careful and prudent manner and at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the highway; provided, that it shall be unlawful to operate

or drive at a rate of speed in excess of 35 miles an hour, with a limitation of speed in territory closely built up and in the business district of incorporated cities, and when approaching grade crossings and intersecting highways. The section then provides:

"That the maximum rate of speed over any bridge, dam, trestle, culvert, causeway or viaduct as well as the maximum rate of speed over any state highway or portion of state highway may be established by the state highway commission at less than the rate established by law, when in the judgment of said commission the safety of persons using the highway or the protection of the highway shall be promoted thereby, but whenever any such different rate of speed is so established by said commission, the commission shall cause to be erected suitable signs to mark the location and limits of the highway to which said different rate of speed shall apply, and such signs shall be placed at a distance of not less than one hundred feet or at a greater distance than one hundred fifty feet from the highway or portion of highway or from the approaches of any bridge, dam, trestle, culvert, causeway or viaduct with respect to which such different rate of speed may be so established. In the case of a bridge, dam, trestle, culvert, causeway or viaduct, such maximum rate of speed so established by said commission shall not be less than ten miles an hour, and in the case of any other highway or portion of highway, such maximum rate of speed so established shall not be less than fifteen miles an hour."

The statute provides (section 32 [a] Stats. 1917, p. 410) that any person *violating any of its provisions* (the italics are ours) shall be guilty of a misdemeanor and, upon conviction, shall be punished in the manner therein provided. Nothing is said, in express terms or by necessary implication, that would make a violation of any of the regulations or rules of the highway commission a violation of the act, or punishable as such.

[1, 2] The conviction and imprisonment of the petitioner rest upon the validity of the above-quoted portion of section 22 (a). His contention is that there is here an attempted unconstitutional delegation of power by the Legislature to the highway commission. It is settled, of course, beyond controversy, that the power conferred upon the Legislature to make laws cannot be delegated by it to any subordinate body. If the power to be exercised by the highway commission under the provisions of the above section amounts to a lawmaking power, as contended for by the petitioner, it follows that such provision must be unconstitutional. Beatty, C. J., in Ford v. Harbor Commissioners, 81 Cal. 19, 37, 22 Pac. 278. The Legislature cannot delegate its power to make laws. Harbor Com'rs v. Redwood Co., 88 Cal. 491, 494, 26 Pac. 375, 22 Am. St. Rep. 321; Locke's Appeal, 72 Pa. 491, 13 Am. Rep. 716; Field v. Clark, 143 U. S. 649, 694, 12 Sup. Ct. 495, 36 L. Ed. 294. The principle applies to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed, or omitted, "in violation of public law, either forbidding or commanding it." 8 Am. & Eng. Ency. of Law (2d Ed.) 279; U. S. v. Eaton, 144 U. S. 677, 687, 12 Sup. Ct. 764, 36 L. Ed. 591; section 15, Pen. Code. The act nowhere declares that it shall be unlawful to drive or operate an automobile over a bridge, or other designated portion of the highway, at a rate of speed greater than that fixed by the highway commission, but it seemingly attempts to confer upon the commission the power to so declare. Ex parte Cox, 63 Cal. 21. In that case the Legislature delegated to the board of viticultural commissioners the power to make certain rules in the nature of quarantine, to prevent the importation of diseased vines. The act expressly provided that any willful violation of such rules should constitute a misdemeanor. Cox was discharged upon habeas corpus by the court, he having been convicted of violating certain of the rules and regulations, the opinion holding that the Legislature had no authority to confer upon the board the power to declare what acts should constitute a misdemeanor.

There is very little difference, if any, in effect between the portion of the vehicle act here under attack and the section of the act to provide for the proper sanitary condition of factories and workshops (Stats. 1889, p. 3) which this court had under consideration in Schaezlein v. Cabaniss, 135 Cal. 466, 67 Pac. 755, 56 L. R. A. 733, 87 Am. St. Rep. 122, and which laid down certain definite regulations relating to sanitation, ventilation, and working conditions in factories and workshops. It further provided, in section 4, that if, in such places, any process or work was carried on by which dust or injurious gases were generated that were liable to be inhaled by the persons employed therein, and it appeared to the commissioner of the bureau of labor statistics that such inhalation could, to a great extent, be prevented by the use of some mechanical contrivance, the commissioner should direct that such contrivance should be provided and used. The concluding section provided a penalty for "violating any of the provisions of the act." Schaezlein and others were convicted of having unlawfully refused and neglected, after notice, to provide and use a suction device in a metal polishing shop, within a reasonable time after having been directed by the commissioner so to do. The ultimate question there presented was the constitutionality of section 4 of the act just quoted. The court said (135 Cal. at page 471, 67 Pac. 757, 56 L. R. A. 733, 87 Am. St. Rep. 122):

"The manifest objection to this law is that upon the commissioner has been imposed not the duty to enforce a law of the Legislature,

but the power to make a law for the individual and to enforce such rules of conduct as he may prescribe. It is thus arbitrary, special legislation, and violative of the Constitution."

We are unable to draw a distinction between the effect of that decision on the situation there considered and its application to the facts here.

The statute itself distinguishes between the rates of speed prescribed by the Legislature and those to be determined by the commission in such way as to be practically determinative of the question we are considering. It declares that the maximum rate of speed over bridges or over any portion of the highway—

"may be established by the state highway commission at *less than the rate established by law.*" (The italics are ours.)

Here seems to be a plain recognition by the Legislature that the rates of speed to be determined by the commission are not to have the effect of law. There are, therefore, two sufficient reasons why the detention of the petitioner is unlawful: Viewed as an attempt to legislate concerning the rate of speed for vehicles over the bridge, as part of the highway, the declaration of the commission was without authority, and void; accepted as a rule or regulation for vehicles using the bridge, the statute has fixed no penalty for its violation.

[3] For the proper enforcement of its laws, the Legislature may delegate a power to an officer, board, or commission to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. Field v. Clark, supra; U. S. v. Grimaud, 220 U. S. 506, 520, 31 Sup. Ct. 480, 55 L. Ed. 563; Harbor Com'rs v. Redwood Co., supra. But in such cases, the distinction between the legislative and administrative function must be recognized and enforced.

"The distinction is fundamental. Where the charge is of crime, it must have clear legislative basis." U. S. v. George, 228 U. S. 14, 22, 33 Sup. Ct. 412, 415, 57 L. Ed. 712.

The petitioner is ordered discharged.

We concur: WILBUR, C. J.; MYERS, J.; LENNON, J.; SEAWELL, J.; KERRIGAN, J.; LAWLOR, J.

---

190 Cal. 354

## In re CLARK'S ESTATE. (L. A. 7268.)

(Supreme Court of California. Jan. 29, 1923. Rehearing Denied Feb. 26, 1923.)

**1. Executors and administrators ⟸315(5)—Order of distribution is proceeding in rem.**

An order of final distribution of a decedent's estate is in rem.

**2. Executors and administrators ⟸314(12)—Heirs entitled to appeal from order for distribution of estate in which intestate interested, when administrator refuses.**

Where an administrator refuses to appeal from an order distributing an estate in which his intestate is interested, the heirs may maintain the appeal, especially in view of Code Civ. Proc. §§ 938, 1665, 1668, 1713–1715, under which successors in interest may petition for distribution, persons interested may appear and contest a petition for distribution, and parties aggrieved may appeal.

**3. Appeal and error ⟸162(3)—Appeal from order of distribution not precluded by accepting amount awarded to which appellants entitled in any event.**

Where persons appealing from a decree distributing a decedent's estate were in any event entitled to one-half of the estate as awarded them by the decree, they were not precluded from maintaining an appeal for the purpose of establishing a greater claim by accepting the amount awarded them.

**4. Judgment ⟸688—Suit by husband's administrator held conclusive against sister, claiming right to inherit from wife.**

A judgment for the defendant, in suit by husband's administrator against wife's administrator to recover property, involving the sole issue whether the property was the separate property of the husband or of the wife at the time of the husband's death, was conclusive against the husband's sister, asserting a right to inherit from the wife, under Civ. Code, § 1386, subd. 8, on the theory that the property came to the wife by descent from the husband, as her right depended on the property having been the separate property of the husband at the date of his death.

**5. Judgment ⟸677—Concludes persons claiming under title represented by defeated party.**

A judgment concludes, not only the adverse party, but all those claiming under the title which he represented.

**6. Judgment ⟸714(1)—Conclusive as to fact thereby affirmed, when again in issue, though incidentally.**

A judgment or decree necessarily affirming the existence of any fact is conclusive on the parties or their privies whenever the existence of that fact is again in issue between them, not only when the subject-matter is the same, but when the point comes incidentally in question in relation to a different matter.

**7. Judgment ⟸636—Probate court concluded by judgment of other court of competent jurisdiction adjudicating title, when that was the only evidence offered.**

Under Civ. Code, § 1386, subd. 8, providing that property which came to an intestate from his or her deceased spouse by descent, devise, or bequest shall descend to certain relatives of the deceased spouse, the probate court, in necessarily determining the source of the title to the property, is concluded by a judgment obtained in a court having jurisdiction to litigate the title, and adjudging that

the property was the separate property of the intestate prior to the death of the deceased spouse, where no other evidence than the judgment roll was offered or received.

In Bank.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

In the matter of the estate of Margaret T. Clark, deceased. From a decree of distribution, certain of the parties appeal. Reversed.

Geo. K. Ford, of San Francisco, and Arthur Wright, of Los Angeles, for appellant.

Edward L. Rives, James S. Bennett, and Frank Bryson, all of Los Angeles, for respondent.

LENNON, J. Margaret T. Clark, a resident of Los Angeles county, died intestate on September 9, 1914, leaving surviving her an aunt, Arvilla Armstrong Grover, a sister of said Margaret T. Clark's mother, and also Jessie Clark Newton, a sister of said Margaret T. Clark's deceased husband. Frank Bryson, public administrator, is the duly qualified and acting administrator of the estate of the deceased, which admittedly consisted entirely of personal property derived from Frank E. Clark, husband of the deceased, Margaret T. Clark, and which came to him by inheritance from the estate of his mother. Subsequent to the death of Margaret T. Clark, her aunt, Arvilla Armstrong Grover, died, leaving as her heirs nine children and five grandchildren, the appellants herein, all of whom reside outside of the state. On the 20th day of October, 1921, Frank Bryson, public administrator, was appointed, and ever since has been the duly qualified and acting administrator of the estate of said Arvilla Armstrong Grover, deceased.

A petition for distribution was filed by Bryson, as administrator of the estate of Margaret T. Clark, deceased, alleging that "the next of kin and heirs at law of said deceased are unknown," and praying that said estate be distributed "to the persons entitled thereto." The children and grandchildren of Arvilla Armstrong Grover, deceased, the appellants herein, as the successors in interest of said Arvilla Armstrong Grover, deceased, presented their petition for distribution to them of the entire estate of said Margaret T. Clark, deceased, upon the ground that said Arvilla Armstrong Grover was the only heir at law of said Margaret T. Clark, deceased.

The petition of appellants that all of the estate of Margaret T. Clark, deceased, be distributed to them, was opposed by Jessie Clark Newton upon the ground that the property in controversy, at the time of the death of Frank E. Clark, was his separate property, and, having come to said Margaret T. Clark by descent, she, Jessie Clark Newton, as sister of said Frank E. Clark, deceased, pursuant to the provisions of the concluding clause of subdivision 8 of section 1386 of the Civil Code, was the statutory heir of Margaret T. Clark, deceased, and therefore was entitled to have distributed to her that portion of the said estate. The petition of Jessie Clark Newton was in turn opposed by the heirs of Arvilla Armstrong Grover, deceased, upon the ground that the property in controversy at the time of the death of Frank E. Clark and prior thereto was the separate property of Margaret T. Clark.

Prior to distribution herein, the Pasadena Trust & Savings Bank was appointed and qualified as administrator of the estate of Frank E. Clark, deceased, and as such administrator commenced an action against Bryson, as administrator of the estate of Margaret T. Clark, deceased, to recover from Bryson the possession of all of the property of said last-mentioned estate upon the ground that at the time of the death of Frank E. Clark said property was his separate property and that said trust and savings bank, as the administrator of his estate, was entitled to its possession. The court in that action gave judgment in favor of the administrator of the estate of Margaret T. Clark, deceased, against the administrator of the estate of Frank E. Clark, deceased. The judgment was made and based upon findings "that at the time of her death said property was the separate property of said Margaret T. Clark," and that she "long prior to the death of Frank E. Clark, became the owner, in possession of, and entitled to the possession of said property." That judgment was, upon appeal, affirmed. At this point it should be noted that the opposition and answer of the appellants herein to the petition of the respondent, Jessie Clark Newton, pleaded "that said Jessie Clark Newton was, at the the time of the filing of her said petition for distribution herein, since has been and is now estopped" by said above-mentioned judgment from claiming said or any property of the estate of Margaret T. Clark, deceased.

Upon the hearing of the probate proceeding for distribution in the court below, the judgment roll in the action just above referred to was offered by appellants and received in evidence over the objection of respondent, Jessie Clark Newton, that it was "incompetent, irrelevant, and immaterial and did not constitute an estoppel between any of the parties to the present proceedings."

The court below, sitting in probate, having heard the evidence adduced in response to the issues raised by the petitions and counter-petitions for distribution, found among other things:

"That said judgment is not binding upon this court sitting in probate and the said Jessie Clark Newton is not estopped by said judgment to claim said estate as heir at law of the said Margaret T. Clark, deceased."

The court further found that at the time of the death of Frank E. Clark, his widow, Margaret T. Clark, succeeded to an equal one-half of the property and estate owned by said Frank E. Clark at the time of his death, and that as to the other one-half of the estate of Frank E. Clark, any right to recover possession thereof from the administrator of the estate of Margaret T. Clark had been lost by laches and barred by the statute of limitations. With these findings as a basis the court further found that Jessie Clark Newton, upon the death of Margaret T. Clark, by virtue of and pursuant to the concluding clause of subdivision 8 of section 1386 of the Civil Code, succeeded to the one-half of the estate of said Frank E. Clark, found to have been succeeded to by said Margaret T. Clark. This was virtually a finding that the property in question was the separate property of Frank E. Clark at the time of his death. It was accordingly decreed that one-half of the proceeds of the property and estate of Margaret T. Clark be distributed to Jessie Clark Newton and that the other one-half be distributed to the administrator of the estate of Arvilla Armstrong Grover. The administrator of the estate of Arvilla Armstrong Grover accepted the portion of the estate of Margaret T. Clark so distributed to him and subsequently, upon a petition for distribution in that estate, that portion was distributed to appellants.

The appeal now before us is from that part of the decree of final distribution made in the matter of the estate of said Margaret T. Clark, deceased, awarding to Jessie Clark Newton, respondent herein, "the sum of $11,245.41, being the proceeds of the property and estate of Margaret T. Clark, received by her by succession from her said husband, Frank E. Clark, together with the interest, income and other rents, issues and profits thereof, and amounting to one-half of the estate in the possession of said administrator at the time of the settlement of his final account herein."

It is insisted at the threshold that the appeal should be dismissed and a motion to dismiss has been made, based upon the following grounds: (1) That the heirs of Arvilla Armstrong Grover have no standing to maintain the present appeal, and (2) that said heirs are estopped to prosecute this appeal by reason of the fact that they accepted that portion of the estate awarded to them by the decree of distribution in question.

[1, 2] Pursuant to the provisions of the Code of Civil Procedure "successors in interest" are authorized to petition for distribution and "persons interested" are authorized to "appear and contest" the petition of another for distribution and "parties aggrieved" are authorized to appeal. Sections 1665, 1668, 1713 to 1715, 938, Code Civ. Proc. Nevertheless it is insisted by respondent that inasmuch as the exclusive control of actions for the collection of money due an intestate is in the administrator of the estate, this appeal should have been prosecuted by Frank Bryson, as administrator of the estate of Arvilla Armstrong Grover, deceased, in behalf of her heirs, and that the heirs themselves have no standing to maintain this appeal. This appeal, however, is not a civil action brought by the heirs for the collection of money due an intestate, but an appeal from an order of final distribution, which is a proceeding in rem. Hill v. Lawler, 116 Cal. 359, 48 Pac. 323. But if this had been an action to recover personal property rather than a proceeding for the distribution of the estate of deceased, respondent's contention that the administrator alone could prosecute the appeal cannot be sustained, for the reason that it is an admitted fact in the instant case that the administrator has declined to appeal. The general rule that the heir may not, in his individual capacity, bring an action to collect debts due the estate applies only in the absence of special circumstances. And the refusal of the administrator in the instant case to prosecute the appeal is such a circumstance. Holland v. McCarthy, 177 Cal. 507, 171 Pac. 421. Furthermore, if this had been a civil action, the heirs could by proper allegation and by making the administrator a defendant by reason of his refusal to act or join with the heirs, have maintained the action. Hall v. Southern Pac. Co., 40 Cal. App. 39, 42, 180 Pac. 20. There is no good reason, therefore, why they should not be permitted here, after his refusal to act, to maintain this appeal.

[3] Respondent's second ground for dismissal is also without merit. The appellants here, in any event, were entitled to the one-half of the estate of Margaret T. Clark, deceased, distributed to the administrator of the estate of Arvilla Armstrong Grover, and subsequently distributed to them in that estate. It is well settled that an appellant is not precluded from maintaining an appeal for the purpose of establishing a greater claim where it appears that he is entitled to that which he has accepted but is claiming something more. Estate of Ayers, 175 Cal. 187, 165 Pac. 528.

The motion to dismiss is therefore denied.

[4] In support of the appeal it is the contention of appellants herein that the judgment in the action between the administrator of the estate of Frank E. Clark, deceased, and the administrator of the estate of Margaret T. Clark, deceased, which adjudged the title to the property here in controversy to be in Margaret T. Clark, as her separate property, at the time of the death of her husband, was binding upon Jessie Clark Newton, represented as she was as heir of Frank E. Clark in that proceeding, by the administrator of the estate of her brother.

[5] This contention, we think, must be sustained. The pleadings and findings of the

court in that action between the respective administrators of the estates of Frank E. Clark, deceased, and Margaret T. Clark, deceased, show unmistakably that the sole and only issue raised by the pleadings and adjudicated in the action was whether or not the property in controversy here was the separate property of the husband, Frank E. Clark, at the time of his death, or had become, prior thereto, the separate property of his wife, Margaret T. Clark. In other words, the issue there was, in whom was the title and ownership of the property in controversy at the time of the death of Frank E. Clark, and the judgment was that the property at the time of the death of Frank E. Clark was the separate property of Margaret T. Clark, since deceased. In that action the judgment was binding not only upon the administrator who prosecuted the action, but upon the heirs as well of the intestate, Frank E. Clark, deceased. The administrator represented the title which the deceased, Frank E. Clark, had at the time of his death. The claimed titles to the property in dispute in the action in question were, of course, hostile to one another and had been directly opposed before the court rendering the judgment, in which the superiority of one title over the other was ascertained and fixed by the judgment. And whatever the rule may be in other jurisdictions, it is the rule in this state that the judgment concludes not only the adverse party but also all those claiming under the title which he represented. Cunningham v. Ashley, 45 Cal. 485; De Halpin v. Oxarart, 58 Cal. 101; Bayly v. Muehe, 65 Cal. 345, 3 Pac. 467, 4 Pac. 202, 486; Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738; Collins v. Scott, 100 Cal. 446, 34 Pac. 1085; Finger v. McCaughey, 119 Cal. 59, 51 Pac. 13; Dickey v. Gibson, 121 Cal. 276, 53 Pac. 704; McCaughey v. Lyall, 152 Cal. 615, 93 Pac. 681; Meeks v. Olpherts, 100 U. S. 564, 25 L. Ed. 735; Lloyd v. Ball (D. C.) 77 Fed. 365.

[6] That judgment is binding, not only in proceedings upon the same, but also upon a different cause of action in so far as it settles and determines questions of fact. 23 Cyc. 1288–1290. It is well settled that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again in issue between them, not only when the subject-matter is the same, but when the point comes incidentally in question in relation to a different matter in the same or any other court. Freeman on Judgments, §§ 249 and 253; Lamb v. Wahlenmaier, 144 Cal. 91, 77 Pac. 765, 103 Am. St. Rep. 66; Reed v. Cross, 116 Cal. 473, 484, 48 Pac. 491; Atchison, T. & S. F. Ry. v. Nelson, 220 Fed. 53, 135 C. C. A. 621. That is to say, "a matter of fact once adjudicated by a court of competent jurisdiction, concurrent or exclusive, may be relied upon as an estoppel in any subsequent collateral suit in the same or any other court, at law, in chancery, in probate or in admiralty, when either party, or the privies of either party, allege anything inconsistent with it, and this too whether the subsequent suit is upon the same or a different cause of action. The facts decided in the first suit cannot be disputed." Bigelow on Estoppel, pp. 110, 111, 112; Rauer v. Rynd, 27 Cal. App. 556, 150 Pac. 780.

In the application of the doctrine of res judicata there is, sometimes, a distinction to be made concerning the effect of the judgment in a former action. Thus: (1) A former judgment may be conclusive evidence that no cause of action exists. That is to say, it may be offered, not as estoppel to proof of any fact, but as proof of the nonexistence of a cause of action at all. Or (2) treated from the standpoint of its use as a piece of evidence, it may be produced when specifically pleaded as an estoppel, as was done in the instant case, as evidence of some material fact in the cause of action on trial, the truth of which both parties are estopped from denying. In the latter case the judgment gives an indefinite life and irrebuttable probative force to any fact found by the judgment to be true. The latter is the effect produced when the controversy is again raised in another suit upon a different cause of action. It is the latter use which was pleaded for the judgment in question by appellants here.

The presentation of a petition for distribution to herself as statutory heir of Margaret T. Clark, deceased, by Jessie Clark Newton, was tantamount to the institution of a proceeding which necessarily had for one of its purposes the relitigation of the ownership of the property in controversy here, title to which had been previously litigated and adjudged adversely to her. Section 1386 of the Civil Code, and particularly the concluding clause of subdivision 8, pursuant to the provisions of which Jessie Clark Newton claims to be entitled to share in the distribution of the estate of Margaret T. Clark, deceased, reads as follows:

"If the estate, or any portion thereof, was the separate property of such deceased spouse, while living, and came to such decedent from such spouse by descent, devise, or bequest, such property goes in equal shares to the children of such spouse and to the descendants of any deceased child by right of representation, and if none, then to the father and mother of such spouse, in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such spouse and to the descendants of any deceased brother or sister by right of representation."

Heirship depends upon certain facts. Here the relationship of heir of Jessie Clark Newton to Margaret T. Clark, deceased, under the provisions of the Code section just above quoted, depends upon two facts: (1) The

fact of the relationship of sister of Jessie Clark Newton to Frank E. Clark, deceased, which is admitted; and (2) the fact of the ownership of the property by Frank E. Clark, deceased, at the time of his death and the taking of that property by his wife by descent.

If, as found by the court sitting in probate, the property in controversy was the separate property of Frank E. Clark, deceased, at the time of his death, and had come to his wife, Margaret T. Clark, deceased, by succession, then, of course, under the provisions of the above-quoted Code section, Jessie Clark Newton was entitled to that portion so coming to the wife by succession. On the other hand, if the property in controversy was not the separate property of Frank E. Clark, deceased, at the time of his death, Jessie Clark Newton had no foundation for her claim as an heir of the estate of Margaret T. Clark, for if at the time of her death the property was the separate property of Margaret T. Clark and had not come to her by descent from her deceased husband, her aunt, Arvilla Armstrong Grover, was her sole heir. Civ. Code, § 1386, subd. 5. Therefore, the primary question presented to the probate court for decision upon the issues raised by Jessie Clark Newton's opposition to the petition for distribution was the question of whether or not the property in controversy was the separate property of Frank E. Clark, deceased, at the time of his death. This was, as before pointed out, the sole question at issue in the previous action brought by the administrator of the estate of Frank E. Clark, deceased, for the recovery of the property of the estate of Margaret T. Clark, deceased, from the administrator thereof.

[7] But it is insisted by respondents that the jurisdiction of the probate court to determine the heirs and to distribute the estate to them cannot be controlled by an adjudication of a co-ordinate court having neither controlling nor revisory jurisdiction in probate matters. Concededly the probate court had jurisdiction for the purpose of distribution to determine who were the heirs of Margaret T. Clark, deceased. But obviously before Jessie Clark Newton could be determined to be a statutory heir under the provisions of subdivision 8 of section 1386 of the Civil Code and distribution accordingly awarded to her, it was necessary for the probate court to ascertain, preliminarily and incidentally, from the evidence adduced in response to the issues raised by the petitions and counter petitions, the source of the title to the property sought to be distributed and thereby determine the character of the estate of which Margaret T. Clark, deceased, died possessed. That is to say, to determine whether or not such property came to her by descent from her husband and was his separate property at the time of his death. This, not for the purpose of finally adjudicating a disputed title, for this would be in excess of the jurisdiction of the probate court (Estate of Rathgeb, 125 Cal. 302, 57 Pac. 1010), but merely for the purpose of determining whether the property in question was of the character claimed for it by Jessie Clark Newton in support of her petition for distribution of said property to her as the statutory heir of Margaret T. Clark, deceased. The only evidence offered and received upon the hearing of the proceeding for distribution consisted of the judgment roll in the action wherein the title to the property in question was finally adjudicated to be in Margaret T Clark, as her separate property at the time of the death of her husband, and having been obtained in a forum which had jurisdiction to litigate said title, was therefore conclusive as a matter of evidence upon the probate court and should have compelled a finding that Jessie Clark Newton was not entitled to the distribution which she prayed for.

It is argued, however, by respondent that inasmuch as Jessie Clark Newton claims, not as heir of Frank E. Clark, deceased, but as statutory heir of Margaret T. Clark, deceased, that she is not in privity with the adverse party in the former proceeding and that the judgment therein is not res judicata as to her. While, theoretically, it may be that the parties in the present suit are not, by reason of the fact that they are all claiming as heirs of Margaret T. Clark, deceased, adverse parties in the strict sense, nevertheless under the circumstances of this particular case it cannot be denied that, as a practical matter of fact, the same adverse rights which were directly and adversely opposed in the former suit are the same as are adversely opposed in the proceeding here. The former action, brought by the administrator of the estate of Frank E. Clark, deceased, was brought by the administrator for the benefit of the heir of Frank E. Clark, Jessie Clark Newton, respondent herein. And in that action he was opposed by the administrator of the estate of Margaret T. Clark, deceased, not only for the benefit of Margaret T. Clark, deceased, but for the benefit of the ultimate heirs of Margaret T. Clark, appellants herein. Bowman v. Parks, 166 Iowa, 403, 147 N. W. 850.

Had the probate court found in accordance with the only evidence adduced upon the hearing for distribution, it must necessarily have found that the property did not come to Margaret T. Clark by descent from her husband, in which event Jessie Clark Newton, the respondent herein, was not entitled to participate in the distribution of the estate. That part of the decree appealed from must therefore be reversed, and it is so ordered.

We concur: WILBUR, C. J.; MYERS, J.; WASTE, J.; SEAWELL, J.; LAWLOR, J.; KERRIGAN, J.

60 Cal. App. 163

## PEOPLE v. ROSS. (Cr. 914.)

(District Court of Appeal, Second District, Division 2, California. Dec. 16, 1922.)

**1. Weapons ⟸17(4)—Evidence held sufficient to support verdict of guilty for carrying concealed weapon.**

Evidence in prosecution for carrying a concealed weapon by accused previously convicted of a felony, contrary to St. 1917, p. 221, § 3, *held* sufficient to warrant jury in concluding that accused carried a concealed pistol on his person.

**2. Weapons ⟸17(2) — Though information must allege lack of license to carry concealed weapon, burden on accused to prove falsity of averment.**

Though the clause of the statute (St. 1917, p. 221, § 3) which exempts from its penal provisions those persons who have been licensed to carry firearms is so incorporated into and made a substantial part of the definition of the offense of carrying a concealed weapon that it is necessary to allege in an information that accused was without a license to carry a weapon, and in pursuance of the statute the information contained an allegation that accused was without a license to carry the concealed weapon, such averment presented a negative, the burden of proving which was not on the prosecution, but on the defendant, since the truth or falsity of the averment lay more immediately within the knowledge of the accused himself.

**3. Criminal law ⟸330—When burden of proving facts within knowledge of defendant rests on him.**

Where the negative of issue does not permit of direct proof, or where the facts come more immediately within the knowledge of the defendant, the onus probandi rests on him.

**4. Weapons ⟸17(2)—Burden on accused to show license to carry.**

Since the burden of proving that accused had a license to carry a concealed weapon was on himself, it was immaterial, as against the contention of accused that the evidence to prove lack of license was insufficient, that the prosecution, when a city marshal testified he did not grant a license to accused, did not show that the city, of which the marshal was an officer, did not belong to that class of municipalities having a board of police commissioners, or a chief of police, or other head of the police department, by whom a license might have been issued.

**5. Criminal law ⟸656(3)—Court's remarks held not error.**

Remarks made by the court in a prosecution for carrying a concealed weapon, when the state objected to certain testimony, to the effect: "Well, allow him to testify. The very best way is to let it in, because it occurred right there simultaneously, at one time. The jury are not going to misunderstand the instructions of the court; they know what matters—that it is made a crime for him to carry a weapon of that character, if he has been convicted of a felony"—*held* not objectionable, as giving the jury to understand that the law makes it an offense simply to carry a weapon, concealed or unconcealed, where a moment previously the court properly used the word "concealed weapon," from which the jury must have understood the reference was to a "concealed weapon," and the court also carefully and accurately defined the offense described in the statute.

**6. Criminal law ⟸1129(3)—Assignment of errors held not sufficiently specific.**

Where the court charged the jury with respect to the presumption of innocence, assignments of error as to the court's refusal to give appellant's requested instruction will not be considered, where they are not set out in appellant's brief, but are referred to therein only as being on a certain page in the clerk's transcript; the appellate court being entitled to a more specific and illuminating assignment.

**7. Criminal law ⟸1036(1)—Objection to evidence, not raised in trial court, may be ignored by appellate court.**

The appellate court is justified in ignoring an objection that the court, contrary to Pen. Code, § 1025, permitted evidence of defendant's prior conviction to be placed before the jury, when such objection was not made in the trial court.

**8. Criminal law ⟸300, 1202(4)—Question of previous conviction of felony held an issue under plea of not guilty, and was a jury question.**

Where accused at time of arraignment, after being informed by the court of his legal rights, waived the reading of the information charging him with the offense of carrying a concealed weapon, and that he was previously convicted of a felony, and, upon being given a copy thereof, pleaded "not guilty as charged in the information," his plea put in issue the charge of the previous conviction as well as the principal offense, as provided in Pen. Code, § 1019, and the question whether defendant had been previously convicted was properly submitted to the jury, under section 1025.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Charles Ross was convicted of carrying a concealed weapon, and appeals. Affirmed.

D. M. Edwards, of Visalia, Ernest Klette, of Fresno, J. C. Thomas, of Susanville, and Nathan Merenbach, of Visalia, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. Defendant, who had previously been convicted of a felony, was charged by information filed in the superior court of Tulare county with carrying a pistol concealed upon his person, in violation of section 3 of the act of 1917 (St. 1917, p. 221), which reads:

"Every person who carries in any city, city and county, town or municipal corporation of this state any pistol, revolver, or other firearm concealed upon his person, without having

a license to carry such firearm as hereinafter provided in section six of this act, shall be guilty of a misdemeanor, and if he has been convicted previously of any felony, or of any crime made punishable by this act, he is guilty of a felony."

Having been found guilty as charged in the information, defendant is now before this court on his appeal from the judgment.

[1] The principal point relied on for a reversal is that the evidence is insufficient to justify the verdict. It seems that defendant, while standing in a street of the city of Tulare, produced from somewhere a pistol with which he repelled an attack made upon him by a man of the name of Jaynes. While standing beside an automobile belonging to one V. S. Jones, with his right arm, which had been broken, resting on the body of the car, conversing with Jones, defendant was shot by Jaynes, who fired four times at him from the rear of Jones' automobile. Wounded in the thigh by one of the shots from Jaynes' pistol, defendant, as the scene was described by one of the witnesses, "doubled over as though he was falling, and when he straightened back up he had a gun in his hand." Holding this "gun" in his left hand, defendant fired several shots at Jaynes. Jones testified that there was no weapon in his automobile, and that he did not see any weapon on defendant's person prior to the shooting. Immediately after the affray, defendant went to a poolroom, where he laid the weapon on the counter. When he left, he picked it up, and took it away with him. From the poolroom he went to a hospital to have his wound dressed. Dr. Zumwalt, a witness for the prosecution, testified that at the hospital the pistol was taken from a pocket of defendant's coat as it lay on a table, and that when in the pocket it was concealed from sight. The city marshal testified that shortly after the arrest he asked defendant why he was carrying a "gun," and that the latter replied that "at times he had sums of money on him, and he carried it for his protection." This witness further testified that he later said to defendant, "Ross, you know what this means, don't you; a man formerly convicted of a felony carrying a concealed weapon?" and that to this question defendant replied, "Yes, I know what it means; it means one to five." Another witness for the prosecution, an eyewitness to the shooting, testified that he saw defendant when the latter came up to Jones' automobile, and that at that time he saw no firearm lying around any place. The foregoing constitutes the substance of the people's case, except that it also was shown by a certified copy of the record that defendant had previously been convicted of a felony in the superior court for Imperial county. Defendant, who took the stand in his own behalf, testified that he never saw the pistol prior to the shooting, but that when Jaynes shot him as he stood talking to Jones beside the latter's car he "went right down over that way and picked a gun up; * * * picked it up with my left hand. * * * I picked it up on the running board"—referring to the running board on Jones' automobile.

We think it clear that the evidence was sufficient to warrant the jury in concluding that appellant was carrying a pistol concealed upon his person. It, of course, is within the range of possibility that the weapon was lying on the running board of the automobile, even though Jones did testify that there was no pistol in his car, and even though another witness for the prosecution testified that he saw no firearm lying around as defendant stood beside the automobile. But, though it is possible that the pistol lay on the running board just where appellant, at the moment of emergency, could reach for it, and thus, forsooth, unexpectedly discover at his hand a lethal weapon wherewith to defend himself against the unanticipated attack, the probability of such a miraculous find was for the determination of the jury. From a consideration of all the evidence the jurors might well have inferred that no pistol lay opportunely on the running board of his friend's car, ready for defendant's convenient use in the moment of his dire necessity, but that that worthy, with canny prescience, had prudently prepared himself for just such a contingency by concealing the weapon on his person ready for instant use. Did the jurors credit the prodigies attributed to the mythical Merlin, and had they beheld the marvelous apparition of King Arthur's fair sword Excalibur as it was presented to him from out the waters of the lake by the arm "clothed in white samite," they might have given faith to defendant's wondrous story of the appearance of the pistol; but to hard-headed, practical men of affairs the instant appearance of the weapon at defendant's feet, just when he needed it most, must have savored too much of the thaumaturgic art of the magician to justify ready credence.

[2-4] The only evidence offered by the prosecution to prove that defendant had no license to carry a firearm was that of the city marshal, who testified that no license had been issued by him to defendant. Appellant claims that this was not sufficient. Because it was not shown to what class the city of Tulare belongs, it is argued that the municipality may have had a board of police commissioners, or a chief of police, or other head of the police department, by whom a license might have been issued. The contention lacks merit. It was not incumbent upon the prosecution to show that no license had been issued to appellant. The clause of the statute which exempts from its penal provisions those persons who have been licensed to carry firearms is so incorporated into and made such a substantial part of the definition of the offense that it doubtless was necessary

to allege in the information that appellant was without a license to carry the pistol. There is such an allegation in the information, but it presents a negative which the prosecution was not called upon to prove, for the truth or falsity of the averment lay more immediately within the knowledge of the defendant himself. It is a well-settled rule of law that where the negative of an issue does not permit of direct proof, or where the facts come more immediately within the knowledge of the defendant, the onus probandi rests upon him. This doctrine is illustrated in cases of practicing medicine without a license, or of selling spirituous liquors without a license. People v. Boo Doo Hong, 122 Cal. 606, 55 Pac. 402; People v. Fortch, 13 Cal. App. 770, 110 Pac. 823; People v. Hing, 47 Cal. App. 327, 190 Pac. 662; People v. Goscinsky (Cal. App.) 198 Pac. 40; People v. Spagnoli (Cal. App.) 208 Pac. 185. In a prosecution for carrying a firearm concealed upon the person it would in many cases cast a great burden upon the people if they were required to prove that no license had been issued to the defendant. To do so the prosecution would have to show that the various magistrates who had jurisdiction to grant licenses had not in fact issued one in the particular case. If a license has been issued that fact is more immediately within the knowledge of the defendant and can be easily established by him; and there is no hardship or injustice in placing so slight a burden upon him. People v. Grass, 79 Misc. Rep. 457, 141 N. Y. Supp. 204.

[5] Appellant complains of injury arising from a remark made by the court during the progress of the trial. It seems that during the cross-examination of one of the people's witnesses the district attorney objected to a line of questions designed to bring out the fact that during his affray with Jaynes the defendant had been shot. In ruling on one of these objections the court said:

"Well, allow him to testify. The very best way is to let it in, because it occurred right there simultaneously, at one time. The jury are not going to misunderstand the instructions of the court; they know what matters—that *it is made a crime for him to carry a weapon of that character*, if he has been convicted of a felony."

Appellant now claims that by the words which we have italicized, "it is made a crime for him to carry a weapon of that character," the jurors were given to understand that the law makes it an offense simply to carry a weapon, concealed or unconcealed. But, when this part of the court's remarks is considered in connection with what had just preceded, it is evident that it is not subject to the construction placed upon it by appellant. In ruling upon a similar objection a moment or two previously the learned trial judge had said:

"The defendant is charged with carrying a *concealed* weapon—having a weapon of *that* character in his possession."

So that when, shortly after making this statement, the court said "it is made a crime for him to carry a weapon of *that* character," the jurors, as reasonable men, must have understood that the reference was to a "concealed weapon." Particularly is this so in view of the fact that in its formal charge to the jury the court carefully and accurately defined the offense described by the statute. The case clearly falls within the views announced in People v. Mayes, 113 Cal. 622, 623, 45 Pac. 860; People v. Woon Tuck Wo, 120 Cal. 294, 52 Pac. 833; and People v. Mooney, 132 Cal. 13, 17, 63 Pac. 1070. Nor was any objection made or exception taken to the court's remarks. As was said in People v. Kramer, 117 Cal. 651, 49 Pac. 843:

"The defendant cannot remain silent and take the chance of a favorable issue, and, losing, urge as ground for reversal an error which, but for his silence, might never have found its way into the case. His failure to object justly gives rise to the inference that at the time he saw no injury being done him, and he cannot complain on being met here by a barrier arising from his own omission."

To the same effect are People v. Miller, 177 Cal. 404, 408, 170 Pac. 817, and People v. Osborn, 12 Cal. App. 148, 106 Pac. 891.

[6] Error is claimed in refusing defendant's proffered instructions Nos. 3 and 6. These instructions are not set out in appellant's brief, and the only comment made upon them is the following:

"We believe the court erred in refusing the instruction offered by the defense and found on page 26 of the clerk's transcript. This instruction states the law as to presumption of innocence"—citing a case; and "the same is true of the instruction contained on page 29 of the clerk's transcript"—citing an authority.

We are not called upon to test the sufficiency of assignments of error thus made. The court charged the jury respecting the presumption of innocence; and, if appellant believes that the instruction as given was not sufficiently informing, we are entitled to know it by a more specific and illuminating assignment of error. People v. Wademan, 38 Cal. App. 132, 175 Pac. 791; People v. Zarate (Cal. App.) 201 Pac. 955.

[7, 8] Finally, it is urged that the court erred in permitting evidence of defendant's prior conviction to be placed before the jury. It is claimed that this was done in violation of section 1025 of the Penal Code. The point was never suggested by counsel in the trial court. It apparently is an afterthought, and is made for the first time in appellant's reply brief. For this reason we would be justified in ignoring it. We have, however, given the point consideration, and on examining the record find that there is no ground for the ob-

jection. The Penal Code provision which it is claimed was not observed (section 1025) provides that if a defendant, charged with having suffered a previous conviction, pleads not guilty of the offense for which he is informed against, but answers that he has suffered such previous conviction, then "the charge of the previous conviction must not be read to the jury, nor alluded to on the trial." The minute entry made by the clerk at the time of the arraignment states that defendant was informed by the court of his legal rights, and that after being so informed he waived the reading of the information, and upon being given a copy thereof pleaded "Not guilty as charged in the information." This plea put in issue the charge of the prior conviction, as well as the principle offense. Pen. Code, § 1019; People v. Gutierrez, 74 Cal. 81, 15 Pac. 444; People v. Wheatley, 88 Cal. 114, 26 Pac. 95. The question as to whether or not defendant had suffered such prior conviction was therefore properly submitted to the jury.

In conclusion, we have only to add that defendant has been convicted by a jury, and that there is nothing in the record before us to induce the belief that he did not have a fair and impartial trial on the merits, or that he was deprived of any legal or technical benefit or advantage given him by the law.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

---

(60 Cal. App. 231)

## NEWTON v. DE ARMOND et al.
(Civ. 4330.)

(District Court of Appeal, First District, Division 2, California. Dec. 26, 1922. Rehearing Denied Jan. 24, 1923. Hearing Denied by Supreme Court Feb. 21, 1923.)

**Judgment ⇐143(9)—Where defendant in good faith believed that insurance company which had insured codefendant would defend on behalf of all defendants, and therefore did not appear, default judgment should have been vacated.**

Where one defendant in good faith believed, from what an insurance agent told him, that the insurance company, having insured a codefendant who would defend the action on behalf of all the defendants, and therefore did not appear to defend, the court should have set aside the default.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by C. C. Newton against R. C. De Armond, James H. Buckley, and others. A default judgment was entered against second named defendant, whose motion to set aside the default and to vacate the judgment was denied, and he appeals. Reversed.

A. D. Barber, of Watsonville, for appellant.

O. C. Wilson, of San Francisco, and C. Huntington Jacobs, of Berkeley, for respondent.

STURTEVANT, J. A default judgment was entered against the defendant; he made a motion to set aside the default and to vacate the judgment; his motion was denied, and the defendant has appealed.

Heretofore (the exact date is not shown) the defendant was the owner and in possession of a certain Fageol motor truck; he sold the truck under an executory contract to R. C. De Armond, who did, at a date prior to the 28th day of September, 1921, take out a license in his own name, but registered the truck in the records of the motor vehicle department, showing James H. Buckley, this defendant, to be the legal owner. Just when the license was taken out the record does not show. On the 18th day of August a collision occurred between the Fagoel truck and a Packard truck owned and operated by the plaintiff. It is not claimed that the defendant was driving or was personally operating the Fageol motor truck at the time of the accident. The record contains much hearsay in the form of letters, written by third persons after the accident, which does not throw any light on the matter now before the court. However, the record shows that a complaint was filed December 19, 1921, in the superior court of Santa Clara county, and that a summons issued on the same day. The summons was served on the appellant in Santa Cruz county on December 22, 1921. The last day for the appellant to appear and answer was January 21, 1922. By the affidavit of the appellant it appeared that Mr. E. P. Pfingst was the resident agent at Watsonville of certain insurance companies, and "is an educated business man of high standing in the city of Watsonville"; that immediately after appellant was served with summons and complaint he saw Mr. Pfingst, informed him of the fact of the service, and that Mr. Pfingst stated to appellant that De Armond was insured, and that Pfingst had attended to the matter; that the appellant accepted the statement of Pfingst as meaning that the case would be defended on behalf of all of the defendants, and that appellant acted accordingly. The plaintiff caused appellant's default to be entered January 25, 1922, and a judgment to be entered on the default, February 2, 1922, and, immediately thereafter, he caused a copy of the notice of judgment to be mailed to the appellant at his post office address at Watsonville. When the appellant received the notice in question he took it at once to Mr. Pfingst, who, in turn, sent the same to the office of the attorneys of the insurance company in San Francisco, and it was

not until the company's attorneys wrote back, on February 7, 1922, that Mr. Pfingst came to appreciate the fact that the attorneys representing the insurance company would appear for Mr. De Armond only. As soon as Mr. Pfingst learned of the necessities of Mr. Buckley he did, on February 16, 1922, mail to him a letter informing him of the necessity of his employing his own attorney. But at that time the default and judgment had been entered.

In addition to what we have said regarding the facts showing inadvertence, surprise, and excusable neglect, it is of much importance to state that when the appellant made his motion to vacate the judgment he tendered a verified answer, which alleged most positively that at the time of the accident the driver of the truck was not acting as his agent or in his employment, nor was anyone else operating the truck as the agent or servant of the appellant. Of course, if that allegation is true, then the appellant had a complete defense to the action on the merits thereof.

No fact of any kind or nature appears in the record which shows or tends to show that Mr. Buckley did not in the best of good faith receive the assurance above mentioned from Mr. Pfingst, or that he did not believe the statements made by Mr. Pfingst, or that he did not have a right to believe and act on the same. Under such a record the appellant was entitled to have his default set aside, and the trial court had no evidence before it which justified the trial court in refusing to vacate the default.

For the reasons stated the order is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

---

60 Cal. App. 183

## PAVILION ICE RINK v. O'BRIEN et al.
(Civ. 4323.)

(District Court of Appeal, First District, Division 2, California. Dec. 19, 1922.)

**Injunction ⟸77(2)—Petition to restrain police officers from interfering with dance hall stated cause of action.**

A complaint for injunction to restrain police commissioners, the chief of police, and policemen from trespassing on plaintiff's premises, which alleged that the refusal to issue a dance hall permit to plaintiff on January 1, 1921, was in effect a revocation of his right to do business, and that such revocation was arbitrary and capricious and without just cause, as required by the San Francisco Charter, stated a cause of action.

Appeal from Superior Court, City and County of San Francisco; F. J. Murasky, Judge.

Suit for injunction by the Pavilion Ice Rink, a corporation, against Daniel J. O'Brien and others, Board of Police Commissioners of the City and County of San Francisco, and others. Demurrer to complaint sustained, judgment for defendants, and plaintiff appeals. Reversed.

H. I. Stafford, Edward A. Cunha, and John T. Williams, all of San Francisco, for appellant.

Matthew Brady, Dist. Atty., Joseph T. O'Connor, Deputy Dist. Atty., and George Lull, City Atty., all of San Francisco, for respondents.

NOURSE, J. Plaintiff commenced this action to obtain an injunction restraining the defendants, who are the police commissioners, the chief of police, and officers of the police department of San Francisco, from trespassing upon plaintiff's premises, and from interfering with plaintiff's business of conducting a public dance hall in said city. It is alleged in the amended complaint that ever since April 21, 1918, plaintiff had been engaged in the business of conducting a public dance hall on the premises under a quarterly permit duly issued therefor by the board of police commissioners commencing on said date and continuing until January 1, 1921; that on the latter date the said Board refused to issue a permit to plaintiff, and that said action was arbitrary, capricious and without good cause. It is the theory of the amended complaint that these permits, though issued quarterly, were in effect merely renewals of the original permit of April 21, 1918, upon the faith of which large investments had been made by the plaintiff and a profitable business had been established.

The action was commenced at the same time as that of Pavilion Ice Rink v. Bryant et al. (No. 3976) 209 Pac. 76, which was decided by this court on July 20, 1922. The latter action was one in mandate to compel the tax collector and the board of police commissioners of San Francisco to issue the permit required for the period commencing January 1, 1921. In that action the trial court sustained a demurrer to plaintiff's complaint without leave to amend, and the judgment following upon that order was reversed by this court on the ground that the complaint alleged facts showing that the action of the police commissioners was arbitrary and capricious, and that a lawful business properly conducted and not injurious to property, persons, or public welfare was thereby confiscated. In this action for an injunction the trial court also sustained the defendants' demurrer, and the appeal is from the judgment which followed for the defendants.

On this appeal the appellant urges the same grounds for reversal as were urged in the mandamus action. The amended com-

plaint is practically identical with the complaint which was considered in the former case. Though it may be conceded that a permit is necessary to conduct the business of a public dance hall, it is argued that the issuance of these permits for quarterly periods was merely a renewal of the original permit issued on April 21, 1918, and that the refusal to issue a permit on January 1, 1921, was in effect a revocation of appellant's right to do business. It is then said that such revocation was had arbitrarily and capriciously and without just cause, as required by the San Francisco charter. If, as held in the mandamus case, the complaint stated facts sufficient to entitle the appellant to the issuance of a permit for the period commencing January 1, 1921, it follows that the amended complaint in this action is sufficient to entitle the appellant to an injunction restraining these respondents from interfering with appellant's business until that right is legally revoked.

Judgment reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

---

60 Cal. App. 185

## PAVILION ICE RINK v. O'BRIEN et al. (Civ. 4324.)

(District Court of Appeal, First District, Division 2, California. Dec. 19, 1922.)

**1. Appeal and error ⇐920(3)—Where hearing on pleadings used as affidavits, order of trial court not disturbed on appeal.**

Where the answer to a complaint for injunction denied all the material allegations of the complaint, and both the complaint and answer were used as affidavits on hearing and were the only evidence on which the trial court's order was based, as no findings were required, it must be presumed on appeal, in support of the order of the trial court, that it found the allegations of the complaint to be untrue and the allegations of the answer to be true, and hence order of the trial court may not be disturbed.

**2. Appeal and error ⇐954(1)—Injunction ⇐135—Granting temporary injunction addressed to trial court's discretion.**

Granting or refusing a temporary injunction is a matter addressed to the discretion of the trial court, whose action may not be disturbed on appeal, except when an abuse of that discretion is shown.

Appeal from Superior Court, City and County of San Francisco; F. J. Murasky, Judge.

Suit for injunction by the Pavilion Ice Rink, a corporation, against Daniel J. O'Brien and others, as the board of Police Commissioners of the City and County of San Francisco, and others. From an order refusing a preliminary injunction, plaintiff appeals. Order affirmed.

H. I. Stafford, Edward A. Cunha, and John T. Williams, all of San Francisco, for appellant.

Matthew Brady, Dist. Atty., Joseph T. O'Connor, Deputy Dist. Atty., and George Lull, City Atty., all of San Francisco, for respondents.

NOURSE, J. This is an appeal from an order of the superior court refusing a preliminary injunction to restrain the police commissioners, chief of police, and officers of the police department from trespassing upon plaintiff's premises and from interfering with its business of conducting a public dance hall in the city and county of San Francisco.

[1] Application for a temporary injunction was made in the action numbered 4323 (212 Pac. 631), just decided, and was heard upon the amended complaint, which was considered in that case, and upon the answer of the defendants. The answer denied all the material allegations of the amended complaint, and both the amended complaint and answer were used as affidavits upon the hearing, and constituted the only evidence upon which the order of the trial court was based. As no findings are required in a proceeding of this nature, we must presume in support of the order of the trial court that it found the allegations of the amended complaint to be untrue and the allegations of the answer to be true. Such being the case, this court may not disturb the order of the trial court.

[2] The granting or refusing to grant a temporary injunction is a matter which is addressed to the discretion of the trial court (Kendall v. Foulks, 180 Cal. 171, 174, 179 Pac. 886), and the action of the trial court may not be disturbed on appeal, except when an abuse of that discretion is shown. This is especially true where the motion for a temporary injunction is based upon the complaint alone and a verified answer denying all the material allegations of the complaint. Kendall v. Foulks, supra.

Order affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

---

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

60 Cal. App. 206

## WILCOX v. HARDISTY et al.
(Civ. 2513.)

(District Court of Appeal, Third District, California. Dec. 22, 1922. Hearing Denied by Supreme Court, Feb. 16, 1923.)

**1. Deeds ⟸208(5)—Delivery to third person to deliver at grantor's death justifies inference of parting with control.**

Evidence that a grantor delivered a deed to a third person, with instructions to the latter to deliver to the grantee after the grantor's death, is sufficient, without any other evidence of intention, to justify the inference that the grantor thereby intended to part with all right thereafter to control the deed.

**2. Appeal and error ⟸996—Whether permissible inference is overcome by other proof is within exclusive province of trial court.**

Whether the permissible inference that grantor intended to part with all control over the deed by delivering it to a third person is overcome by other proof involves the question of weighing the evidence, a matter which is within the exclusive province of the trial court.

**3. Deeds ⟸56(2)—Intention of grantor at time of parting with possession controls.**

The intention of the grantor, which is controlling on the question of delivery is that existing at the very time of the delivery of the deed to the depository, and prior and subsequent acts and statements by the grantor are important only as throwing light upon the intention at that time.

**4. Deeds ⟸61—Uncertainty of depository as to effect of delivery is immaterial.**

The fact that the attorney, to whom the grantor delivered deeds to be by him delivered to the grantees upon the grantor's death, was uncertain as to the effect of such delivery, and thought he would have returned the deeds to the grantor if she had requested them, is immaterial on the issue of delivery by the grantor; the question being the grantor's intention and what the depository would have had a right to do.

**5. Appeal and error ⟸205, 1031(4)—Sustaining objection to question held not prejudicial in absence of offer of proof.**

In a suit to quiet title involving the issue of delivery of the deed under which plaintiff claimed, a question asked defendant's witness as to whether anything was said by grantor at the time certain deeds were destroyed was so framed as not to indicate that the information sought was immaterial to any issue, so that no prejudice by the exclusion of such evidence was shown, in the absence of a showing as to what the answer would have been, and no prejudice can be presumed.

**6. Deeds ⟸181—Evidence as to parties requesting witness to examine deeds before their destruction held immaterial.**

Where a witness had testified that she had examined certain deeds before they were destroyed by the grantor, it was immaterial who requested her to make the examination.

**7. Trial ⟸396(3)—Findings as to delivery of deed held sufficient under the pleadings.**

Where defendant's cross-complaint alleged that grantor attempted to convey the lands in controversy to plaintiff, but that the deed prepared for that purpose was never signed, sealed, nor acknowledged by the grantor, that she requested an attorney to keep the deed until she sent for it, and he promised to return it upon her demand, a finding that the deed was duly executed and delivered to the attorney, to be held by him until the grantor's death, and then be delivered to the respective grantees therein named, and that it was duly executed by the grantor and duly delivered to the plaintiff, was as definite as the pleadings and responsive to the issues thereby raised, though there was no express finding that the grantor intended to part with all control over the deeds when she gave them to the attorney.

**8. Quieting title ⟸49—Plaintiff can attack subsequent deed only in so far as it affects her lands.**

Plaintiff, in a suit to quiet title, can attack a subsequent deed to defendant only in so far as it affects the lands previously conveyed to plaintiff, and a judgment that the deed was null and void will be modified by inserting thereafter the words "in so far as it purports to convey lands previously conveyed to plaintiff," even though the judgment would not be conclusive as to the rights of those not parties to the suit.

Appeal from Superior Court, Calaveras County; A. I. McSorley, Judge.

Action to quiet title by Ida I. Wilcox against Etta Hardisty, formerly Etta Jenkins, and others. Judgment for plaintiff, and the named defendant appeals. Modified and affirmed.

R. L. Beardslee and Nutter & Hancock, all of Stockton, for appellant.

Snyder & Snyder, of Stockton, for respondent.

FINCH, P. J. In this action the plaintiff was adjudged to be the owner of certain lands in Calaveras county under a deed alleged to have been executed by her mother, Julia A. Jenkins.

In January, 1896, Mrs. Jenkins, a widow, and her daughter Etta, defendant herein, resided on the former's ranch in Calaveras county. Two other daughters, the plaintiff and Mrs. Emma Parker, resided elsewhere. At the request of Mrs. Jenkins, Frank F. Carnduff, a lawyer, having offices at Biggs, Butte county, went to the ranch and prepared four deeds. By reason of a crippled condition of her hands, Mrs. Jenkins was unable to write, and she signed these deeds by her mark, on the 18th day of January, 1896; Carnduff writing her name and signing his own as a witness. These deeds purported to convey 1,350 acres of land, a certain part to one Hiram Tyrer and the remainder in separate parcels to the three daughters; that

conveyed to plaintiff being the land in suit. There being no notary public present, Mrs. Jenkins requested Carnduff to make proof of the execution of the instruments so as to entitle them to be recorded. He took the deeds away with him, and January 25, 1896, made such proof before a notary public at Biggs; the notary attaching his certificates to the deeds. The deed to Tyrer was mailed to Mrs. Jenkins, and the others retained by Carnduff. Carnduff testified:

"As to the deeds to Etta Jenkins, Mrs. Parker, and Mrs. Wilcox, she [Mrs. Jenkins] instructed me to have them acknowledged, keep them in my possession until her death, and to give them to no living person but Ida Wilcox, in case of her death, or I wanted to be released from the trust, * * * and after her death, to give them to the parties named therein. * * * 'In case of my death,' I said in my testimony, * * * or, wishing to surrender my trust, I should deliver them over to Mrs. Wilcox. * * * After they were acknowledged, I put them into an envelope, * * * and I wrote on it the instructions, as near as I can remember, that Mrs. Jenkins had given me. I wrote on them fully in case of my death who they were to be delivered over to."

He testified that he again went to Mrs. Jenkins' home at her request, and under her direction drafted three other deeds to her daughters, making a different division of the land, by which Etta was given a larger part thereof; that these deeds were executed February 8, 1896, in the same manner as those of January 18th; that Mrs. Jenkins at that time said that Etta was dissatisfied with the division, of the property theretofore made, and was "raising the devil with her," and that she had to make a change to satisfy her, "as she had to live with her"; that Mrs. Jenkins instructed him to take the deeds of February 8th, "have them acknowledged, and hold them until she sent for them"; that after she had signed the new deeds, "I said to Mrs. Jenkins, 'What shall I do with those three deeds of January 18th?' She says, 'You keep them and carry out my instructions;' and I says, 'Well, now, I presume you are going to write for these deeds; now, suppose I get a letter from some one representing you, asking that I return the deeds of January 18th, what shall I do about it?' She says, 'You return no deeds to any person;' that is meaning the deeds of January 18th, that I had in my charge;" that in June, 1896, he received a letter from Mrs. Jenkins, requesting him to return the deeds of February 8th, and that he then mailed them to her; and that in August, 1905, he delivered the deeds of January 18th to the plaintiff, he then being about to travel extensively with his family. Carnduff further testified that he "understood that those deeds were to be escrow deeds," and that "Mrs. Jenkins had no right to make second deeds of the same property;" that if she had demanded the return of the deeds of January 18th, "I should have given them to her. * * * I claim that a person has a right to divide or handle his property until they are dead. That is my doctrine." When asked if he told Mrs. Jenkins that he "understood the law to be that she could have the deeds back at any time that she wanted them," he replied, "I did not discuss the law with her." He testified that there was no understanding that the deeds were to be returned to Mrs. Jenkins if she so requested. The record book of the notary public at Biggs was admitted in evidence. It showed that Carnduff made proof of the execution of the deeds of January 18th and those of February 8th, as testified by him. Carnduff testified that the defendant was not present when Mrs. Jenkins instructed him what to do with the deeds of January 18th.

Relative to the deeds of January 18th, the defendant testified:

"Mr. Carnduff gave my mother the deeds. She said she did not have a safe place to keep them. He said, 'Well, you can give them to me, as Mr. Jenkins did, if you wish,' or words to that effect. * * * She says, 'I guess I should, but if I want these deeds, can I have them?' * * * He says, 'Any time you want these deeds, you can always have them;' and she says, 'With that understanding, I give you the deeds; take care of them for me.' * * * They were returned to my mother * * * some time in June, * * * the same year. * * * We buried them * * * in the bedroom; we took up the carpet and a board and dug a hole and buried them. * * * The following August * * * my mother destroyed them, she burned them. Mr. Carnduff was not at the house of my mother * * * in the month of February, 1896."

August 23, 1897, Mrs. Jenkins executed a deed conveying a larger part of the land to defendant than was conveyed to her by that of January 18, 1896. October 27, 1898, Mrs. Jenkins made her will, by which she attempted to dispose of the ranch, giving the defendant the same lands described in the deed of August 23, 1897, and appointing her executrix without bonds. July 7, 1899, Mrs. Jenkins executed a codicil, making some changes in her will, but not cutting down the acreage devised to defendant. Mrs. Jenkins died February 5, 1907, and her said will, together with the codicil, was thereafter duly admitted to probate. February 6, 1907, the plaintiff caused the deed to her, of January 18, 1896, to be duly recorded and on the 12th day of February, 1907, the defendant caused the deed of August 23, 1897, to be recorded.

[1, 2] From the foregoing conflicting testimony it devolved upon the court to determine whether the deed under which plaintiff claims title was one of the instruments executed January 18, 1896, and, if so, whether Mrs. Jenkins delivered it to Carnduff, "intending at the time of such delivery to the custodian to part forever with all right or power thereaft-

er to repossess, retake, or control the deed." Long v. Ryan, 166 Cal. 442, 444, 137 Pac. 29. While there is sufficient evidence to support a contrary finding, this court cannot say that the evidence is not sufficient to sustain the finding that the deed was so executed and delivered. Bury v. Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186; Husheon v. Kelley, 162 Cal. 656, 124 Pac. 231; Estate of Cornelius, 151 Cal. 550, 91 Pac. 329; Rice v. Carey, 170 Cal. 748, 151 Pac. 135. Evidence that a grantor delivered his deed to a third person, with instructions to deliver it to the grantee after the grantor's death, without any other evidence of intention, is sufficient to justify the inference that the grantor thereby intended to part with all right thereafter to control the deed. Whether such inference is overcome by other proof involves the question of weighing the evidence, a matter within the exclusive province of the trial court. In Saltzsieder v. Saltzsieder, 219 N. Y. 523, 114 N. E. 856, it is said:

"The evidence must show that the owner intended in the delivery to divest himself of his right to withdraw, revoke, or control the instrument as completely as though he were delivering it to the person named as grantee, and by words or act expressly or impliedly acknowledged his intention. Whether or not the intention existed and was expressed is a question of fact solvable by a consideration of the other facts. * * * In the present case the owner gave to a third person the instrument, adequate in form to convey the land to the persons named as grantees, with accompanying instructions to the third person to hold it until the owner's death and hand it over then to those persons. The act and language, considered by themselves, are adequate to expressly acknowledge the intention of the owner to be immediately and unconditionally bound by the provisions of the instrument."

In Wilson v. Bridgeforth, 108 Miss. 199, 66 South. 524, the grantor, after executing deeds and his will, handed them to his attorney and said:

"Here are some papers I want you to keep and give to my children after my death."

The court said:

"All that is necessary in order for the depositary to become the agent of the grantee is for the deed to be deposited with him for delivery to the grantee 'without a reservation by the grantor, express or implied, of the right to retake it or otherwise control its use.' * * * This delivery of the deeds was certainly unaccompanied by an express reservation on the part of the grantor of the right to retake or otherwise control them; and we fail to find anything in the evidence from which such a reservation can be inferred, except the mere fact that the will was deposited with Wilson along with the deeds."

The trial court in that case adjudged that the "deeds never became operative, for the reason that they were never intended to be, and in fact were not, delivered by the grantor." The judgment was reversed on appeal for the reasons stated.

[3] The intention of the grantor which is controlling is that existing at the very time of the delivery to the depository. Prior and subsequent acts and statements by the grantor are important only as throwing light upon his intention at the time of such delivery.

"A subsequent change of intention could not affect the delivery thus completed, and even a mental reservation of the testator contrary to that expressed by his words and deeds, existing only in his mind, would not invalidate the delivery effected by his acts and the words actually used." Hudson v. Hudson, 287 Ill. 286, 122 N. E. 497; Norton v. Collins, 81 Kan. 33, 105 Pac. 26; White v. Watts, 118 Iowa, 549, 92 N. W. 660.

[4] Carnduff seems to have been uncertain as to the legal effect of the delivery to him of the deeds of January 18, 1896. It was within the province of the court, not that of the witness, to determine such effect. What he understood the effect of the transaction to be was important only as bearing upon the value of his testimony as to what was actually said and done. Evidence of what he "thought and of what he would have done with the deeds is of very little value, for we are concerned here only with what he had the right to do with them." Wilson v. Bridgeforth, supra; Peterson v. Bisbee, 191 Mich. 439, 158 N. W. 134; White v. Watts, supra; Adams v. Harris, 118 Wash. 189, 203 Pac. 48. Appellant relies on the case of Williams v. Kidd, 170 Cal. 631, 151 Pac. 1, Ann. Cas. 1916E, 703, In that case the trial court found that the deed there in question was not delivered with a present intention to pass title, and the higher court did not hold that the evidence was insufficient to support a contrary finding, but said:

"Taking into consideration all these circumstances, it cannot be said but that they fairly warrant the inferences drawn by the trial court and on which its finding of nondelivery was based."

[5] It is contended that the court erred in sustaining plaintiff's objection to defendant's question as follows:

"Q. Was anything said by your mother at the time those deeds were destroyed?

"Mr. Snyder: That is objected to upon the ground that it is irrelevant, incompetent, and immaterial and hearsay testimony.

"The Court: Objection sustained. * * *

"Mr. Hancock: We take an exception to the ruling of the court on the last question.

"The Court: You do not contend seriously that that is admissible, do you?

"Mr. Hancock: Well, there is a question in my mind about it.

"The Court: The record may show that you have an exception. The court is clear on the question.

"Mr. Hancock: I want it a matter of record; that is all."

The question was not so framed as to indicate that the evidence sought to be elicited was material to any issue in the case, and counsel did not suggest to the court what he sought to prove. The question was broad enough to include matters wholly foreign to the case. Prejudice is not to be presumed, and there is nothing in the record from which this court can say that the evidence sought was material.

[6] Mrs. Fouts testified that she was present in August, 1896, when Mrs. Jenkins burned three deeds; that "they were opened, and we looked at them and burned them one by one." She was then asked: "Were you requested to look at them?" To this question the court sustained plaintiff's objection "on the ground that it is irrelevant, incompetent, and immaterial." The testimony of the witness shows that she had looked at the deeds, and knew at least some of the contents thereof, and no reason is suggested why it was material to show who requested her to look at them. Other rulings of which complaint is made are similar to those discussed and it is sufficient to say that they were not erroneous.

[7] At the oral argument, appellant urged that the findings are insufficient, in that there is no express finding to the effect that Mrs. Jenkins intended to part with all control over the deeds at the time she gave them into the possession of Carnduff on January 18, 1896. Appellant's cross-complaint alleges that Mrs. Jenkins, on January 18, 1896, "attempted to give, grant, alien and confirm" the lands in controversy to plaintiff, but that the deed prepared for that purpose was "never signed, sealed, nor acknowledged by said Mrs. Julia A. Jenkins"; that she requested Carnduff to keep the deed until she sent for it, and that he promised to return it upon her demand; that he thereupon returned the deed to her at her request, and that she destroyed it. The court found that the deeds of January 18, 1896, were duly executed by Mrs. Jenkins, and that they were thereupon "delivered to said Frank F. Carnduff, to be held by him until the death of said Julia A. Jenkins, to be then by the said Frank F. Carnduff delivered to the respective grantees therein named, and in case of the death of said Frank F. Carnduff before the death of Julia Jenkins, or if for any reason the said Frank F. Carnduff should so desire, the said deeds were to be delivered by said Frank F. Carnduff to said Ida I. Wilcox to be held by her until the death of Julia A. Jenkins." The court further found that the deed upon which plaintiff relies "was duly executed by the said Julia A. Jenkins, and duly delivered to the said Ida I. Wilcox." The foregoing findings are as definite as the pleadings, and are responsive to the issues thereby raised. In Williams v. Kidd, 170 Cal. 631, 638, 151 Pac. 1, Ann. Cas. 1916E, 703, the trial court found that Williams executed the deed there in question and handed it to Kidd, with directions to deliver it to the grantee after Williams' death. The court said:

"It may be true that if the only evidence in the case and the only facts found were as recited above with reference to the making of the deed—the instructions of Williams and the carrying out thereof by Kidd—it might be held that these were sufficient to show that the deposit of the deed with Kidd was accompanied by an intention on the part of Williams that title to the property should thereby vest immediately in the grantee."

In Newman v. Fidler, 177 Ind. 220, 97 N. E. 785, where a deed and a will had been handed to a depository, the court found:

"That after said deed was signed and acknowledged * * * the said decedent handed said deed to Robert J. Loveland, with instructions to deliver them after her death."

It was contended that the finding did not show that the grantor had relinquished control of the deed. The court said:

"The facts found here show * * * that, after Mrs. Newman had executed her will, and signed and acknowledged the deed, she handed the latter to a third person, and instructed him to deliver it after her death. She thereby parted with any right to the possession of the instrument."

Since the findings are responsive to the issues raised by the pleadings, it must be presumed in support of the judgment that the delivery found to have been made was an effective delivery.

[8] The court adjudged the deed of August 23, 1897, "to be null and void and of no force and effect." This is assigned as error. That deed purports to convey to defendant certain lands included in the deed upon which plaintiff's cause of action is based and other lands not in controversy here. There was no issue presented by the pleadings as to any land except that which was common to both deeds, and the findings and judgment should have been limited accordingly. The court found that the deed of August 23d was duly executed and delivered. While it was not effective to transfer title to lands theretofore conveyed to plaintiff, the plaintiff has no standing to contest its validity as to other lands. While respondent contends, and correctly, that the judgment has no validity except as between the parties and with respect only to the land in controversy, the judgment should be expressly limited to that particular land.

The judgment is modified by inserting, after the word "void" therein the words "in so far as it purports to convey to defendant any of the lands described in the aforesaid deed, executed on the 18th day of January, 1896, by Julia A. Jenkins to the plaintiff," and, as so modified, the judgment is affirmed, respondent to recover costs on appeal.

We concur: HART, J.; BURNETT, J.

60 Cal. App. 129

## SIMMONS et ux. v. PACIFIC ELECTRIC RY. CO. et al. (Civ. 3872.)

(District Court of Appeal, Second District, Division 2, California. Dec. 12, 1922. Hearing Denied by Supreme Court. Feb. 12, 1923.)

**1. Street railroads ⊂=117(26)—Driving upon track not negligence per se.**

It is not negligence per se merely to drive a vehicle astride of or in close proximity to street car tracks.

**2. Street railroads ⊂=85(3)—Other vehicles entitled to use street.**

A street car company has the right to use the street only in common with the public, and other vehicles have the right to travel over the entire street, though they must not unnecessarily interfere with or obstruct a street car in its movement.

**3. Street railroads ⊂=117(29)—Failure of vehicle driver to look behind not negligence per se.**

It is not negligence per se for the driver of a motor bus, while driving upon a street car track, to fail to keep a constant watch behind for approaching street cars.

**4. Carriers ⊂=235, 280(1), 300—Bus driver is a common carrier required to exercise utmost care, and is required to look behind at intervals for street cars.**

A bus driver is a common carrier required to exercise the utmost care and diligence for the safety of his passengers, and the jury may find that he is thereby required while driving along a street car track to look behind at intervals to ascertain whether a street car is approaching.

**5. Carriers ⊂=300—Vigilance required of driver of bus on street car track is question for jury.**

The amount of vigilance required of a bus driver as a carrier of passengers while driving along street car tracks is a question for the jury.

**6. Street railroads ⊂=99(5)—Vehicle driver should leave track on receiving signals.**

It is the duty of the driver of a vehicle to turn off or away from street car tracks when he sees or hears, or by the exercise of reasonable care should see or hear, a car approaching from the rear, and he should listen for signals from such a car.

**7. Carriers ⊂=318(7)—Evidence held to warrant finding gong was rung for bus so that there was concurrent negligence in a collision.**

In an action by a passenger in a motor bus against the owner of the bus and a street car company, for damages sustained in a collision between a street car and the bus, evidence *held* to warrant the jury in finding that the motorman of the street car rang his gong in approaching the bus from the rear, so that the jury could find the bus driver was negligent in failing to heed the gong without finding he suddenly turned upon the track as claimed by the street car company, and therefore could properly render a verdict against both defendants for concurrent negligence.

**8. Carriers ⊂=300—Utmost vigilance requires bus driver to turn off from street car tracks when signal is sounded.**

The utmost care and vigilance which the driver of a bus owes to his passengers under Civ. Code, § 2100, requires him when driving along an interurban track to exercise the utmost care to hear the warning signal of a car approaching from behind, and to turn off from the tracks as soon as he safely could do so, and it was negligence for him to remain upon the tracks after hearing such signal merely because it was more comfortable for the passengers.

**9. Negligence ⊂=92—Contributory negligence of bus driver not imputable to passenger.**

In an action for injuries to a passenger in a motor bus, resulting from a collision between the bus and a street car, the negligence of the bus driver who was the operator of a public conveyance for hire is not imputable to his passengers.

**10. Street railroads ⊂=114(9)—Mere ringing of gong does not disprove negligence as cause of collision with vehicle.**

Mere proof that the motorman of an interurban car, approaching from behind a motor bus, sounded his gong, is not irreconcilable with a finding that the motorman was negligent in other respects.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by W. A. Simmons and wife against the Pacific Electric Railway Company and Fred Walker. Judgment for the plaintiffs against both defendants, and defendant Walker appeals. Affirmed.

See, also, 212 Pac. 641.

W. H. Thomas and B. P. Gibbs, both of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondents.

FINLAYSON, P. J. Plaintiffs, who are husband and wife, brought this action to recover damages for injuries suffered by the wife in a collision between an electric interurban car operated by the defendant railway company and an auto bus or jitney operated by a servant of the defendant Walker—a carrier of passengers for hire. Mrs. Simmons was a passenger on the auto bus. Walker and the railway company were made defendants, on the theory that the negligence of each concurred in causing the injury. The jury returned a verdict against both defendants, who, upon different records, present separate appeals from the judgment. The appeal now to be considered is that of the defendant Walker.

The collision occurred on Santa Monica boulevard, between Twenty-Fifth and Twen-

ty-Sixth streets, in the city of Santa Monica, while both the bus and an interurban car of the railway company were proceeding easterly toward the city of Los Angeles. Mrs. Simmons had boarded the bus at Third street and Santa Monica boulevard. According to appellant's witnesses, the catastrophe, which was a rear-end collision, was caused by the interurban car crashing into the rear of the bus while that vehicle was traveling easterly along Santa Monica boulevard astride of the southerly car rail, and after it had traveled in this manner for a distance of about four blocks from Twenty-First street, where it had stopped at the curb to take on a passenger.

The railway company operates an interurban railway from the city of Santa Monica to the city of Los Angeles, and for that purpose it uses double tracks along Santa Monica boulevard. That highway runs in a general easterly and westerly direction, is graded, and has a width of 52 feet between the curbs. The distance between the south curb and the nearest rail is 17½ feet, affording ample space between the curb and the railroad tracks to accommodate automobiles and other private vehicles. But there is quite a slope from the southerly rail to the curb. This slope is so marked that it is the custom of many automobilists traveling over the boulevard to keep as near as possible to the center line of the highway, even though by doing so they "straddle" the street car rail.

At the trial each defendant sought to show that the negligence of the other was the proximate cause of the injury. Appellant concedes that the evidence might show one or the other of the defendants to be negligent and hence liable for the injury, but claims that the evidence is such that it is not possible that both could be guilty of negligence. Whether, therefore, the evidence will support a verdict against both defendants is the sole question presented by this appeal.

Appellant's theory of the accident: According to the testimony of witnesses for appellant, the driver of the auto bus, after taking on the passenger at Twenty-First street, looked once to see if any interurban car was coming toward him from behind. Seeing none, he started up his vehicle, drove it diagonally a distance of about 40 feet toward the center of the highway until its left wheels were astride of the southerly rail, when he straightened the wheels, and then, with his bus still astride of the rail, proceeded easterly along the boulevard at the rate of 15 miles an hour for a distance of about four blocks, when an east-bound interurban car of the railway company, which was following the bus and which had been steadily gaining on it, crashed into the rear of the latter vehicle without giving any warning of its approach. The driver of the bus testified that he drove the four blocks astride the rail "because it was more comfortable for the passengers and also for the driver." The driver does not claim that he looked behind him to see if perchance a car of the railway company might be approaching from the rear, save on the one occasion when, as he drove diagonally from the curb at Twenty-First street toward and onto the car track, he looked to see if a car was coming toward him.

The railway company's theory: According to the description of the accident as given by witnesses for the railway company, the auto bus, after taking on the passenger at Twenty-First street, moved from the curb in a diagonal direction toward the car tracks, but, instead of "straddling" the rail, was "straightened out" before it reached the nearest rail, and then was driven easterly along Santa Monica boulevard parallel with the southerly rail but sufficiently distant therefrom to permit an interurban car traveling in the same direction to pass without danger of collision, and continued thus along the boulevard for a distance of about four blocks, followed by the electric car, when, suddenly and without giving the motorman any warning of his intention to change his course, the driver of the bus turned his vehicle abruptly to the left, toward and onto the car tracks, directly in the path of the interurban car, which, traveling in the same direction as the bus, ran into the rear end of the latter vehicle before the surprised motorman, by the exercise of reasonable diligence, could arrest the momentum of his car in time to avoid the collision.

Appellant concedes the rule to be, as indeed he must, that, where an injury is occasioned by the separate but concurrent negligence of two parties at one and the same time, each is liable, and an action will lie against both. But though conceding that he and his codefendant would be liable if the injury were proximately caused by their concurrent negligence, appellant contends that, under the facts of this case, it was impossible for both defendants to have been negligent. His argument runs substantially as follows: Because a verdict was rendered against the railway company it necessarily must follow that the jury found that appellant's auto bus was not suddenly and unexpectedly turned onto the railroad tracks in the path of the oncoming interurban car, as described by the railway company's witnesses; for, if the bus had been driven in that manner, no negligence could have been imputed to the servants of the railway company, and that defendant would not have been held liable; and if appellant's bus was not driven in the manner described by the railway company's witnesses, then the jury necessarily must have accepted appellant's theory, i. e., that the bus was crashed into from the rear while being driven astride the southerly rail. And it further is argued that, since it is not negligence per se to drive a vehicle along or in close proximity to street car tracks, and since

the failure of one thus driving his vehicle to keep a constant watch behind for an approaching street car does not show a want of ordinary care nor constitute negligence per se (O'Connor v. United Railways, 168 Cal. 43, 141 Pac. 809), appellant cannot be held liable under a theory of the accident which makes his codefendant liable.

The vice of appellant's argument lies in the assumption that, because the failure of one who is driving along a street car track to keep a constant watch behind for oncoming cars is not negligence per se, therefore one so driving is not guilty of negligence, though he never look behind and even though he give no heed to a warning to turn off the track.

[1-3] Unquestionably the mere fact that one is driving a vehicle astride of or in close proximity to street car tracks is not negligence per se. Public highways are for the use of the traveling public, and the right of a street car company is only to use the street in common with the public. The railway company has no exclusive right to travel even over that portion of the street which is covered by its tracks. Other vehicles have the right to travel over the entire street, including the space between the tracks. As one of the traveling public, the driver of an automobile is entitled as of right to use the entire street, subject only to the limitation that, as the use of the street by the railway company is confined to its tracks the driver must not unnecessarily interfere with or obstruct a car in its movement thereon. O'Connor v. United Railways, supra. Equally true is it that it is not negligence per se for one who is driving his vehicle astride of or in close proximity to a street car track to fail to keep constant watch behind for an approaching car. In O'Connor v. United Railways, 168 Cal. at page 49, 141 Pac. at page 811, the court says:

"Nor did the fact that he [the driver of the hotel bus] did not keep a *constant* watch behind for an approaching car while driving near the track show want of ordinary care on the part of the plaintiff or constitute negligence *per se*." (Italics ours.)

The reason for this, as stated in the O'Connor Case, is that one driving along a public highway in the same direction in which a car may approach from behind is necessarily engaged in looking in front of him to have a care that he does not collide with some other vehicle ahead, enjoying also the common use of the highway. The exercise of ordinary care makes it his duty to look ahead so as to avoid any collision with those in advance of him. And as it is not possible for him to look simultaneously forward and backward, it necessarily is not negligence per se to fail to keep a constant watch behind for an approaching street car.

[4, 5] But though it cannot be said that the failure to keep a constant watch behind for an approaching street car is negligence per se, it does not follow that one may drive his vehicle for any distance astride of or in close proximity to car tracks without ever looking behind or even listening for the approach of a street car. What amount of vigilance was requisite to constitute the "utmost care and diligence" required of this appellant as a carrier of passengers for hire was a question which the jury was to determine, not alone from what the driver of the auto bus may have done in the way of looking and listening, but from a consideration of the reciprocal rights of all the parties entitled to the use of the highway, including those of the street car company. O'Connor v. United Railways, 168 Cal. 49, 50, 141 Pac. at page 811.

"The car company is entitled in the interest of the public service to a free and unobstructed passage at all times of its cars over its tracks when necessary, and when such movement is being made free vehicles must yield a clear right of way to it for that purpose." Id.

[6] For this reason, although it cannot be said that one who is driving a vehicle along or in close proximity to a street car track is in duty bound to keep a constant watch behind for approaching cars, it is his duty to turn off or away from the tracks when he sees or hears, or, by the exercise of reasonable care, should see or hear, a car approaching from the rear. He should listen for and he should heed whatever signal there may be of an approaching car. Swayne v. Connecticut Co., 86 Conn. 439, 85 Atl. 634, 737; Morrissey v. Bridgeport Traction Co., 68 Conn. 215, 35 Alt. 1126; Kowalkowski v. Milwaukee, etc., Ry. Co., 157 Wis. 473, 146 N. W. 801; North Chicago, etc., Ry. Co. v. Peuser, 190 Ill. 67, 60 N. E. 78; Chicago, etc., Ry. Co. v. Bert, 69 Ill. 388; O'Brien v. Washington, etc., Co., 79 Wash. 82, 139 Pac. 771; Keyes v. Metropolitan Street Ry. Co., 161 Mo. App. 545, 144 S. W. 166; 36 Cyc. 1549. The rule is stated by the Missouri Supreme Court as follows:

"The plaintiff [a teamster] had a right to drive along the street and even drive upon the track of the defendant if the condition of the street or the exigencies of the case required it, and he should have exercised ordinary care in listening for the gong or signal of an approaching car from the rear and if he heard one to have withdrawn his wagon from the tracks." Zander v. Transit Co., 206 Mo. 445, 103 S. W. 1006.

It has been held by eminent authority that though one driving along or in close proximity to street car tracks need not keep a constant watch for street cars approaching from the rear, he should look behind him from time to time so that, if a car be near, he may turn off and allow it to pass without hindrance or any slackening of its ordinary speed, and that his failure to observe such precau-

tion is at his own risk. Adolph v. Central Park, etc., R. R. Co., 76 N. Y. 530; Theobald v. Transit Co., 191 Mo. 395, 90 S. W. 354; McGauley v. Transit Co., 179 Mo. 583, 79 S. W. 461; Booth on Street Railways, § 316. In Adolph v. Central Park, etc., R. R. Co., supra, Mr. Justice Folger, in a very carefully considered opinion, states the rule and the reasons therefor as follows:

"The car cannot turn off the track to go by. He [the driver of a vehicle ahead of the car] can turn off the track to let it go by. He must do this. He must be ready to do it, when the need arises. * * * So that the driver of the common vehicle, should be in constant expectation of the coming of a car, with a constant feeling that he will be at once required to do his duty of leaving the track. Therefore it is due from him, not only that he should turn off from the track when called upon to do so by a servant of the company, but that he should be more active than that in learning a necessity for getting out of the way of a coming car. To this end he should listen for whatever signal there may be, either of tinkle of bell or cry of driver; and he should also, while from time to time looking forward to see that his way is clear before him, *look behind him from time to time* to see whether he should not soon turn off, so that a car may pass without hindrance or undue slackening of ordinary speed. * * * He is bound to keep out of the way when the need, under such circumstances, arises that he should. Hence, there is upon him the duty of learning, when the need has arisen, or is likely to arise; and as it is a duty actively to be performed, he is bound to use all the ordinary means of learning; and all his natural senses are surely a part of those means, and to be used in such way as that they will bring information to him. So that he may not wait to hear a signal of the approach of a car, but he must at intervals look backward for it. He is enjoying a right liable to frequent interruption. It is a condition of his enjoyment of it that he make no needless delay. He should use his senses to effect that result." (Italics ours.)

[7] We do not find it necessary to go so far as the New York courts and to hold with them that it is the duty of the driver of the free vehicle to look behind him from time to time to see whether he should not turn off to permit an approaching car of the railway company to pass him. In the instant case there is evidence that the bus driver was given timely warning by the ringing of the gong on the interurban car, but that he gave no heed thereto. True, the bus driver, as well as other witnesses for appellant, testified that they did not hear any bell or gong sounded by the motorman. But there is no evidence that they listened. To say that the driver of the bus did not hear is as consistent with his not listening as with his listening and not hearing. Tognazzi v. Milford, etc., Street Ry. Co., 201 Mass. 7, 86 N. E. 799, 21 L. R. A. (N. S.) 309. That the motorman did ring his gong was directly testified to by himself and by passengers on his car. The former, testifying as a witness for plaintiffs, on being asked if he rang his bell, replied:

"All the way up from Sixteenth street I was ringing the gong handle as I always did. * * I rang the gong."

A passenger on the interurban car testified that the car kept on at its regular speed; that he observed it gradually overtaking the bus; that his attention was called to it by hearing the motorman ring his gong twice; and that after hearing this signal he did not suppose the bus would keep on the same way, but that it did. The jurors had the right to believe this testimony of the passenger and also the testimony of the motorman that he rang his gong all the way from Sixteenth street—a distance of nine or ten blocks to the place where the accident occurred. Indeed, from the nature of their verdict we must assume that the jurors did believe this testimony that the gong on the car was sounded. It is just this testimony which presents a situation justifying the conclusion that the servants of both defendants were concurrently negligent—the motorman because he did not slacken the speed of the interurban car and the bus driver because he did not heed the signal to get off the track.

[8] If, as the motorman testified, the gong on the interurban car was rung, then there can be no question as to appellant's liability. For though it may have been more comfortable for the passengers on the bus and for its driver to travel astride the rail because of the street's slope toward the curb, still it was not necessary to occupy any part of the space between the car tracks—there was ample unobstructed space between the curb and the nearest rail along which the bus could have traveled. In going upon the track the bus driver chose the more dangerous part of the street. With more safety to his passengers he could have driven along the southerly side of the boulevard outside of the car tracks. His duty to Mrs. Simmons, as one of his passengers, was to use "the utmost care and diligence." Civ. Code, § 2100. But though he owed to the passengers on his bus the highest degree of care, there is evidence to show that he failed to measure up to the standard of even ordinary care. When he selected the more dangerous part of the highway his care should have been commensurate with the greater danger then assumed. He knew that interurban cars were liable to approach the bus from behind, and as the driver of a vehicle carrying passengers for hire he should have exercised the utmost care to hear the warning signal and to turn off and away from the tracks as soon as the diligence commensurate with the high degree of care which he owed to his passengers would permit. This he failed to do, and his want of due care was a proximate contributing cause of the collision and of the consequent injury to Mrs. Simmons. And though his

own contributory negligence would prevent him from recovering for any injuries which he might have sustained, it will not prevent Mrs. Simmons, who was a passenger on the bus, from recovering for her injuries. The negligence of the driver of a public conveyance in which passengers are being carried for hire is not imputable to the passengers. Tompkins v. Clay Street Ry. Co., 66 Cal. 163, 4 Pac. 1165; Doeg v. Cook, 126 Cal. 218, 58 Pac. 707, 77 Am. St. Rep. 171; Field v. Spokane P. & S. R. Co., 64 Wash. 445, 117 Pac. 228; Leavenworth v. Hatch, 57 Kan. 57, 45 Pac. 65, 57 Am. St. Rep. 309; 10 C. J. 969, 970.

[9] If it should be argued that the verdict against the railway company is irreconcilable with any implied finding that the motorman gave timely warning by ringing his gong, the obvious answer is that the mere ringing of the gong would not necessarily relieve the railroad company from blame. The verdict against it, carrying the necessary implication that it also was guilty of negligence, may be accounted for and justified, notwithstanding the motorman warned the bus driver by vigorously sounding the gong. For though the gong may have been rung, and though the bus driver may thus have been charged with the duty to give way to the approaching car, nevertheless the motorman may have been guilty of negligence by failing to decrease the speed of his car in time to avoid a rear-end collision after it became apparent that the driver of the bus was not going to turn off in time to avoid a catastrophe; and it is quite possible that the jury found that such failure to decrease the speed of the interurban car was a contributing cause of the accident, and that for that reason the railway company should be held liable, even though it should be found that the bus was traveling astride of the rail and that the motorman gave warning by sounding his gong. The motorman's negligence in failing to decrease the speed of his car is a question which is presented for our determination on the appeal taken by that defendant, and for that reason it will not be necessary to consider it further here.

[10] Our conclusion is that after making due allowance for all the facts which, by necessary implication, must be deemed to have been found in appellant's favor by reason of the verdict against his codefendant there still was sufficient evidence to support the verdict against him; for the evidence would still tend to show that the bus driver made no effort to heed the signal to turn off the track and away from the zone of danger, but that he heedlessly continued on his course, regardless of the warning afforded by the clanging gong.

The judgment is affirmed.

We concur: WORKS, J; CRAIG, J.

60 Cal. App. 140

## SIMMONS et ux. v. PACIFIC ELECTRIC RY. CO. et al. (Civ. 3883.)

(District Court of Appeal, Second District, Division 2, California. Dec. 12, 1922. Hearing Denied by Supreme Court Feb. 8, 1923.)

**1. Evidence ⟸588—Jurors are not restricted to adoption of theory of one of parties.**

In an action for injuries to a passenger in a motor bus, brought against the operator of the bus and the street car company whose car collided with the bus, the jury is not restricted to the adoption of the theory of the accident advanced by the operator of the bus, or of that advanced by the street car company, but can take any view of the facts justified by the evidence, even though thereby it accepts some of the testimony of one defendant and some of the testimony of the other.

**2. Street railroads ⟸114(9)—Evidence held to warrant finding of negligent failure to slacken speed.**

Evidence *held* to warrant the jury in finding that a street car motorman negligently failed to slacken speed after he saw a motor bus was not turning from the track in response to his signals.

**3. Street railroads ⟸90(5)—Failure of bus driver to leave track does not justify failure to slacken car speed.**

Though it is the duty of the driver of a motor bus to turn from a street car track on hearing the signal of a street car approaching behind him, his failure to do so does not justify the motorman in approaching the bus at such a speed that he is unable to avoid colliding with it.

**4. Appeal and error ⟸930(4)—Presumption is jury adopted theory justifying verdict, if that was supported by evidence.**

Where there is any theory supported by the evidence which would justify the verdict rendered by the jury, the appellate court must assume that the jurors adopted that theory.

**5. Carriers ⟸306(4)—Bus passengers can recover against both bus owner and street car company if negligence is concurrent.**

Where a collision between a motor bus and an interurban car was caused by the concurrent negligence of the operator of the bus and the street car company, a passenger of the bus can recover from either or both defendants.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by W. A. Simmons and wife against the Pacific Electric Railway Company and Fred Walker. Judgment for plaintiff against both defendants, and the Pacific Electric Railway Company appeals. Affirmed.

See, also, 212 Pac. 637.

Frank Karr, R. C. Gortner, and W. R. Millar, all of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondents.

FINLAYSON, P. J. This appeal is by the defendant Pacific Electric Railway Company, against whom and its codefendant Fred Walker a verdict in favor of plaintiffs for $6,000 was rendered. Appellant is a railway corporation operating a system of interurban electric cars between the cities of Santa Monica and Los Angeles. A part of its route is over Santa Monica boulevard, in the city of Santa Monica. Appellant's codefendant Walker, a carrier of passengers for hire, operates a system of jitneys or auto busses between Santa Monica and Los Angeles. On Santa Monica boulevard, between Twenty-Fifth and Twenty-Sixth streets, an interurban car of the railway company ran into the rear end of a bus operated by a servant of the defendant Walker, and in the collision the plaintiff Florence Simmons, who was a passenger on the bus, received injuries for which the jury awarded the verdict against both defendants. There was evidence to show that the motorman made no attempt to decrease the speed of his car until too late to avoid colliding with the bus. The general facts of the case are stated in the opinion this day filed in the appeal of the defendant Walker from the same judgment.

It is contended by the railway company on this appeal, as it was by the defendant Walker on his appeal that, though the evidence might warrant a verdict against either defendant, it cannot justify a verdict against both. Because each defendant presented a theory of the accident wholly irreconcilable with that advanced by the other, it is claimed that the adoption by the jurors of one of those theories necessarily must exculpate that defendant whose theory the jury so approved and inculpate the other defendant only.

[1] It may be conceded that the railway company would have to be absolved from all blame if the jury accepted its theory of the accident; for according to the testimony of the motorman, the bus turned into the danger zone so suddenly that he did not have time to avoid a collision by any reasonable effort to arrest the speed of his car. But the evidence discloses facts which warranted the jury in espousing a theory of the accident differing in some particulars from that contended for by either defendant—a theory of the facts which absolves neither but inculpates both. The vice of appellant's argument lies in the assumption that the jurors were limited to a choice between but two opposing theories, entirely overlooking a third possible theory—one which makes the servants of both defendants guilty of separate but concurrent negligence contributing to the injury. It matters not that this third theory is supported in part by facts testified to by appellant's witnesses and in part by facts testified to by the witnesses for appellant's codefendant Walker. The jury could take any view of the facts justified by the evidence; and on this appeal we must assume that they adopted that theory which finds support in the evidence and which accords with the verdict.

"In considering as a question of law the relative negligence of plaintiff and defendant, and the conduct of either or both as contributing to the injury, an appellate court will assume that the jury took any view of the facts, justified by the evidence, which tends to support the verdict." King v. Green, 7 Cal. App. 477, 94 Pac. 777.

[2] Witnesses for the defendant Walker gave evidence which warranted the conclusion that the auto bus traveled easterly for three or four blocks "astraddle" the southerly rail of the railway company, followed by appellant's interurban car; witnesses for appellant, passengers on the interurban car, gave testimony which justified the conclusion that, though the bus was at all times in plain view, the motorman did no more than sound his gong, and that, though he thus gave the bus driver timely warning, thereby charging the latter with the duty to turn away from the track, he made no attempt to slacken the speed of the mechanically propelled, ponderous, and unwieldy interurban car until it was too late to avoid an accident. If the jurors found these to be the facts, as well they might, then they were fully justified in finding that the motorman's failure to check the speed of his car before the collision became inevitable was negligence which concurred with that of the bus driver and contributed to the injury. In other words, there not only was evidence to support the conclusion that the bus driver was negligent in that, heedless of the clanging gong, he neglected to turn away from the zone of danger into which he had entered when he drove his vehicle astride the car rail, but there also was evidence sufficient to support the theory that it must have become apparent to the motorman, as a reasonably careful observer, that the bus driver, whose vehicle was straddling the rail, did not intend to heed the warning signal by turning off the track, and that, notwithstanding the motorman's observation of the bus driver's heedlessness, he recklessly permitted his heavy interurban car to gain on the bus, making no effort to slacken speed until the collision was unavoidable.

[3] True, the motorman had the right to expect that the bus driver would heed the warning signal and get off the track. But, notwithstanding such rightful expectation, if the motorman saw that the bus driver would not heed the signal, it then became his duty to make a reasonable effort to check the speed of his car in time to prevent it from catapulting into the bus and injuring its passengers. The motorman's duty to exercise ordinary care to avoid a collision and

the bus driver's duty to exercise the highest degree of care to avoid injury to his passengers were reciprocal; and whether the former in his management and control of appellant's interurban car did or did not observe his duty was clearly a question of fact for the jurors, upon whom alone rested the responsibility of determining whether an ordinarily prudent person, circumstanced as was the motorman, and having due regard for the safety of the passengers on the auto bus, observing the bus continuing on its course for several blocks ahead of him and astride the rail would so operate the ponderous interurban car that it could not be stopped in time to avoid a collision in the event that the bus driver should disregard the warning signal to leave the track.

[4] Our conclusions are: First, that the jurors were warranted in accepting that version of the accident which was given by the bus driver and the other witnesses for the defendant Walker, with the exception that the gong on the interurban car was sounded, as testified to by the motorman; secondly, that since this theory of the facts justifies the verdict against both defendants, we, as an appellate court, must assume that that was the theory which the jurors adopted; and, thirdly, that under this theory of the facts the jurors were clearly justified in concluding that, had the motorman been exercising reasonable care, he would have seen that the bus driver was unmindful of the warning signal to leave the track, and that, observing such heedlessness, the motorman, had he been reasonably careful, would have brought the heavy interurban car under such timely control as to be able to stop it before it crashed into the auto bus.

[5] Since, for the reasons we have stated, the jurors were justified in finding that the separate but concurrent negligence of the drivers of both vehicles contributed to the injury of Mrs. Simmons, the latter was entitled to recover from either or both defendants. Tompkins v. Clay Street Ry. Co., 66 Cal. 163, 4 Pac. 1165; Kimic v. San Jose, etc., Ry. Co. 156 Cal. 379, 104 Pac. 986.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

---

60 Cal. App. 275

## MEHESY v. MISSION GARAGE. (Civ. 3689.)

(District Court of Appeal, Second District, Division 2, California. Dec. 27, 1922. Hearing Denied by Supreme Court Feb. 21, 1923.)

**1. Appeal and error ⊜1010(1)—Court's finding upheld if there is evidence substantially tending to support it.**

Whenever it is contended on appeal that a finding by the trial court is not supported by the evidence, the finding must be upheld if there is in the record any evidence substantially tending to support it.

**2. Livery stable and garage keepers ⊜6—Evidence held to show want of authority to deliver automobile to third person.**

Evidence that an automobile had been stored in a public garage with instructions to the keeper to deliver it only to the owner or his wife, or to some one authorized by the wife, and that it was delivered, without express directions from the wife, to one who had been seen driving it for the wife, and who returned it to the garage after the trip, *held* to sustain the court's finding that the person to whom it was delivered was not authorized to receive it, even if the burden of establishing the want of authority was on the owner.

**3. Livery stable and garage keepers ⊜6—Breach of contract not to let unauthorized person take car is negligence.**

A breach by a public garage keeper of his agreement not to let any unauthorized person take plaintiff's automobile is itself a failure to exercise due care to keep the car safely.

**4. Livery stable and garage keepers ⊜7—Evidence held to sustain finding car was substantially damaged after being taken from garage.**

Evidence that plaintiff's car was in good condition when he left it in defendant's public garage, and apparently in good running order when defendant let an unauthorized person take it, that it was not returned to the garage by such person, but was taken to another garage with the top broken and body smashed up and wheels broken off, is sufficient to sustain a finding that the car was substantially damaged.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by E. Mehesy against the Mission Garage, a corporation, for damages to an automobile. Judgment for plaintiff, and defendant appeals. Affirmed.

Swaffield & Swaffield, of Long Beach, for appellant.

David R. Faries, Ivan Kelso, John R. Berryman, Jr., and J. Allen Davis, all of Los Angeles, for respondent.

WORKS, J. This is an action for damages. Defendant, as its name implies, operates what is known as a "public garage." Plaintiff engaged defendant to keep his automobile in its garage when the car was not in use, plaintiff to pay a monthly storage charge or fee for the service to be rendered. The obligation of defendant under the contract between the parties is shown by the uncontradicted testimony of plaintiff, as follows:

"I told him," an employee of defendant, "that I wanted the car left there and no one except myself or my wife or any one that she brings in to drive the car for her when I am not there.

* * * I didn't want anybody else to use that car while I was not using it unless authorized by Mrs. Mehesy or some one with her. I made that statement to Mr. Wooten," the employee.

On a certain occasion, one Baker, a night man then in sole charge of the garage, permitted one Kohler to take the car from the place. It was damaged before its return to the garage, and it was to recover for this damage that the action was commenced. Plaintiff had judgment, and defendant appeals.

[1, 2] The first point made by appellant is that the evidence was insufficient to support a finding of the trial court to the effect, as stated in appellant's brief, "that in breach" of the agreement between the parties "appellant wrongfully permitted Kohler to take the automobile from the garage on the occasion it was damaged." The objection to this finding is twofold, the first assault being upon the ground that "the evidence was insufficient to establish that Kohler was not authorized by respondent to take the automobile from the garage." The point is thus stated by appellant in order to attract attention to its view that the burden of proof was upon respondent to show that Kohler did not possess the authority mentioned, and not upon appellant to show affirmatively that he did possess it. We proceed to discuss the question presented upon the theory that appellant's statement of this rule of evidence is correct. We state by way of premise, however, that, as is the case whenever it is contended on appeal that a finding is not supported by the evidence, the finding now in question must be upheld if there is in the record any evidence substantially tending to support it. What, then, was the evidence? Respondent testified:

"I had not given Mr. Kohler any permission to take the car out. He never had the authority to take it out at any time, and I never told any one at the garage that they might allow Mr. Kohler to take the car out."

As to respondent's wife, who also had authority under the contract of storage to designate persons who might take the automobile from the garage, all the evidence in the record upon the present subject is in the testimony of Baker; neither Mrs. Mehesy nor Kohler having been called to the stand. Baker's testimony shows that he had been employed at the garage but a short time when he first met Mrs. Mehesy. His introduction to her occurred but about two days before he permitted Kohler to take the car from the garage. He was introduced to Mrs. Mehesy by Wooten, who had then left his employment in the garage; Wooten remarking at the time of the introduction that Mrs. Mehesy "was after a driver" for the car. She and Wooten then drove the car out of the place. Later that same night the vehicle was driven up to the garage, Kohler being at the wheel and Mrs. Mehesy sitting on the front seat with him. After a question addressed to Baker, the two drove away. In five or ten minutes Kohler returned with the car, unaccompanied, and put it into its place. About two days later, and upon the occasion when the automobile was taken from the garage and damaged Kohler came to the place alone and asked for the car. Baker permitted him to take it, although he testified:

"When I let Kohler take the car I had no instructions or permission from any one to deliver the car to Mr. Kohler."

We think all this evidence, taken together, furnished substantial support to the proposition that Kohler had no authority to take the car from the garage. The statement of Baker, quoted immediately above, was only his conclusion, it is true; but when it is taken with the other evidence upon the question, all coming from the man who permitted the automobile to be driven from the garage, a situation is presented which is sufficiently clear to us, even though the burden was upon respondent to show that Kohler had no authority to take the car.

[3] The second attack upon the finding now under examination is made under the head, in appellant's brief:

"Assuming, but not admitting, that Kohler was not authorized by respondent, * * * or by Mrs. Mehesy, * * * to take the automobile on the occasion it was damaged, the evidence was insufficient to show that appellant failed to exercise ordinary care in the keeping, care, and preservation of the automobile."

The point now made by appellant is based upon the fact that the trial court found that the engagement of appellant was not to keep respondent's car safely, "except that it is true [that] * * * defendant agreed and undertook to use ordinary care and prudence in the keeping, care, and preservation of said automobile." Upon the assumption with which appellant opens the statement of his point, that is, that Kohler was not authorized to take the automobile from the garage, we do not see how the proposition can be said to possess merit. We cannot perceive that the question of ordinary care can be of interest in the case if Kohler was not authorized to take the car, for when Baker permitted him to take it a plain and simple breach of the contract of storage was committed by appellant, through Baker as its agent, and the fact of the breach was found by the trial court, as already shown. It surely cannot be said that ordinary care is exercised in the keeping of an automobile under such a contract as was made here if that contract is breached by a delivery of the car to a stranger. We have no doubt that the trial court, after finding that the contract required only the exercise of ordinary care by respondent, intended the finding that

the contract had been breached as a finding that such care had not been exercised. At any rate, to our minds, the finding so operates. It would be difficult to imagine a stronger case of lack of exercise of such care. It is not to be forgotten, of course, that the opening words of appellant's proposition have ceased to operate merely as an assumption, conceded by appellant only for the purpose of argument, this because of the views expressed by us in the paragraph next preceding the present one.

[4] The only remaining point made by appellant is that the evidence was insufficient to "justify a finding of substantial damages in favor of respondent." Baker testified that Kohler drove the car out of the garage upon the occasion on which it was taken out and damaged. In truth, that he did so is not questioned. This, of course, shows that the car could at least be operated at that time. Also, respondent testified that he left the car at appellant's garage upon the day on which later Kohler took it out and that it was then in good condition. Kohler did not return the car, but the undisputed evidence is that it was on the next day "towed" by other parties into a garage other than that of appellant. Respondent testified that he saw the car when it was being towed in and that then "the top was broken in and the body was smashed up and the wheels broken off." The evidence which we have noted was amply sufficient to show that the car was substantially damaged. The manner in which this point is presented does not justify us in assuming that appellant intends to assail the finding of the trial court as to the amount in dollars in which the automobile was damaged. We are willing, however, because of some things said in arguing the point actually presented, to go so far as to make the assumption. Still we do not feel, considering the nature of the question really made, that it is incumbent upon us to do more than make the assertion that the finding of the court as to the amount of damage is supported by evidence found in the record.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

60 Cal. App. 198

## Ex parte KOLB. (Cr. 1098.)

(District Court of Appeal, First District, Division 2, California. Dec. 21, 1922.)

**1. Habeas corpus ⟸92(3)—Question as to legality of order of commitment to jail held not raised.**

Where the sheriff's return to a writ of habeas corpus contained no facts tending to show that the contempt judgment committing the petitioner was void, no question as to the legality of the commitment of petitioner to jail was presented for review, where petitioner interposed no answer to the return or produced no evidence, or the parties made no stipulation that the petition might stand as a traverse.

**2. Divorce ⟸200, 289—Decree against husband awarding maintenance to nonresident wife and child held valid.**

In an action for divorce by the husband, resident of the state, where the wife, then residing in New York with her minor child, came to California upon being informed of the pendency of the action, an interlocutory decree based on her cross-complaint, adjudging that she was entitled to a decree of divorce and awarding to her maintenance for herself and minor child, but not mentioning or affecting the custody of the child, was valid, being a proceeding within Code Civ. Proc. §§ 367, 395, 1037, and Civ. Code, §§ 138, 139, though the minor child was not brought into this state and though, after the interlocutory decree was entered, the wife returned to New York.

**3. Divorce ⟸269(10)—What kind of an affidavit based on information and belief is valid.**

When the terms of a court decree have been violated and proceedings are taken to terminate the violations or to punish therefor, as to compel a defendant in a divorce action to comply with the court's decree ordering the payment of maintenance for the wife and child, an affidavit on which such proceedings are based is not invalid, because a part of it was made on information and belief.

Petition by Fred W. Kolb for writ of habeas corpus to be directed to Thomas F. Finn, as sheriff of the City and County of San Francisco. Writ discharged, and petitioner remanded.

Emilio Lastreto and A. Bathurst Crane, both of San Francisco, for petitioner.

Jesse H. Miller and Walter H. Linforth, both of San Francisco, for respondent.

R. M. J. Armstrong, of San Francisco, for sheriff.

STURTEVANT, J. [1] Heretofore the petitioner filed a petition in this court asking that a writ of habeas corpus issue, and, pursuant to such a request, a writ was issued and made returnable before the court. Thereafter the writ was served upon Thomas F. Finn, as sheriff of the city and county of San Francisco, and the said sheriff made his return in which he set forth that on the 13th day of November, 1922, he received said Fred W. Kolb under a certain order of the superior court. He then sets forth in words and figures a copy of said order, from which it appears that heretofore an interlocutory decree of divorce was duly and regularly entered in a case in which Fred W. Kolb was plaintiff and Vera A. Kolb was

defendant; that said decree was based on the defendant's cross-complaint, and adjudged that the defendant was entitled to a decree of divorce and awarded to the defendant maintenance for herself and minor child; that thereafter, on the 8th day of November, 1922, an order to show cause issued out of the trial court and was served on this petitioner, commanding him to appear and show cause on the 10th day of November, 1922, why he should not be punished for contempt of court for failing to pay the maintenance awarded by the terms of the aforesaid interlocutory decree; that the order to show cause was served on the petitioner, and thereafter the same was heard in open court, and evidence both oral and documentary was introduced; that from the evidence so introduced the court found that the petitioner was, at the time of the hearing, in default in the sum of $100 in the payment of the moneys theretofore directed to be paid; and that it was also found that the petitioner had the ability to pay the sum of $100, and that his failure to pay said sum was willful and deliberate. Then follows the portion of the judgment finding the petitioner guilty of contempt of court and fixing the punishment at five days' imprisonment in the county jail. To the return so made by the sheriff, the petitioner did not interpose an answer, nor was there a stipulation that the petition might stand as a traverse, nor was any evidence produced.

Taking the recitals of the return, it will be noted that no fact is stated which tends to show that the judgment committing the petitioner is void. But, on the record as made, the return is all that is before us. In the case entitled In re Collins, 151 Cal. 340, 342, 90 Pac. 827, 828, 129 Am. St. Rep. 122, Mr. Justice Sloss, writing for the court, says:

"Before proceeding to a consideration of the merits of the application, it may be well to here repeat what was orally stated at the hearing regarding the practice of this court on habeas corpus. The function of the petition is to secure the issuance of the writ, and, when the writ is issued, the petition has accomplished its purpose. The writ requires a return by the officer or other person having the custody of the prisoner. To such return the petitioner may present exceptions, raising questions of law, or a traverse, raising issues of fact, or both. Where the return is not subject to exception—that is, where it sets forth process which on its face shows good ground for holding the prisoner, such process being produced at the hearing (Pen. Code, § 1480), and the traverse alleges matter tending to invalidate the apparent effect of such process—the burden of proving such new matter is on the petitioner. The remarks in In re Smith, 143 Cal. 368, 77 Pac. 180, are to be taken as referring only to the case where, by agreement of the parties and the consent of the court, the petition is treated as a traverse to the return, and its averments are not disputed. The course of treating the petition as a traverse has frequently been followed in this court, but where it is followed it does not require the respondent to file, in addition to the return, a pleading specifically denying the affirmative allegations of the petition (treated as a traverse) nor does it shift the burden of proof as to such allegations from the petitioner to the respondent. To adopt the analogy of pleadings in civil actions, the return is the complaint, the traverse is the answer; new matter set up in the traverse is deemed denied, and must be proved by the party alleging it."

[2] It is patent, therefore, that there is nothing further before this court. However, as a man's liberty is at stake, we have not failed to examine into each question which counsel, by their arguments, assume to be before us. At the time the divorce case was commenced the wife was residing in New York. Upon being informed of the pendency of the action, she came to California, but the minor child was not brought into this state. After the interlocutory decree was entered, the wife returned to New York. It does not appear that the decree purported to give the wife the custody of the minor child. No issue of or concerning its custody is involved. Hence the rule stated in De la Montanya v. De la Montanya, 112 Cal. 131, 44 Pac. 354, is not involved. The decree did award maintenance to the wife and minor child, residents of New York, and such money judgment was rendered by a court of this state against the husband, a resident of this state. Such proceedings do not involve the doctrine of the case just cited, but do come within the provisions of the Code of Civil Procedure, §§ 367, 395, 1037, and Civil Code, §§ 138, 139. If the husband wanted the child brought within the jurisdiction of the court, he could have made such request at the proper time and place.

[3] It was assumed by counsel that the affidavit praying for the issuance of an order to show cause was made by the wife's attorney, and that at least a part of it was made on information and belief. Thereupon it was argued that such a paper is not in legal effect an affidavit. Gay v. Torrance, 145 Cal. 144, 78 Pac. 540. However, that rule is one that has exceptions. One of the exceptions is that line of cases where the terms of a court decree have been violated and proceedings are being taken to terminate the violation or to punish therefor. Hughes v. Moncur, 28 Cal. App. 462, 469, 152 Pac. 968; In re Selowsky, 38 Cal. App. 569, 581, 177 Pac. 301.

[4] Finally it is claimed that, on the hearing of the order to show cause, the testimony showed that the petitioner did not have the ability to comply with the court's order, and that therefore the petitioner should have been discharged. The record does not sustain the contention. The averment of the

petition is that the petitioner "had no further funds." It does not appear but what he possessed other properties, real or personal.

It follows that the petitioner should be remanded, and the writ discharged.

It is so ordered.

We concur: LANGDON, P. J.; NOURSE, J.

---

60 Cal. App. 225

## WELLS FARGO NEVADA NAT. BANK OF SAN FRANCISCO v. HASLETT WAREHOUSE CO. (Civ. 4357.)

(District Court of Appeal, First District, Division 2, California. Dec. 26, 1922. Hearing Denied by Supreme Court Feb. 21, 1923.)

**1. Customs duties ⊂⊃91—Persons holding receipt from bonded warehouse have notice of control by customs service.**

Persons holding negotiable warehouse receipts, which showed on their face that they were issued for goods in a bonded warehouse, are charged with notice that the goods were held subject to the control of the collector of customs, and that the regulations of the Secretary of the Treasury prevented the delivery of the goods, except upon presentation of a permit to the storekeepers signed by the collector and naval officer.

**2. Customs duties ⊂⊃89—Goods in bonded warehouse are in joint custody.**

Goods received in a government bonded warehouse are in the joint custody of the collector of customs and the warehouseman, under Rev. St. U. S. § 2960 (U. S. Comp. St. § 5644), declaring that the proper customs officer and owner of the warehouse shall have joint custody of such goods.

**3. Customs duties ⊂⊃53—Rgulations of Secretary have force of law.**

The customs regulations of the Secretary of the Treasury, issued under the authority given him by Rev. St. U. S. § 2989 (U. S. Comp. St. § 5682), have the force of law.

**4. Customs duties ⊂⊃91—Negotiable receipt does not guarantee title of goods, and customs officer could refuse permit.**

A bonded warehouseman who issues a negotiable warehouse receipt does not thereby guarantee the title of the person who deposited the goods in the warehouse, but the transfer of such receipt gives the transferee the same rights to the goods as an actual delivery of the goods would give and no more, so that the warehouseman is not liable where a customs officer refused to issue a permit for the withdrawal of the goods upon such receipt, because the person who deposited them therein did not have title to them.

Appeal from Superior Court, City and County of San Francisco; G. E. Crothers, Judge.

Action by the Wells Fargo Nevada National Bank of San Francisco against the Haslett Warehouse Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Raymond Perry, of San Francisco (John S. Partridge, of San Francisco, of counsel), for appellant.

Breuner & Erb, C. W. Durbrow, and John Breuner, Jr., all of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against it, in an action brought against the defendants to recover $32,507 damages for failure to deliver 100 cases of egg albumen, stored in the defendant's warehouse, for which plaintiff had purchased a negotiable warehouse receipt, for value and without notice of any adverse claims to the goods.

The trial court found that on December 11, 1919, the collector of customs of the port of San Francisco ordered 100 cases of dried egg albumen to be stored as unclaimed goods in Humboldt bonded warehouse, a warehouse owned and operated by defendant as a class 3 warehouse, as classified under and by virtue of the provisions of the customs regulations duly made by the Secretary of the Treasury for the regulation of United States bonded warehouses, and that on or about the said 11th day of December, 1919, defendant received said goods in said warehouse; that on or about the 24th day of December, 1919, the said goods were entered by the said collector of customs in the name of, and as the property of, one T. N. Morris, and that defendant, thereupon, and by virtue of such entry, entered said goods at said warehouse in the name of, and as the property of, said T. N. Morris; that on or about the 6th day of January, 1920, H. W. Gutte & Co. presented to defendant an order for the delivery of said goods to said H. W. Gutte & Co., Inc., duly executed by said T. N. Morris, and on said date defendant issued a negotiable warehouse receipt for said goods to said H. W. Gutte & Co., Inc., and said receipt provided, and it so appeared upon the face of the receipt, that the said goods were received by defendant in storage in said Humboldt bonded warehouse.

On January 7, 1920, Gutte & Co. indorsed and delivered the said negotiable warehouse receipt to Kockos Bros., who purchased the same in good faith and for value, without notice of any fact that might cause it to be dishonored. Kockos Bros., in turn, indorsed and delivered said negotiable warehouse receipt to plaintiff, who purchased it in good faith and for value. On February 17, 1920, plaintiff surrendered said negotiable receipt to defendant in exchange for a nonnegotiable warehouse receipt for the same goods, which nonnegotiable receipt stated

that it was given for goods in storage in Humboldt bonded warehouse. On February 17, 1920, the plaintiff gave to Kockos Bros. an order allowing them to withdraw 50 cases of the 100 cases of egg albumen mentioned in the warehouse receipts.

Prior to the issuance of either of the warehouse receipts, to wit, on January 2, 1920, a permit for the withdrawal of said goods was filed by the said T. N. Morris with the said collector of customs, and upon the said withdrawal permit the said T. N. Morris ordered the delivery of said goods to be made to Kockos Bros. On February 18, 1920, Kockos Bros. paid the customs duties upon said goods and the said withdrawal permit was thereupon stamped "Duty Paid," and the United States storekeeper at said Humboldt bonded warehouse was authorized by the collector of customs to release said goods, which authorization was in writing upon the face of said withdrawal permit. On February 18, 1920, the said withdrawal permit together with an order for the delivery of 50 cases of said egg albumen, was presented at the said Humboldt bonded warehouse, and the storekeeper of customs at said Humboldt bonded warehouse, acting under instructions of the said collector of customs, refused to deliver the said 50 cases of egg albumen, or any part thereof.

At the time said documents were presented at said warehouse, defendant had information that plaintiff was not lawfully entitled to the possession of said goods, and that the person or persons lawfully entitled to the possession of said goods were Christenson, Hanify & Weatherwax, a copartnership, or some person or persons for whom the said copartnership was acting. The firm of Christenson, Hanify & Weatherwax was brought into the case by order of court, and the evidence demonstrated its right to the goods as agent of the owner.

Shortly after the 18th day of February, 1920, the said withdrawal permit was surrendered to the collector of customs who, thereupon, refunded the customs duties to said Kockos Bros., and canceled the "Duty Paid" stamp theretofore stamped on said permit, and the collector of customs has issued no further withdrawal permit, either to the said Kockos Bros., or to the plaintiff herein.

The defendant claims no interest in the goods, and is ready to deliver them upon the payment of the storage charges thereon, if the collector of customs will authorize the release of said goods from the said bonded warehouse.

The trial court also found the following facts, which establish the contention relied upon by defendant as a defense to this action: Unless the goods in controversy be released from said bonded warehouse by said collector of customs, defendant is unable and cannot deliver said goods to plaintiff, because said goods are stored, as plaintiff well knew when purchasing the warehouse receipt therefor, in a United States bonded warehouse, and said goods are in the joint custody of defendant and the collector of customs and subject to the exclusive control of said collector with respect to the delivery of said goods and the release of said goods from said bonded warehouse; that defendant issued its warehouse receipts for said goods as and for goods received in said bonded warehouse and that all persons holding or receiving said receipts had notice, by virtue of the provisions thereof and recitals therein, that said goods were in storage in a bonded warehouse and subject to the control of said collector and subject to the rules and regulations, duly made and issued by the Secretary of the Treasury, for the government and control of bonded warehouses and goods stored therein.

[1-3] Appellant contends that the refusal of the collector of customs to allow defendant to deliver the goods to plaintiff does not release defendant from liability, because plaintiff has been damaged by relying upon the negotiable warehouse receipt issued by the defendant. But it appears from the undisputed facts and from the findings of the trial court that the warehouse receipts showed on their face that they were issued for goods in a bonded warehouse. All persons holding or receiving said receipts had notice, therefore, that the goods were subject to the control of the collector of customs with respect to the release of said goods and subject to the rules and regulations issued by the Secretary of the Treasury for the government and control of bonded warehouses and goods stored therein. Goods received in a government bonded warehouse are in the joint custody of the collector and the warehouseman. The United States Revised Statutes declare that the proper officer of the customs and the owner and proprietor of the warehouse shall have joint custody of the merchandise stored in the warehouse. U. S. R. S. § 2960; U. S. Comp. Stats. § 5644. The Secretary of the Treasury is empowered to establish rules and regulations governing bonded warehouses. U. S. R. S. § 2989; U. S. Comp. Stats. § 5682. The Treasury regulations have the force of law. United States v. Ehrgott (C. C.) 182 Fed. 267, 272. The customs regulations of the Secretary of the Treasury, in so far as they are relevant to the issues of this case, were introduced in evidence. These regulations provide that all goods will be received and delivered by storekeepers or under their supervision, and that goods shall not be delivered from bonded warehouses except upon presentation of a permit to the storekeeper, signed by the collector and naval officer, if any. The case of Bliss v. Carroll (Cal. Sup.) 9 Pac. 88, holds that the indorsee of a negotiable warehouse receipt is bound to take notice of the

Treasury regulations and the law applicable to bonded warehouses.

It follows, therefor, that the goods could not be delivered from the bonded warehouse except upon presentation of a permit to the storekeeper, signed by the collector of customs or his authorized deputy. The evidence in the instant case is that the collector, by his deputy, refused to allow the goods to be delivered, and so instructed the storekeeper in charge of the warehouse.

[4] The defendant makes no claim to the goods, and the trial court has found that it is ready and willing to deliver the goods if permitted by the collector of customs to do so. The defendant did not guarantee that the collector of customs would permit the assignees of Morris to withdraw the goods. It merely issued a receipt showing that the goods were actually held by it as the property of Morris. But appellant contends that defendant thereby guaranteed the title of Morris. We think the contention is without merit. To hold that defendant guaranteed Morris' title by issuing to him a negotiable receipt for the goods would mean that if goods were stolen and placed in a warehouse by the thief, and a negotiable receipt issued therefor, a purchaser for value of such receipt could recover from the warehouseman after the real owner had secured possession of his goods. The mere statement of the case demonstrates its unsoundness. Assuredly, the purchaser of a negotiable warehouse receipt representing merchandise can be in no better position than a purchaser receiving actual possession of such merchandise. In the latter case, the purchaser would take no better title than his grantor, except where an estoppel of the real owner was involved, an element that does not enter into the present case. To put the matter more strongly, let us suppose that the defendant and collector of customs had delivered the goods to plaintiff before they had knowledge of the superior claim of Christenson, Hanify & Weatherwax. This latter firm, representing the real owners, as appears by the evidence, in the absence of any facts which would estop it to assert its rights, could have recovered the goods from plaintiff. In such an event, would plaintiff and appellant contend that it could recover damages from the defendant because its delivery of the goods upon Morris' order constituted a guaranty of Morris' title? Assuredly, it could not. Does appellant occupy a superior position because it accepted a receipt for the goods from the defendant, rather than the goods itself? We think not. The transfer of a negotiable warehouse receipt is but a symbolic delivery of the goods called for by it. Widemann Co. v. Digges, 21 Cal. App. 342, 131 Pac. 882. The transfer of such a receipt passes the title to the goods as effectually as if the actual delivery had been made. Widemann Co. v. Digges, supra. But it cannot pass title more effectually than an actual delivery, and, if the defendant would not have been liable to plaintiff in the case of an actual delivery of the goods and a subsequent dispossession by the real owner, it is not liable under the facts presented here.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

190 Cal. 364

## Ex parte VON PERHACS. (Cr. 2503.)

(Supreme Court of California. Jan. 30, 1923. Rehearing Denied March 1, 1923.)

**1. Indictment and Information ⊂=110(47)—Complaint alleging reckless driving in statutory language held to be sufficient.**

A complaint alleging that accused "did * * * willfully and unlawfully operate and drive a certain motor vehicle upon a public highway," and continuing in the language of the Motor Vehicle Act, § 20, subd. (a), is an allegation of facts sufficient to constitute a public offense, nor is the substitution of the affirmative language "in a reckless manner" for "not careful" a material deviation, it being sufficient if the language of the statute is substantially followed.

**2. Highways ⊂=186—Jurisdiction of offenses against Motor Vehicle Law not left to civil court nor motor vehicle department.**

The jurisdiction of offenses against the Motor Vehicle Act is not left to the civil courts, nor to the motor vehicle department, and where reckless driving in violation of section 20, subd. (a), has been established, the penalty prescribed by section 32, subd. (a), is properly imposed.

**3. Highways ⊂=186—Revocation of licenses for violation of Motor Vehicle Law not intended as sole penalty.**

Revocation of the operator's license for violation of the Motor Vehicle Act, as provided by section 22 thereof, is not intended as the sole penalty, particularly in view of section 32, subds. (b) and (c), providing additional remedies.

On Petition for Rehearing.

**4. Habeas corpus ⊂=3—May not be resorted to in lieu of demurrer to complaint in misdemeanor case.**

Habeas corpus may not be resorted to in lieu of a demurrer to a complaint in a misdemeanor case on the ground of uncertainty, and any defect appearing in the complaint should be remedied by demurrer, or later by a motion in arrest of judgment, as provided for by Pen. Code, § 1452.

In Bank.

Application by L. Von Perhacs for a writ of habeas corpus to be directed to the Sheriff of Tulare County. Writ dismissed, and petitioner remanded.

D. M. Edwards, of Visalia, and J. C. Thomas, of Susanville, for petitioner.

Fred C. Scott, Dist. Atty., and Leroy McCormick, Deputy Dist. Atty., both of Visalia, for respondent.

LENNON, J. [1] Petitioner herein seeks his release on habeas corpus after judgment of conviction rendered in the justice's court of Tulare township, county of Tulare. In the justice court of that township petitioner herein was charged with, and upon a trial by a jury was convicted of, a misdemeanor arising out of an alleged violation of the provisions of the state Motor Vehicle Act. The complaint against petitioner charged that he "did on the 1st day of July, 1922, * * * at the county of Tulare, state of California, willfully and unlawfully operate and drive a certain motor vehicle, to wit, an automobile, upon a public highway of said county of Tulare, in a reckless manner, and without due regard for the safety and convenience of other vehicles upon said highway, and the safety of property. * * *" The petitioner herein, defendant there, was sentenced to serve 40 days in the county jail and to pay a fine of $200. Upon appeal to the superior court of Tulare county, the judgment was affirmed.

There is no merit in petitioner's contention that the complaint does not state facts sufficient to constitute a public offense. The law does provide such a penalty as is here imposed for the commission of the offense of which the said defendant was convicted. Section 20, subd. (a), of the Motor Vehicle Act (Stats. 1919, c. 147, p. 215) provides that—

"The driver or operator of any vehicle in or upon any public highway shall drive or operate such vehicle in a careful manner with due regard for the safety and convenience of pedestrians and of all other vehicles or traffic upon such highway. * * *"

The same section specifically sets forth other rules to be followed in the operation of vehicles on the public highway, as, for instance, the procedure to be followed in passing and overtaking other vehicles on the highway and turning at intersections.

It has recently been held by this court, in the matter of the Application of John H. Murphy, on habeas corpus, 212 Pac. 30, that subdivision (a) of section 20, hereinbefore quoted, "prohibits the operation of vehicles in an unsafe manner. * * *" There is, therefore, a direct provision of the statute which provides that vehicles shall be driven in a careful manner, or, in other words, which prohibits vehicles from being driven in a careless manner without regard to the safety and convenience of others.

[2] The jurisdiction of such offenses is not left, as is petitioner's contention, to the civil courts or to the motor vehicle department. Section 32 (a) of the Motor Vehicle Act provides that—

"Excepting as in this act otherwise provided, or where a different penalty is expressly fixed by this act, any person violating any of its provisions, or knowingly making a false statement or knowingly concealing a material fact or otherwise committing a fraud in an application for the registration of a vehicle, or in an application for an operator's or chauffeur's license, shall be guilty of a misdemeanor, and upon conviction thereof, unless in this act oth-

erwise provided, shall be punished by a fine not exceeding five hundred dollars or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

The offense in question—reckless driving, as above pointed out—was contemplated and covered by and came within the purview of the provisions of section 20 (a). Petitioner herein, by driving recklessly, was guilty of a violation of that provision of the Motor Vehicle Act, and the penalty provided in section 32 (a) was properly imposed.

[3] The revocation of the operator's license for reckless driving, as provided in section 22 of the statute, was not intended as the sole penalty to be imposed, as is contended by petitioner. On the contrary, the legislative intent to impose an additional penalty for the wanton disregard of the life and safety of others is shown by a review of the Motor Vehicle Act in its entirety and particularly by a consideration of those provisions of that act which provide both directly and by necessary implication for the revocation of an operator's license, not as a substitute for, but as a supplement to, any other penalty imposed. For instance, subdivision (c) of section 32 provides that—

"In addition to any or all other punishments provided in this act and imposed by the court upon any person for violation of any of the provisions of this act, the court may, in its discretion, suspend an operator's or chauffeur's license for a period of not to exceed thirty days, * * *"

Again, section 32 (b) provides that—

"Immediately upon receipt by the department of information * * * concerning the third conviction within one year of any person for the violation of any of the provisions of section twenty-two of this act, the department shall forthwith revoke the operator's or chauffeur's license. * * *"

Obviously, since it is upon information of conviction that the license is to be revoked, the revocation must necessarily have been intended as an additional penalty.

The fact that, in making the charge in the complaint, the exact language of the statute was not used does not, of course, vitiate the complaint. It is sufficient if the pleadings are substantially in the language of the statute, and it is not necessary that the language be followed literally. In re Avdalas, 10 Cal. App. 507, 102 Pac. 674. Practically the only deviation from the words of the statute is the substitution of the words "in a reckless manner" in place of the words "not careful." The only distinction is that the one is stated in a negative and the other in a positive manner. Certainly if petitioner herein was guilty of driving in a reckless manner he was guilty of driving in a manner not careful.

There is some question as to whether the petitioner is charged with the violation of section 20 of the Motor Vehicle Act or section 22 (a) of the same act. The two provisions are practically the same, both providing that vehicles shall not be driven in an unsafe manner. It is therefore immaterial to the petitioner whether he is charged with a violation of one or the other.

The writ is dismissed, and the petitioner remanded to the custody from whence he came.

We concur: WILBUR, C. J.; LAWLOR, J.; MYERS, J.; WASTE, J.; KERRIGAN, J.; SEAWELL, J.

On Petition for Rehearing.

PER CURIAM. [4] The petition for rehearing is denied. Habeas corpus may not be resorted to in lieu of a demurrer to a complaint in a misdemeanor case upon a ground of uncertainty, etc. The defect, if any, in the complaint in the instant case, for failure to specify the particulars of the offense charged, might have been remedied by demurrer, and, if not by demurrer, then by motion in arrest of judgment as provided under section 1452, Penal Code.

WILBUR, C. J., and LENNON, KERRIGAN, WASTE, MYERS, and SEAWELL, JJ., concur.

---

60 Cal. App. 252

## MONTEVERDE v. SUPERIOR COURT OF SACRAMENTO COUNTY et al.

(Civ. 2576.)

(District Court of Appeal, Third District, California. Dec. 26, 1922.)

**1. New trial ⟸2—May be granted where agreed statement of facts does not state ultimate facts, but not where ultimate facts are agreed.**

Under Code Civ. Proc. § 656, defining a new trial to be a re-examination of an issue of fact, the court has no authority to grant a new trial, where the agreed statement of facts involves a statement of the ultimate facts which might appropriately stand as the findings, but, where the agreed statement is merely of the evidence and not of the ultimate facts, a new trial may be granted.

**2. New trial ⟸2—Agreed statement of evidentiary facts presenting controversy did not preclude granting of a new trial.**

In an action to recover payments on the purchase price of lots for breach of contract to furnish water for domestic uses and to construct and improve streets and highways, where the agreed statement of facts presented the controversy as to whether the defendant had improved streets in accordance with the contract, and whether its proposed sinking of a

well to obtain water would be within its agreement, the determination of such controversy in favor of plaintiff by the court's findings of fact did not preclude the court from granting a new trial.

Application for writ of review to annul any order of the Superior Court of Sacramento County granting a new trial in the action by John J. Monteverde against the Brooke Realty Company, in which the court and Peter J. Shields, Judge, were made respondents. Writ disallowed.

V. L. Hatfield and W. H. Hatfield, both of Sacramento, for petitioner.

Dunn & Brand, of Sacramento, for respondents.

HART, J. The petitioner, by this application for a writ of review, seeks to secure a judgment of this court annulling an order by the respondents granting a new trial in a certain action wherein the petitioner is the plaintiff and Brooke Realty Company, a corporation, is the defendant, and which action was tried by, and is now pending before, said respondents.

The position of the petitioner, as must be inferred from the nature of the relief herein sought, is that the respondents, in making the order herein complained of, acted in excess of their jurisdiction. Section 1068, Code Civ. Proc. The ground upon which the petitioner bases the claim for the relief herein asked is that the notice of intention to move for a new trial, served and filed by the defendant in the action above named, was and is insufficient in law to vest respondents with the power or right to hear, determine, and grant a motion for a new trial in said action. The notice of intention to move for a new trial is in the following form:

"Please take notice that the defendant herein intends to move the court to vacate and set aside the judgment rendered in the above cause, and to grant a new trial of said cause upon the following grounds, to wit: (1) Insufficiency of the evidence to justify the judgment. (2) That the judgment is against the law. Said motion will be made upon this notice, the papers on file in this case, and upon the entire record of this action."

Among the grounds specified in section 657 of the Code of Civil Procedure, upon which "the former verdict or other decision may be vacated and the new trial granted on the application of the party aggrieved," are: First, insufficiency of the evidence to justify the verdict or other decision; second, that the verdict or decision is against the law.

On the return day of the writ, the respondents appeared by their counsel and demurred to the petition on the ground that the same did not state facts sufficient to entitle the petitioner to the relief prayed for in the petition, and also filed the return of the respondents to the writ.

When presenting his petition for the writ herein prayed for, it was the theory of the petitioner that the notice of intention to move for a new trial was insufficient and fatally defective because it stated that the application for a new trial would be based upon the grounds that the evidence was insufficient to justify the judgment and that the judgment was against law, instead of stating that the evidence was insufficient to justify the decision and that the decision was against law, as the above-named section of the Code prescribes. When the case was called for argument, however, counsel for the petitioner stated that they had reached the conclusion that the grounds upon which they relied, as set forth in the petition, were insufficient to justify the granting of a writ of certiorari. In other words, they, in effect, conceded that the notice of intention to move for a new trial to which they had objected was sufficient to vest the respondents with the authority to entertain the motion. See Locke v. Moulton, 96 Cal. 21, 30 Pac. 957. They thereupon abandoned the petition in so far as were concerned the grounds therein specifically set forth as the foundation for the relief asked for. Upon this confession of the insufficiency of their petition to justify the granting of a writ of review, the demurrer interposed by the respondents could and should, of course, be sustained. But counsel for the petitioner at the hearing raised another point involving a challenge of the jurisdiction of the court to grant the motion for a new trial in the action referred to, to wit: That the case of the petitioner against the Brooke Realty Company was tried in the court below upon an agreed statement of facts and that in such case, so the contention was and is, a motion for a new trial cannot be entertained by the trial court. Counsel for the respondents made no objection at the time of the suggestion of this point to the hearing and determination thereof by this court, and we suppose that the failure of the respondents to object to the consideration of the point thus raised may be assumed to amount to a stipulation or an agreement that the ground last stated might be treated as having been included in the petition as among the grounds upon which the petitioner asks for a writ of review herein. A serious question arises, though, whether the point last suggested is one which it is appropriate to consider through the instrumentality of a jurisdictional writ. Obviously, the superior court has jurisdiction to grant new trials upon any of the grounds stated in section 657 of the Code of Civil Procedure. A question which might here suggest itself is whether the action of the court in granting the new trial does not involve, if anything at all as against the legal propriety of granting the motion, error rather than an excess of ju-

risdiction, the same being correctable through appeal, the ordinary remedy in the course of law. However, since the question was argued on both sides and submitted for decision we will consider the point. To do this, it will be necessary first to examine briefly the record in the action in which the new trial was granted as the same is disclosed by the return to the writ.

It is shown by said return that, previously to the institution of said action by the petitioner, the assignor of the latter and the Brooke Realty Company, a corporation, entered into two written contracts, each bearing the same date, whereby said company sold to the said assignor of petitioner two several lots in a subdivision known and designated as "Sacramento Heights," in the county of Sacramento. The agreed aggregate price of the lots was to be paid for in certain specified monthly installments. By a certain provision in each of said contracts, the seller obligated itself to "pipe or cause to be piped," within two years from the date of the agreements, water in sufficient quantity for domestic purposes "along the street or alley adjoining the herein described premises, or furnish water immediately upon notification in writing of the completion of a dwelling house by the vendee; and also to construct, grade, and improve the streets and highways in said subdivision." Claiming that the seller (Brooke Realty Company) had breached the provision of the agreements thus referred to, the petitioner brought the said action to recover the amounts paid by his assignor on the lots described in the agreements, together with interest thereon. The complaint was founded upon the theory of money had and received. The answer specifically denied all the material averments of the complaint.

The agreed statement of facts upon which the case was tried and decided consisted mainly of documentary evidence, viz.: The contracts of purchase and letters passing between the parties in which the vendee complained that the seller had failed to perform those terms of the agreements contained in the provision above mentioned, and the vendor maintained that it had lived up to the agreements in all respects or intended to do so—that is, as to the furnishing of water to the premises for domestic use, it would sink a well thereon for that purpose in lieu of piping water thereto, and that, as to the improvement of the streets, etc., it had improved and graded the same as required by the agreement. A statement of the character and the extent of the improvement of the streets by the vendor was embraced in the agreed statement The specific findings were in accord with the allegations of the complaint, and the court further found: "That all of the allegations of the answer are untrue." The conclusions of law were in harmony with the findings. The foregoing statement of the record in the action between the petitioner and the Brooke Realty Company is sufficient for the purposes of the decision of the question presented.

Section 656 of the Code of Civil Procedure defines a new trial to be "a re-examination of an issue of fact," etc. The contention of the petitioner is that, since the action above referred to was tried and decided solely upon an agreed statement of the facts, no issue as to the facts was raised or submitted for decision and that, therefore, there is no issue of fact to be re-examined in said action. The consequence is, so the argument goes, that, where a trial court in such a case entertains a motion for a new trial and assumes to act in such proceeding, it transcends its lawful authority or jurisdiction. In support of their position, counsel for the petitioner cite the following cases: Gregory v. Gregory, 102 Cal. 50, 52, 36 Pac. 364; Stanwood v. Carson, 169 Cal. 647, 147 Pac. 562; Quist v. Sandman, 154 Cal. 748, 99 Pac. 204, and Kaye v. Superior Court, 33 Cal. App. 269, 270, 164 Pac. 912.

In Gregory v. Gregory the cause was tried upon a stipulation of the facts, and the trial court drew its conclusions of law from the facts so stipulated. The Supreme Court held that findings of fact were not necessary; that the facts stipulated, being the ultimate facts, were themselves sufficient to stand as the findings. In Stanwood v. Carson, the findings consisted of all the facts embraced in the agreed statement of facts. That case went to the Supreme Court on an appeal from the judgment and from the order denying a new trial. No question of the jurisdiction of the trial court to entertain a motion for a new trial was therein raised, and the judgment and the order were affirmed.

In Quist v. Sandman the case was tried, not only upon an agreed statement of facts, but upon stipulation that the facts so agreed upon were to be considered as the findings of the court in the case, and they were so treated. In Kaye v. Superior Court the court adopted the agreed statement of facts as its findings.

[1, 2] There can be no doubt that where an agreed statement of facts involves a statement of the ultimate facts and as such may appropriately stand as the findings a motion for a new trial after decision upon such statement would not and could not be entertained. And that is the situation we find in the cases above named. In this case, however, the so-called agreed statement of facts is in truth an agreed statement of the evidence and not a statement of the ultimate facts. Under the agreed statement here there existed a controversy between the parties to the action as to whether or not the defendant therein had improved streets in accordance with the terms of the contracts

and whether, by sinking a well to obtain water for the domestic uses of the premises, as the defendant said that it proposed to do, in the place of piping the water thereto, it would remain within the terms of the contracts. The latter proposition might be said to be a question of law for the court to determine upon a construction of the contracts, but it cannot be doubted that whether the defendant had fulfilled the terms of the contract as to the improvement of the streets was a question of fact for the court to determine from the evidence, from which either of two opposing inferences might reasonably be drawn. The court did determine this fact by its findings, which do not, however, as in the cases above mentioned, embrace the stipulated facts in extenso. Nor, as in said cases, were the conclusions of law drawn directly from the agreed statement of facts. The case here falls within the doctrine of the following named cases: Crisman v. Lanterman, 149 Cal. 647, 654, 87 Pac. 89, 117 Am. St. Rep. 167; Southern Pacific Land Co. v. Dickerson (Cal. Sup.) 204 Pac. 576. In Crisman v. Lanterman it is said:

"As has been stated, the cause was tried upon an agreed statement of facts, and it is claimed by the appellants that, where the facts are agreed, no findings are necessary, and that, if findings are made, they are entitled to no weight. There have been several rulings by this court to the effect that the want of findings affords no ground for reversing a judgment where the facts have been agreed upon. Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364; Muller v. Rowell, 110 Cal. 318, 42 Pac. 804. But here the facts embraced in the stipulation were not the ultimate facts put in issue by the pleadings, but were (as to the question of consent) a recital of the circumstances surrounding the sale, from which the ultimate fact of consent is, as is claimed, inferable. If those circumstances would support an inference either way, it was not only proper but necessary that the trial court should make a finding of the ultimate fact. Such finding when made is entitled to the same weight as any other finding on conflicting evidence, and will not be overthrown unless the facts stipulated cannot by any reasonable inference support the conclusion reached by the trial court."

But the case of S. P. L. Co. v. Dickerson seems to go even further in the statement of the rule as to the proposition in hand than does the case of Chrisman v. Lanterman. In the former case it is said:

"Where there is an absence of conflict, the question of right of recovery is one of law, to be passed upon by the court only (Herbert v. S. P. Co., 121 Cal. 227, 229, 53 Pac. 651), and in such a case the proper procedure is for the court, upon motion, to withdraw the question from the jury by granting a nonsuit or directing a verdict (O'Connor v. Mennie, 169 Cal. 217, 146 Pac. 674; Estate of Caspar, 172 Cal. 147, 155 Pac. 631; Estate of Sharon, 179 Cal. 447, 177 Pac. 283). However, when an issue has been dealt with as an issue of fact and submitted to the jury for decision, and a single, general verdict returned, our Code of Civil Procedure recognizes one method only for obviating the binding effect of the resulting verdict; i. e., upon a motion for a new trial the verdict may be set aside if, at the same time, a new trial is granted. Our statutes provide no other means for the correction of any error that may have been committed in submitting an issue to the jury. The argument that a new trial could not have been granted, for the reason that a new trial is a 're-examination of an issue of fact' (Code Civ. Proc. § 656), and there was no issue of fact in this case by reason of the absence of conflicting evidence, is specious. Subdivision 6 of section 657 of the Code of Civil Procedure authorizes a new trial upon the ground of 'insufficiency of the evidence to justify the verdict,' which has been interpreted as applying not only to cases where the verdict is contrary to the weight of the evidence, but where there is no evidence to support the verdict. Estate of Bainbridge, 169 Cal. 166, 170, 146 Pac. 427; Estate of Caspar, 172 Cal. 147, 155 Pac. 631. When the determination of an issue has been intrusted to a jury, it has, for the purposes of the trial, become an issue of fact, and if it is later discovered that the question should have been passed upon by the court instead of the jury, the mistake can be rectified only by ordering a 're-examination' of what has previously been treated as an issue of fact."

Of course, there can be no distinction as to the application of this doctrine as between a case tried by a jury and a case tried by the court. Where the court itself tries a case without the aid of a jury (we refer to a case at law as distinguished from a case in equity), the former in legal effect becomes the jury.

We conclude that the writ herein prayed for should be disallowed and, accordingly, the demurrer to the petition is sustained and the order to show cause discharged.

FINCH, P. J., and BURNETT, J., concurred.

60 Cal. App. 273

## In re CATE. (Civ. 3999.)

(District Court of Appeal, Second District, Division 2, California. Dec. 27, 1922.)

**1. Attorney and client ⊂⊃61—Belief that attorney is sufficiently punished is no ground for reinstatement.**

The disbarment of an attorney is not intended as a punishment but is a measure for the protection, in a certain sense of the profession, and in a higher sense of the public, and therefore a belief that an attorney had been sufficiently punished is no ground for his reinstatement as a member of the bar.

**2. Attorney and client ⊂⊃61—Disbarred attorney must produce evidence of reformation to be entitled to reinstatement.**

Before an attorney, who was disbarred for professional misconduct, can be reinstated, he must produce evidence of facts showing a reformation and which indicate that he is worthy of the confidence of the public, and mere statements in letters by lawyers and others that they believed he had reformd, unaccompanied by any facts and not supported by oath, except the professional oath of the lawyers, are insufficient.

**3. Attorney and client ⊂⊃61—Judgment disbarring instead of merely suspending will not be lightly set aside.**

Where the court had, under Code Civ. Proc. § 299, the option of suspending an attorney instead of disbarring him, because, though he had pleaded guilty of a felony, his disbarment was asked on other grounds, the order of disbarment indicated a choice by the court which heard the accusation from which an appeal could have been taken, and will not be lightly set aside in a proceeding for the reinstatement of the disbarred attorney.

**4. Attorney and client ⊂⊃61—Application for reinstatement of disbarred attorney is not application to vacate disbarment.**

Though a proceeding by an attorney who has been disbarred to be again enrolled as an attorney of the court is popularly called a proceeding for reinstatement, it is really an application for an admission to the bar, not an application to vacate the order of disbarment, and should be considered as if it were an application for admission by one who came from another state.

**5. Attorney and client ⊂⊃61—Application for reinstatement of disbarred attorney denied for lack of evidence of reformation.**

An application for reinstatement of an attorney who had been disbarred for misconduct, including embezzlement of funds of a client, supported only by letters from his employers and from attorneys stating a belief he had reformed, without any statement of facts showing such reformation, will not be granted, especially where he made no attempt to return the money embezzled by him until after his first application for reinstatement had been denied, and then only upon the advice of counsel.

Original application by Clyde E. Cate for reinstatement as a member of the bar. Application denied.

Vincent B. Vaughan, of Los Angeles, for petitioner.

Norman S. Sterry and G. R. Crump, both of Los Angeles, for respondent Los Angeles Bar Ass'n.

WORKS, J. Petitioner was admitted to the bar on June 14, 1912, at the age of 21. He pursued the even tenor of his way as a practicing lawyer for several years, nothing appearing in the record here to have affected his professional integrity or standing until January 31, 1917, on which date an accusation was filed against him with the grievance committee of respondent bar association. From that date forward his troubles came thick and fast. Other charges against him were filed with the same committee on March 23, June 7, and August 20, 1917, and March 8, 1918. All of these matters were investigated by the committee, and a report in each of them adverse to petitioner was made to the bar association. Some of the charges resulted in findings by the committee that petitioner had been guilty of unethical conduct, while it was found in others that he had embezzled the money of his clients. On February 1, 1918, a criminal complaint was filed in the superior court against petitioner, charging him with the embezzlement of $600 while acting as the agent of a certain party. This charge appears not to have been connected with any of the matters covered by the various accusations made to the grievance committee. Petitioner pleaded guilty to the charge, was admitted to probation, and was later discharged. On April 27, 1918, an accusation praying the disbarment of petitioner was filed in the superior court, the proceeding being based on two of the charges which had been presented to the grievance committee. A judgment of disbarment followed in May or June, 1918. On June 1, 1921, an application was presented to Division 1 of the Court of Appeals of this district, praying the reinstatement of petitioner as a member of the bar, but the petition was denied for the reasons stated in the opinion of the court. In re Cate (Cal. App.) 201 Pac. 964. The present application for reinstatement was filed July 10, 1922.

Ever since his disbarment, petitioner has been under the employment of the Standard Oil Company at its Fresno branch, except that, as indicated by a letter in the record, he voluntarily gave up his place with that company on May 15, 1922, to take a position with the Hudson Automobile Company. Petitioner's uprightness in his employment with the Standard Oil Company is attested by letters and petitions signed by employees of

the company. There is nothing in the record before us, however, to show the character of that employment, except that his petition and several of the documents accompanying it contain the general statement that it was one of trust and confidence. We are unable to determine from this statement to what extent petitioner has been subjected to temptation in his employment, to what extent he has been relieved of it by the surveillance or control of superiors, or whether he has been put "to the test necessary to purge him of the taint of his old wrongdoing and to satisfy us and the public generally that he would made a faithful and trustworthy practitioner at the bar." In re Stevens (Cal. App.) 210 Pac. 442.

[1] The signers of several of the letters and petitions which accompany the present application for reinstatement ask that petitioner be granted the relief he prays, for the reason that he has been punished sufficiently by his disbarment, adjudged, as it was, four years before the filing of his application. Such a consideration can in no way affect the merits of the application. It was said in a proceeding similar to this that—

"In one or two of the affidavits in the record the statement is made that the petitioner has been punished enough, as if a disbarment were punitive in character. It is not. The removal of an attorney's name from the rolls of the profession is a measure protective in character; in a certain sense protective of the profession, but in a higher sense protective of the public which finds it necessary to resort to the services of lawyers." In re Shepard, 35 Cal. App. 492, 170 Pac. 442.

See, also, 6 C. J. 581; People v. Meyerovitz, 278 Ill. 356, 116 N. E. 189; In re Rouss, 221 N. Y. 81, 116 N. E. 782; In re Kerl, 32 Idaho, 737, 188 Pac. 40, 8 A. L. R. 1259.

[2] In addition to the letters and petitions from employees of the Standard Oil Company, petitioner's reinstatement is advocated by letters from five lawyers, by a petition from 23 members of the Fresno County Bar Association, and by a petition from nine business men of Fresno. These letters and petitions, including those from the Standard Oil Company's employees, are based in the main upon the "belief" of the signers that petitioner has learned a valuable lesson from his disbarment and that, if reinstated, he will conduct himself with propriety in the future. None of these documents comes to us under the sanctity of the oath of a single signer, except that it may be said that the letters and petitions presented by lawyers, "all of whom were morally bound by their oaths as attorneys at law not to recommend a disbarred attorney for reinstatement in the courts of their state unless they were satisfied of the rehabilitation of his character" (In re Thompson, 37 Cal. App. 344, 174 Pac. 86), are so sanctified. It was also said in the opinion last cited, that when a reinstatement is asked by one resting under a judgment of disbarment "his request cannot be granted except upon some formal showing of a reformation of character." In their ordinary cases between man and man, attorneys understand that they must produce evidence in order to prevail. Such being the necessary rule in litigation in which purely private interests are arrayed against each other, it can surely be no less important to require that evidence be produced in support of an application for the reinstatement of a disbarred lawyer. In such matters every member of the legal profession has a deep interest, but the interest of the general public therein is immeasurably greater. In truth, whether the legal profession is to be maintained as an honest and honorable calling is a matter of grave general concern.

"No one not a lawyer can fully realize the opportunities for undiscovered peculation, graft, and embezzlement which are afforded the practitioner at the bar. No one not a lawyer can so understand the degree to which the public is entitled to protection from dishonesty in the profession." In re Shepard, supra.

That these matters are fully appreciated by the courts is evident from the frequency with which petitions for reinstatement have been denied in this state of late years, during which, it is true, the number of disbarments themselves has substantially increased. We call attention to a list of opinions in cases in which reinstatements have been refused: In re Shepard, supra; In re Thompson, supra; In re Cate, supra; In re Collins (Cal. Sup.) 206 Pac. 990; In re Stevens, supra. The terms upon which applications for reinstatement will be considered favorably are shown in the following cases in which reinstatements have been allowed: In re Treadwell, 114 Cal. 24, 45 Pac. 993; In re Burris, 147 Cal. 370, 81 Pac. 1077; In re Mash, 39 Cal. App. 548, 179 Pac. 897. Light is cast on the subject, also, by the text which is found in 6 C. J. at page 615. We cannot say that all these authorities are strikingly illuminative of the point to which we attempt to attract attention. We do say, however, from a consideration of all of them, that no disbarred attorney can be reinstated in his old place in the profession except upon a showing of facts, aided perhaps by affidavits or even letters of well-known persons, particularly lawyers and judges, expressing a conviction, based on a statement of facts, that the petitioner for reinstatement has reformed, and all demonstrating that he is fit to reassume the ermine which he has already polluted. Without a statement of facts, affidavits and letters are of slight, if any, value. We quote from a few of the authorities language which illustrates the principle which it is our desire to inculcate, with such explanatory remarks as we deem necessary in order

to present them intelligently to the profession, and to those who have once been of the profession, but who have been found wanting and who may ask that purging which is implied in a readmission to its ranks. Italics used in these quotations, except as otherwise noted, are ours: One Treadwell was disbarred by an order of date April 2, 1885. In an opinion filed August 13, 1896, the Supreme Court said:

"An application is now made in behalf of Mr. Treadwell by E. B. and George H. Mastick, attorneys of this court in good standing, asking that he be restored to said roll of attorneys. The *sworn* petition shows that continuously since the first day of January, 1887, Mr. Treadwell had been in the employment, as general assistant and confidential managing clerk, of the law firm composed of these petitioners and the late W. C. Belcher. * * * It states: 'That during the *nine* years which have elapsed since said Treadwell entered their employment, as aforesaid, petitioners have reposed in him the most implicit confidence, and have given him the management of matters of great importance, requiring the utmost care, secrecy, and good faith, and have intrusted to him large sums of money and property belonging to themselves and others.'"

After quoting further from the petition the court said:

"It is further shown that the money, the appropriation of which caused the disbarment of Treadwell, has been by him fully refunded and repaid to those entitled thereto."

After referring to exhibits which accompanied the petition, the court further remarked in passing on the merits of the application:

"An order or judgment of disbarment is not *necessarily* final or conclusive for all time, and does not preclude the court for good cause from setting it aside and restoring the delinquent attorney."

And a quotation was made from the opinion in an English case to the effect that—

"Both on principle and precedent, sentences of exclusion from * * * the profession need not *necessarily* be exclusions forever."

The court then ordered a reinstatement. In re Treadwell, supra. In another case in which a reinstatement was asked, there being no opposition, the Supreme Court filed but a short opinion, saying, in the course of it, however, that the order of disbarment—

"was made *more than ten years ago* upon a charge * * * involving no criminality, and no serious wrong to any one, though inexcusable in itself."

A reinstatement was allowed. In re Burris, supra. In a late case, in which a reinstatement was refused, we said, after referring to the matter which had occasioned the disbarment of the petitioner, the italics being in the opinion there rendered:

"We have no doubt * * * that the public, remembering the offenses of petitioner, would be shocked at his restoration to the legal profession except upon such a complete and conclusive showing of reform on his part as would convince the general mind that, if reinstated, he would discharge his every duty as a lawyer with an unswerving fidelity. Such considerations must be of controlling moment in every such proceeding as this. Not only must members of the profession be people of integrity, but the public must *know*, if possible, that they are people of integrity. Not only must the bar be entitled to the respect and confidence of the public, but it must, if possible, *actually enjoy* that respect and confidence. * * * Having these precepts in mind, we could not reinstate any disbarred attorney at law if the general public could entertain any just doubt, upon the showing of reformation and regeneration made by him, whether the standing of the profession were not lowered by his return to its ranks." In re Stevens, supra.

In the same case we said, after mentioning certain affidavits presented by lawyers and judges in behalf of petitioner:

"These lawyers and judges give us no facts upon which we can be reasonably certain that, if petitioner were reinstated, he would be faithful to the sacred trust which is reposed in every attorney at law."

It is said in 6 C. J. at page 615, the italics being ours:

"An order or judgment of disbarment is not *necessarily* final, or conclusive for all time, but an attorney who has been disbarred may be reinstated, on motion or application, for reasons satisfactory to the court. * * * The decisive question on such an application is whether the applicant is of good moral character in the sense in which that phrase is used when applied to attorneys at law, and is a fit and proper person to be intrusted with the privileges of the office of an attorney. * * * The *proof* must be sufficient to overcome the court's former adverse judgment of the applicant's character."

[3] We have been at much pains to refer to these matters and to make these quotations, and all because of an apparent lack of appreciation of the serious nature of a judgment of disbarment. We cannot but be impressed with the fact that the courts are confronted with an undue number of applications for reinstatement, especially when we consider the brief period of time which usually elapses between a given judgment of disbarment and the application for reinstatement which is quite likely to follow it. In passing upon such applications, we are bound to consider, it is true, the possibility that every wrongdoer may reform (In re Mash, supra; In re Stevens, supra); but we are not bound to believe that true reform is wrought in short periods of time. Further, we are not bound to pronounce solemn judgment upon the mere faith of friends and acquaintances of applicants that reform has

been accomplished. Something more than the faith of kindly disposed friends is necessary. However kindly disposed we ourselves may be, we are neglectful of our duty if we allow reinstatements except upon *evidence* of reform. We have lately said that one who has been disbarred for grossly immoral conduct—

"should not be reinstated in the ranks of the legal profession except upon the most clear and convincing, nay, we will say upon overwhelming, proof of reform." In re Stevens, supra.

That this position is justified will appear, if, in addition to all we have said above, we attend for a moment to the law of this state upon the subject of disbarments and suspensions. With the one exception provided by the statute; that is, where the person sought to be disbarred has been convicted of a felony, it is optional with a court exercising jurisdiction in a disbarment proceeding to frame its judgment in accord with the gravity of the offense charged. An order of suspension, instead of an order of "permanent" disbarment, may be made. Code Civ. Proc. § 299; Bar Association v. Cantrell (Cal. App.) 200 Pac. 968. The court had that option in the instance of the present petitioner, for, although he had pleaded guilty to the commission of a felony, his disbarment was asked on other grounds. The court determined that an order of suspension was not adequate to the moral delinquencies of petitioner, and an order of disbarment followed. Yet we are now asked to pronounce a judgment which will operate in effect to make the order of disbarment but an order of suspension. Such is, of course, the effect of every order for a reinstatement. A choice between suspension and disbarment being allowed by the statute to the court to which an accusation for disbarment is addressed, and, moreover, it being possible that an appeal may be taken from the judgment pronounced by such a court (see In re Riccardi, 182 Cal. 675, 189 Pac. 694), it must of necessity follow that a judgment of disbarment will not be set aside lightly, even in a proceeding for the reinstatement of the disbarred individual.

[4] Proceedings of this nature are generally styled proceedings for reinstatement, but they are only popularly so called, for it has been determined that they are really but applications for admission to the bar, and cannot in strictness be treated as applications to vacate the order of disbarment. In re Mash, supra; Danford v. Superior Court (Cal. App.) 193 Pac. 272. We therefore must consider the present petition as if it were an application for an admission by one who came to us from a sister state, with the record as a lawyer there similar to the record which petitioner established when he was a member of the bar here. Can it be conceived that one presenting himself with such a record of unenviable achievement in another state could be welcomed to the bar of California upon the meager showing of rehabilitation of character which is made by the present petition and its accompanying letters and petitions? We cannot ourselves conceive the possibility of such an outcome.

[5] We must refer to one matter which to our minds casts light upon the question whether petitioner's character really has been reformed; in fact, upon the question whether even now he appreciates the serious nature of his past misdeeds as a lawyer. Up to the time, one year ago, when Division One of the Court of Appeals of this district passed upon petitioner's earlier application for a reinstatement, he had made no attempt to reimburse certain persons who had been the victims of his misappropriation of funds, persons who were among those who had made complaint against petitioner to the grievance committee of respondent bar association. Not only so, but attempts in that direction which he has since made have been undertaken at the prompting of the counsel who represents him in this proceeding, and not from the spontaneous pricking of his own conscience. Petitioner acknowledges that he owes the persons in question at least $200. He is now unable to locate them, and they are finally to be deprived, as it appears, of the right to their money. An earlier attempt to reimburse them might have been successful, and petitioner might thus have made partial amends for the wrong he did in the particular instance in question, but his delay in attempting to make restitution appears to have perpetuated the original wrong. Such a condition of affairs comes far from deserving our commendation.

It is our duty to scan carefully every application of a disbarred attorney for reinstatement. It is our duty to acknowledge the possibility that every wrongdoer may reform, and to allow a reinstatement in every case in which a genuine reform is shown, yielding some consideration to petitions for reinstatement purely from the standpoint of the petitioner, but viewing them more broadly from the standpoint of the rights and needs of that public which deserves an adequate protection from the grafts and peculations of dishonest lawyers. Our duty goes no further.

"When a member of the profession has been found lacking in the requisites which go to make him a helper to his clients, and has been discovered to possess aims, views, and purposes which indicate a moral obliquity in him, and which might make his clients his victims, it is well that he were removed from the possibility of doing them harm. When he has been once disbarred, a mistaken charity should not restore him to his position. That restoration should only come when he has lived long enough after his disbarment in honorable intercourse with his fellow citizens to demon-

strate that he is both tried and true." In re Shepard, supra.

Petition denied.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

60 Cal. App. 244

## HENRY v. WILLETT et al. (Civ. 2481.)

(District Court of Appeal, Third District, California. Dec. 26, 1922.)

**1. Venue ⊂⊃77—Absolute right to change of venue may be waived.**

While the right of a defendant to a change of venue in a proper case is absolute, such right may be waived.

**2. Partnership ⊂⊃213(1)—Complaint construed as one against defendants as individuals, and not within statute providing for suit against association by common name.**

Where the caption of the complaint states that defendants do business under a certain firm name, but the body of the complaint alleges defendants "now are, and during all the times herein mentioned were, engaged in and doing business in S. county, Cal., and are now engaged in the building," etc., and the caption of the summons is the same as that of the complaint and is addressed to defendants as individuals, the action is clearly against defendants individually and is not within Code Civ. Proc. § 388, providing that, when two or more persons associated in any business transact such a business under a common name, the associates may be sued by such common name.

**3. Associations ⊂⊃20(1)—Action against individuals under firm name held not within constitutional provision authorizing suit in county where breach of contract occurred.**

An action against individuals under their firm name to recover for money due for labor and services, brought in the county where the labor and services were performed and not in the county where defendants were resident, *held* not within Const. art. 12, § 16, providing that an association may be sued in the county where the contract is made or is to be performed or where the obligation or liability arises or the breach occurs or in the county where its principal place of business is situated; the action being personal in character.

**4. Venue ⊂⊃77—Motion for change held not abandoned by filing subsequent motions.**

Where a hearing on motion for a change of venue was set for a certain day but no dispcsition of the matter was made on such day and no postponement was entered, that subsequent motions were made setting the matter for hearing on other days did not constitute an abandonment of the original motion.

**5. Courts ⊂⊃80(1)—Court rules cannot control or be substituted for statutory provisions as to procedure.**

Rules of court cannot be invoked to control or be substituted for statutory provisions as to procedure.

Appeal from Superior Court, Siskiyou County; C. J. Luttrell, Judge.

Action for money due for labor and services by W. P. Henry against Walter M. Willett and P. L. Burr, doing business under the firm name of Willett & Burr. From an order denying a motion for change of venue, defendants appeal. Reversed, with directions.

John D. Murphy, of Oakland, and Taylor & Tebbe, of Yreka, for appellants.

Jacob P. Wetzel, of San Francisco, and Collier & Collier, of Yreka, for respondent.

HART, J. This is an appeal from an order denying a motion by the defendants for a change of the place of trial of the above-entitled action.

The action was brought by the plaintiff to recover from the defndants the sum of $525.96 alleged to be due the former from the latter for labor and services performed.

The complaint alleges that the defendants now are, and during all the times mentioned in the complaint were, engaged in and doing business in Siskiyou county, Cal., "and are now engaged in the grading, building and constructing of a road between Happy Camp and Cottage Grove, for the government of the United States"; that the defendants, through their superintendent and agent, E. R. Miller, on or about the 13th day of June, 1921, employed the plaintiff to perform work and labor on the road then being constructed in Siskiyou county, and in pursuance of said employment the plaintiff performed work and labor for a period of 93 days, and that said work and labor were reasonably worth $6 per day; that the plaintiff performed other services for the defendants in road construction for which the latter agreed to pay him the sum of 65 cents per yard, amounting in the aggregate to the sum of $100.75; that defendants have failed and refused to pay the plaintiff said money or any part thereof except the sum of $50.

Summons and a copy of the complaint were duly served on the defendants in the city and county of San Francisco by the sheriff of said city and county on the 18th day of October, 1921.

The defendants appeared by filing a demurrer on the 2d day of November, 1921. With the demurrer was served a notice of motion for a change of the place of trial from Siskiyou county to the city and county of San Francisco. There were also filed at the same time a demand for a change of the place of trial, affidavits by the defendants Walter M. Willett and P. L. Burr, deposing that they were at all times mentioned in the complaint residents of the city and county of San Francisco, an affidavit of merits, notice of motion for a change of place of trial,

and an affidavit showing that all the foregoing papers were regularly and duly served on the 1st day of November, 1921, upon Jacob P. Wetzel, one of the attorneys for said plaintiff, at Yreka, Siskiyou county, the place of residence of said Jacob P. Wetzel.

The notice of the motion for an order changing the place of trial from Siskiyou county to the city and county of San Francisco stated that said motion would be called for hearing on the 14th day of November, 1921, at the hour of 10 o'clock a. m. on said day "or as soon thereafter as counsel can be heard." On said day, when said motion was called for hearing, in pursuance of the notice given, there was no appearance on behalf of the defendants, and no action whatever was taken upon the application. The minutes of the court of November 14, 1921, as to this motion, following title of court and cause, merely show this:

"Monday, November 14, 1921. This being the time noticed for motion for a change of place of trial of the above entitled action, the matter was regularly called on the court calendar by the court and there was no appearance on behalf of defendants."

Thus it will be noted that the court omitted to continue the hearing of said motion to any definite or certain date or time or to take any action thereon.

On the first calendar day thereafter, which was the 3d day of December, 1921, counsel for the defendants moved the court for an order changing the place of trial of the above-entitled action to the city and county of San Francisco, "on the grounds theretofore set forth in the notice of motion and the demand and affidavits of residence theretofore filed and fixed for hearing, on November 14, 1921." Counsel for plaintiff at no time filed counter affidavits or otherwise made any showing in opposition to the granting of the motion except in objections orally made at the time the proceeding was heard to the hearing or granting of said motion for these alleged reasons: That no continuance of the hearing of the motion on the 14th day of November, 1921, had been made by the court, and that the motion noticed for hearing on said date had been abandoned by defendants, and that there had been no motion noticed for the 3d day of December, 1921. No action was taken by the court upon the motion made at that time. Thereafter, and on the 7th day of December, 1921, counsel for the defendants filed and served on counsel for the plaintiff a notice of motion to change the place of trial of said action, fixing the time for the hearing of said motion for Monday, the 13th day of December, 1921, at 10 o'clock a. m., "or as soon thereafter as counsel can be heard." Said notice recited that said motion would be made upon the affidavits and demand for a change of place of trial theretofore served upon the attorneys for plaintiff, upon a written notice of motion setting said hearing for the 14th day of November, 1921, and that the same would be made upon the grounds stated in the original notice, demand, and affidavits as follows, to wit: That the said defendants Willett and Burr were not at any of the times mentioned in the complaint residents of the county of Siskiyou, but that at all said times were residents of the city and county of San Francisco, etc.

When the matter came up for hearing on the 13th day of December, 1921, in pursuance of the notice of motion last above referred to, counsel for the plaintiff renewed their objections to the hearing of the motion upon the same grounds upon which they objected to the hearing of the motion which had been fixed for hearing on the 7th day of December, 1921, and added this further objection:

"That another motion in this action for the change of the place of trial of this action from the superior court of Siskiyou county to the superior court of the city and county of San Francisco, on the same grounds as stated in defendants' last motion, is now pending and undetermined in this court, and that this court has no jurisdiction to hear or consider this motion."

It was also, in effect, objected that the court lost its right to entertain the motion because said motion was not fixed for hearing and presented on one of the regular law days which are designated as such by the rules of the superior court of Siskiyou county. On the 16th day of December, 1921, the motion and the objections to the consideration thereof by the court were taken up for hearing and argued by the respective counsel, and on the 1st day of March, 1922, the court rendered its decision denying said motion. The order of the court denying the motion reads as follows:

"The motion of the defendants in the above-entitled action for an order changing the place of trial of said action from the above-entitled court to the superior court of the state of California in and for the city and county of San Francisco, made in this court on the 3d day of December, 1921, and also the motion of said defendants in said action for an order changing the place of trial of said action from the above-entitled court to the superior court of the state of California in and for the city and county of San Francisco, made in this court on the 13th day of December, 1921, are this day denied without prejudice, and said defendants are and each of them is hereby given permission to renew said motion for a change of the place of trial in said action if they, or either of them, be so advised."

The respondent has not filed any brief in support of the order from which this appeal is prosecuted, nor was he represented

when the case was called for oral argument before this court. We do not know whether the failure of counsel for the respondent to file a brief supporting the order complained of by the appellants or to appear before this court and argue the case orally when it was regularly called for such hearing is to be taken as an abandonment of the case by respondent or an assumption on the part of counsel that the order appealed from is so obviously impregnable against successful attack as to require no argument to support it. At any rate, we are without enlightenment upon the views of counsel for the respondent as to the theory upon which they expect the order to be sustained, if, indeed, they have entertained any such expectation. But, from the nature of the objections urged against the hearing of the several motions, as they are recorded in the transcript before us, we may well assume that the theory of the respondent was and is that the failure of the defendants to appear either in person or by counsel in the court below on the day originally fixed for the hearing of the motion to present and urge said motion amounted to an abandonment thereof and that said failure is equivalent to a waiver of their right, if any they have, for a change of the place of trial from the superior court of the county of Siskiyou to the superior court of the city and county of San Francisco. There was no objection made in the court below to the moving papers themselves or any question raised as to the sufficiency thereof. The sole objection to the hearing of the motion was that the court had lost jurisdiction to entertain the same for the reason that the motion as originally noticed was not pressed by counsel for the defendants, the latter not being present in court on the 14th day of November, 1921, the day fixed in the notice for the hearing of the motion. In other words, the contention seems to be that the defendants exhausted or waived their right to move for a change of venue because of their failure to press their motion on the day on which it was originally fixed for hearing.

[1] It may first be remarked that it is thoroughly settled that the right of a defendant to a change of venue in a proper case is absolute, but that such right may be waived. Authorities need not be cited upon this proposition.

[2-4] Although the caption of the complaint states that the defendants do "business under the firm name of Willett & Burr," the action is clearly against the defendants individually. The body of the complaint, as will be observed, alleges that the defendants "now are, and during all the times herein mentioned were, engaged in and doing business in Siskiyou county, Cal., and are now engaged in the building and constructing of a road," etc., and that the plaintiff was employed by them through E. R. Miller, their superintendent. The caption of the summons is the same as that of the complaint and is addressed to "Walter M. Willett and P. L. Burr, defendants." It is clear that the action does not come within the terms of section 388 of the Code of Civil Procedure. Davidson v. Knox, 67 Cal. 143, 7 Pac. 413; Feder v. Samuel Epstein et al., 69 Cal. 456, 10 Pac. 785; Maclay Co. v. Meads, 14 Cal. App. 363, 372, et seq., 112 Pac. 195, 113 Pac. 364. Nor (if, in point of fact, the defendants constitute an association and as such engaged in doing the business mentioned in the complaint) does the action as it is made by the complaint come within the provisions of section 16 of article 12 of the Constitution. The action is personal in character, and the defendants, unless the objections urged in the court below against their motion are legally sound, are entitled to an order changing the place of trial of the action from Siskiyou county to San Francisco. We are of the opinion that there is no merit in the objections urged against the entertainment of the motion. While it is true that the record indicates that there were several attempts at the presentation of the motion as originally filed for a change of the place of the trial of this action, as a matter of fact, and in legal effect, there was but one motion, to wit, the motion noticed for the 14th day of November, 1921. The other so-called motions merely involved a revival or the pressing of the original motion. No other moving papers were filed than those originally filed and served and the proceeding was conducted entirely upon said papers. The fact that the defendants kept alive their original motion and persisted in having it heard and determined by the court is, of course, indubitable evidence that there was no intention on their part to abandon the motion or waive their right to an order changing the place of trial to the county of their residence. The case of McNeill & Co. v. Doe, 163 Cal. 338, 125 Pac. 345, is altogether different from the case at bar. In that case the defendant had regularly filed and served his motion for a change of the place of trial, but the trial court denied the same on the ground that "the original and supplemental affidavits of merits were radically defective in essential particulars." Subsequently, the "defendant again served a notice and demand for the change of the place of trial, both on the ground of his residence in Tulare county when the suit was commenced, and the further ground of the convenience of witnesses, filing therewith an affidavit of merits addressed to both grounds." The trial court, upon hearing said motion, denied the same. The defendant appealed from the last order, and the Supreme Court, in upholding the same, said:

"The appellant here was required to make his motion for the change when he filed his demurrer and he did so, but as his affidavit of merits was entirely insufficient within the plain requirements of the law, the court properly denied his motion. He accepted this ruling as correct, as it undoubtedly was, and it was conclusive of any right to subsequently renew his motion on his own initiative and on the same ground. His right to move ended with that denial. Hence, when he made the third motion on the same ground of residence in Tulare county, the court properly denied it, as his right to move in that respect was exhausted with the denial of his original application."

In this case, though, the court had not passed upon the motion. On the day originally fixed for the hearing, the matter of the motion, as the minutes of the court disclose, was not disposed of. It was not even postponed for hearing to a further date. The subsequent so-called motions were, as above stated, merely notices of the intention of the defendants to present and press the motion as originally made, and there is, obviously, no ground for holding that the defendants, in such a situation, exhausted their right to proceed with the motion or that the court was without jurisdiction to hear and determine it.

In Bohn v. Bohn, 164 Cal. 532, 129 Pac. 981, a motion for a change of venue was denied on the ground "that the notice of motion was insufficient in that no time of hearing was designated in said notice of motion, and on the further ground that no sufficient service of notice of motion had been given." The Supreme Court on appeal upheld the action of the trial court in denying the motion, but, among other things, had this to say:

"It is suggested that, if sufficient notice had not been given, the court below should not have denied the application for change of venue, but should have deferred action to enable the defendant to give a proper notice. This would, no doubt, have been a proper course, if the defendant had requested it. But, instead of so requesting, he persisted, in the face of the objection of want of notice, in presenting his motion. * * * It may be, too, that a denial of the motion for want of notice would not be a bar to a subsequent motion upon proper notice. But the question of defendant's right, if seasonably asserted, to renew his motion, is not involved here."

See, also, Lundy v. Lettunich (Cal. App.) 195 Pac. 451.

What the Supreme Court first suggested in the above excerpt from the Bohn Case would be the proper course is substantially what the defendants did in this case.

[5] As to the objection to the hearing of the motion on the ground that it was not made on a regular law day, fixed by the rules of the superior court of Siskiyou county, the answer is that the rules of the courts cannot be invoked to control or be substituted for statutory provisions as to procedure. Bohn v. Bohn, supra.

The order appealed from is reversed, with directions to the trial court to make and enter an order granting the motion of defendants for the change of the place of trial as indicated in their moving papers.

We concur: FINCH, P. J.; BURNETT, J.

---

(60 Cal. App. 263)

## PEOPLE v. COLLINS. (Cr. 669.)

(District Court of Appeal, Third District, California. Dec. 27, 1922. Hearing Denied by Supreme Court Feb. 21, 1923.)

1. **Forgery ⊜44(½)—Evidence held to support verdict of guilty.**

Verdict of guilty in a prosecution for forgery *held* amply supported by evidence.

2. **Indictment and information ⊜110(15)—Forgery indictment in statutory language sufficient.**

An indictment for forgery is sufficient where it is in the language of the statute (Pen. Code, § 470).

3. **Criminal law ⊜568—Forgery ⊜44(1)—Intent to do wrongful act provable by extraneous circumstances; signing other's name to check without authority held evidence to defraud.**

Intent to do a wrongful act is always provable by extraneous circumstances—that is, by some physical act or acts which with sufficient clearness disclose the operation of the mind with respect to the wrongful act—and the fact that accused without authority signed to a check names of the officers of a company is itself conclusive evidence that his intent was to prejudice or damage or defraud the company.

4. **Criminal law ⊜301—Refusal to allow withdrawal of plea of not guilty in order to demur held not abuse of discretion.**

Though it would generally not only be the proper but the just course to be adopted by the trial court, where the defendant, having no counsel at the time of his arraignment upon an information or an indictment, enters a plea of not guilty thereto, to set aside such plea upon the motion of the defendant before the trial is begun, for the purpose of enabling him to demur to the pleading or move to set it aside upon any grounds prescribed by the statute, the refusal to do so *held* not an abuse of discretion where, if the demurrer had been interposed, it would have been the duty of the court to overrule it; the indictment being sufficient.

5. **Indictment and information ⊜110—Indictment not quashed on ground that accused not permitted to testify before grand jury.**

Though Pen. Code, § 919, provides that a grand jury may receive none but legal evidence, section 920 expressly declares that, in the in-

vestigation of a charge against a party, a grand jury is not bound to hear evidence for the defendant, and hence an indictment will not be set aside on the ground that accused was not permitted to testify before the grand jury.

**6. Indictment and information ⟸10, 137(4)— Indictment not set aside on ground grand jury based indictment on incompetent evidence; statute excludes other grounds for setting aside indictment, than those specified.**

The express enumeration in Pen. Code, § 995, of the grounds upon which an indictment or information may be set aside necessarily excludes all other grounds or reasons for setting such pleading aside; and an indictment cannot be quashed because grand jury based indictment on incompetent evidence.

**7. Forgery ⟸34(8) — Indictment and proof held not subject to charge of variance.**

The contention that there was a variance between the indictment and the proof, in that check alleged to have been forged by defendant was that of the El Dorado Water Company, whereas the indictment alleged that the defendant forged said check with the intent to defraud the El Dorado Water Corporation, *held* not tenable where the El Dorado Water Company was taken over by the El Dorado Water Corporation, and the latter continued to use the blank printed checks formerly used by the water company and said checks, when signed by the proper officers of the El Dorado Water Corporation, constituted legal demands against said corporation, and were so recognized by the bank upon which they were drawn, notwithstanding that the name El Dorado Water Company was printed thereon.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

John L. Collins was convicted of forgery, and appeals. Affirmed.

John L. Collins, in pro. per.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was charged by an indictment returned by the grand jury of the county of El Dorado with the crime of forgery, and upon trial therefor before a jury was found guilty of the crime as so charged. The specific charge is that the defendant, with the felonious intent to prejudice, damage, and defraud the El Dorado Water Corporation, a corporation organized, etc., did, on the 17th day of June, 1922, make, forge, and counterfeit a certain check for $200, payable to the order of John L. Collins, and which purported to be a check drawn upon the El Dorado County Bank of Placerville, and to have been signed by said corporation, and R. W. Hawley, the general manager, and O. P. Fitch, the secretary-treasurer. He made a motion for a new trial, and the same was denied, and he thereupon was sentenced to imprisonment in the state prison, whereupon he gave notice of an appeal from the judgment of conviction and the order denying him a new trial. The defendant, who does not claim to be an attorney at law, himself conducted in his own behalf all the proceedings following the verdict of guilty returned against him, and also prepared his own brief on file in this court, and appeared personally before the court, and orally argued the cause. He advances a number of points upon which he claims that he is entitled to a reversal of the judgment and the order. After a careful examination of these points we have been convinced that there is no merit in any of them. We will therefore give each brief consideration only, and will take up, out of order, the assignment that the evidence is insufficient to support the verdict. In stating the facts, it will be understood, of course, that they are as they were shown by the evidence at the trial.

[1] The defendant appeared in the city of Placerville some time in the latter part of May, and was introduced to R. W. Browne, assistant secretary of the El Dorado Water Corporation, as the representative of a Mr. Hess, between whom and said corporation a contract had been entered into whereby the former was to construct a dam for the corporation on Webber creek, in El Dorado county. The defendant was introduced to Mr. Browne as "Judge Gordon." He remained in Placerville until about the 10th of June, 1922, and during most of that period of time was in and about the offices of the corporation—in other words, made his headquarters in said offices.

It appears that prior to March, 1922, the El Dorado Water Corporation had been known as the El Dorado Water Company, and that the funds of said company were deposited in the Placerville bank above referred to. The printed checks of said company at that time contained the name of the El Dorado Water Company. Some time in said month of March the El Dorado Water Corporation was organized as a corporation under the laws of the state of California, and thereupon the El Dorado Water Company was transferred to said corporation. The evidence shows that the corporation known as the El Dorado Water Company was never dissolved, but that it was turned over to the El Dorado Water Corporation as the holding corporation of said company. It also appears from the evidence that, after the transfer of the El Dorado Water Company to the El Dorado Water Corporation, the latter continued to use, as a matter of convenience when making payments out of the funds of the corporation in the said bank, the printed checks of the El Dorado Water Company. The witness Browne, as assistant secretary of the corporation, had charge of the check book and,

generally, the business of issuing checks for the corporation. He stated that his custom was to prepare checks, when vouchers were presented, in pen and ink, and then take them to Mr. R. W. Hawley, the general manager, and O. P. Fitch, the secretary-treasurer, to be countersigned. He further stated that he often left the check book on his desk. He would do this, so he stated, only when he was to be temporarily absent from his office, and there was no one in the office whom he had reason to believe was untrustworthy; that, subsequently to the departure of the defendant from Placerville it was discovered that a number of the blank checks were missing from the check book. These were numbered 1388, 1389, 1390, 1433, 1434, and 1435, each of said checks having printed upon it the words "El Dorado Water Company."

The check which is set out in the indictment as having been forged by the defendant bears the number 1435, and it was declared by the officers of the water corporation testifying in the case to be identical in all respects, so far as the printed words thereon and the size and character of the paper are concerned, with the blank checks contained in the check book of the corporation. In this connection it may be stated that the witness Browne testified that the defendant "was shown the courtesy of the office and was often seated in the swivel chair at the desk where the check book was kept in the daytime, and there were times when I left the office and he had access to the check book." He added that the defendant had an opportunity to remove the missing checks from the check book, and could have done so. The part of the check indicating the amount for which it was issued, in the place of having been made out in ink, was filled in by means of a protectograph, and it was stated by the officers of the corporation that there was no protectograph in the office of the corporation on the date on which the check was apparently issued. The name "John L. Collins" in the check was typewritten, and one of the officers of the corporation testified that the character of the typewriting was the same as that produced by a typewriting machine in his office during the period of time that the defendant made his headquarters at the company's office. Both Fitch and Hawley positively testified that they did not attach or subscribe their signatures to the check in question, and that they did not authorize any one to do so.

R. K. Blanchard, chief engineer and assistant secretary of the Neptune Meter Company, manufacturers of hydraulic apparatus, in New York City, who is a resident of said city, testified that the defendant came to the offices of the establishment with which the witness was connected in New York on the 27th day of June, 1922, and, introducing himself as the purchasing agent and assistant general manager of the El Dorado Water Company of Placerville, Cal., after some negotiations, signed a contract with said meter company through the witness for a large quantity of water meters; that on July 6th the defendant presented the check in question to the witness and requested him to cash the same. The witness examined the check and discovered that there was a striking similarity in the style of the signatures of Hawley and Fitch, and, having previously had his suspicion aroused as to the validity of the defendant's contract for the meters, refused to cash the check for its full amount, and gave the defendant $20 only, and retained the check. The witness identified the check in question as the one which was presented to him by Collins as above explained.

There is other testimony in the record tending to show the guilt of the defendant as charged in the indictment, but it is not necessary to recite the same or state the substance thereof herein. It is sufficient to say that a careful examination of the testimony as the same is presented here has left no doubt in our minds that the verdict is amply supported.

Such of the remaining points as we conceive should be given consideration will now be noticed in the order in which the defendant presents them in his briefs.

1. It is first contended that the court was without jurisdiction to try the defendant, because, as he asserts, the crime for which he was extradited (he having been arrested in New York) is not the crime charged in the indictment and of which he was convicted. It is argued that the law of the country is that a person who is a fugitive from justice from a certain state, and domiciled in another state, cannot be extradited from the latter state for a certain crime alleged to have been committed in the demanding state and then put upon trial in the latter state upon an entirely different charge. Assuming, but not conceding, that such is the law, the difficulty in the way of considering the point here is that it is not made to appear in the record that the defendant was prosecuted for and convicted of a different offense from that for which he was extradited.

[2, 3] 2. The objection that the indictment does not state a public offense is without foundation. We will not undertake to follow the criticisms directed by the defendant against that pleading. It is sufficient to say that it is in the language of the statute (section 470, Pen. Code), and is in every particular sufficient in the statement of the crime of forgery as it is defined by the section just named. In this connection we may suggest that the contention of the defendant that the mere intent to injure and defraud a person is

not and cannot be a crime is excusable on the ground that the defendant is himself not a lawyer, and perhaps to no extent versed in the law, and is therefore unable to perceive how the mere intent to do a wrong, without committing the wrong itself, can be made a crime. The difficulty which appears to confront the defendant, though, as we judge from his briefs, is that he is unable to see how the intent to do a wrong, which is, of course, always hidden within the impalpable human mind, can be proved. But the obvious answer to this proposition is that the intent to do a wrongful act is always provable by extraneous circumstances —that is, by some physical act or acts which, with sufficient clearness, disclose the operation of the mind with respect to the wrongful act. In this case, for instance, the fact that he, without authority, signed the names of the officers of the water company to the check is itself evidence, quite conclusive, that his intent was to prejudice or damage or defraud the water corporation.

[4] 3. The complaint that the court erred in refusing the application of the defendant, made before the trial of the case, to be allowed to withdraw his plea of not guilty theretofore entered, so that he could demur to the indictment, and also move to quash or dismiss it, is without legal force. In other words, while it would generally be not only the proper, but the just, course to be adopted by the trial court, where the defendant, having no counsel at the time of his arraignment upon an information or an indictment, enters a plea thereto, to set aside such plea upon the motion of the defendant before the trial is begun for the purpose of enabling him to demur to the pleading or move to set it aside upon any ground or grounds prescribed by the statute, yet, in this case, we find no justification for holding that the court abused its discretion in refusing to allow the motion of the defendant to withdraw his plea. We have already shown that the indictment contains a sufficient statement of the offense of forgery under the statute. Even, therefore, if the demurrer had been interposed, it would have been the duty of the court to overrule it, and, consequently, it would involve a clear miscarriage of justice to send the case back upon the ground that the court had refused to permit the defendant to withdraw his plea in order to enable him to file and present his demurrer.

[5-6] As to the defendant's proposal or desire to move to dismiss or set aside the indictment, the record itself is not clear as to the ground upon which he intended to press the motion. The affidavits upon which the motion to set aside the defendant's plea was based merely state that the defendant was not permitted to appear before the grand jury and give testimony regarding the charge which that body was investigating as against him. In the briefs, however, the defendant declares that it was his purpose to move to quash the indictment on the ground that the grand jury based the indictment herein on incompetent testimony, contrary to the terms of section 919 of the Penal Code, providing that—

"The grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence."

The answer to the first proposition is to be found in section 920 of the Penal Code, which expressly declares that, in the investigation of a charge against a party, "the grand jury is not bound to hear evidence for the defendant." The second proposition is, as stated, suggested in the briefs only, and, while it is not here presented in a form to be reviewed, it may nevertheless be observed that section 995 of the Penal Code expressly sets forth the grounds upon which an indictment may be set aside, and an indictment cannot be set aside for any other reasons than those mentioned in said section. The express enumeration of the grounds upon which an indictment or information may be set aside necessarily excludes all other grounds or reasons for setting such pleading aside. The fact that a grand jury may receive incompetent evidence against a person against whom it has found an indictment, or has based such indictment, either wholly or in part, upon incompetent evidence, does not constitute one of the grounds enumerated in section 995 upon which an indictment may be set aside. People v. Fealy, 33 Cal. App. 605, 613, 165 Pac. 1034. See, also, cases cited therein.

4. It appears that before the indictment herein was found and returned by the grand jury a complaint or deposition was filed in the justice's court of the township of Placerville charging the defendant with the crime herein charged, and a warrant thereupon issued for his arrest. The defendant contends that, this course having been adopted in the first instance, it was the duty of the authorities to take him before the magistrate before whom the deposition was filed, and by whom the warrant was issued, and there subject him to a preliminary examination; that, because of the fact that the district attorney so proceeded in the first place, the grand jury was without authority to investigate his case and return an indictment against him, and therefore the indictment was not valid, and was wholly insufficient to clothe the superior court with jurisdiction to try him. Of course there is absolutely nothing in this point. We notice it merely because the defendant, who, as stated, is not an attorney at law, devotes many pages of his brief to the consideration of the point.

[7] 5. It is contended that there is a variance between the indictment and the proof, in that the check alleged to have been forged

by the defendant is that of the "El Dorado Water Company," whereas the indictment alleges that the defendant made, forged, and counterfeited said check with the intent to prejudice, damage, and defraud the "El Dorado Water Corporation." Indeed, the same contention applies to the indictment itself, since the check, as pleaded, upon its face shows that it was that of the El Dorado Water Comapny, while the indictment charges that it was wrongfully signed and issued by the defendant for the purpose of prejudicing the El Dorado Water Corporation. The contention is untenable. As we have shown, the officers of the corporation testified that, after the El Dorado Water Company was taken over by the El Dorado Water Corporation, the latter continued to use the blank printed checks which had been theretofore used by the former. In other words, said checks were, as a matter of convenience, appropriated by the El Dorado Water Corporation to its uses and purposes in the transaction of its business, and, when signed by the proper officers of the El Dorado Water Corporation, constituted legal demands against said corporation, and were so recognized by the bank upon which they were drawn, notwithstanding that the name "El Dorado Water Company" was printed thereon.

There are other points made by the defendant which are equally as untenable as those above considered. It would be a waste of time to give them specific attention herein. We are satisfied from an examination of the entire record that the defendant was accorded a fair and impartial trial, that, as above declared, there is plenty of evidence, direct and circumstantial, to sustain the verdict, and that there is no meritorious ground upon which an interference with the judgment and the order, or either, may be supported.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; BURNETT, J.

---

(60 Cal. App. 271)

## PEOPLE v. COLLINS. (Cr. 670.)

(District Court of Appeal, Third District, California. Dec. 27, 1922. Hearing Denied by Supreme Court Feb. 21, 1923.)

**1. Criminal law ⟸1081, 1144(19)—Notice of appeal held indefinite, but assumed that defendant intended to appeal from judgment and denial of new trial.**

Where a defendant tried upon a charge of forgery was found guilty by jury, and thereafter judgment regularly pronounced against him, and after denial of his motion for new trial gave notice of "an appeal to the appellate court," the appellate court cannot determine from such notice of appeal whether the judgment or the order only or both were appealed from; but, since defendant was not an attorney, and conducted his own defense, it will be assumed that he intended to appeal from both judgment and order denying new trial.

**2. Forgery ⟸44(½)—Evidence held sufficient to sustain conviction of forgery.**

Evidence in a prosecution for forgery *held* sufficient to support judgment of conviction.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

John L. Collins was convicted of forgery, and appeals. Affirmed.

John L. Collins, in pro. per.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant, who is also the defendant in Cr. 669 (212 Pac. 701), in which an opinion affirming the judgment and the order has this day been filed, was charged by an indictment found and returned by the grand jury of El Dorado county with the crime of forgery, as follows:

That on or about the 10th day of June, 1922, in the county of El Dorado, state of California, he "did then and there willfully, unlawfully, feloniously, falsely, and fraudulently, and with intent to prejudice, damage, and defraud Placerville National Bank, a corporation organized and existing under and by virtue of the laws of the United States of America, make, forge and counterfeit a certain check in the words and figures following, to wit:

" 'Atlanta, Ga. Jun. 2, 1922 192

" 'No. 25792 $100.00.

" 'The Fulton National Bank, 64-7: Pay to the order of David J. Gordon one hundred dollars dollars.

" 'To The National Park Bank, New York, N. Y.

" 'Garrett C. Evans, Asst. Cashier.'

"And having indorsed on the back thereof the words 'D. J. Gordon,' and he, the said John L. Collins, well knowing the same to be false and forged, did, on said 10th day of June, A. D. 1922, at said county of El Dorado, state of California, willfully, unlawfully, feloniously, falsely, and fraudulently, and with intent to prejudice, damage, and defraud the said Placerville National Bank, a corporation organized and existing under and by virtue of the laws of the United States of America, utter, publish, and pass the same as true and genuine to said Placerville National Bank, a corporation organized and existing under and by virtue of the laws of the United States of America, contrary," etc.

[1] The defendant, having been tried upon said charge, was found guilty by the jury before whom the cause was heard, and thereafter judgment of sentence was regularly pronounced against him. He made a motion for a new trial, which was denied, and he thereupon gave notice of "an appeal to the appellate court." From this it cannot be deter-

mined whether his intention was to appeal from the judgment or the order only, or from both, but, inasmuch as the defendant himself conducted the proceedings in the court below occurring after the judgment of sentence was pronounced, and is not an attorney at law, we assume that his intention was to appeal both from the judgment and the order denying him a new trial, and we will so regard his notice of appeal.

[2] The evidence showing when and for how long a period of time and under what circumstances the defendant appeared and remained in the city of Placerville is in substance recited in the opinion of People v. Collins, Cr. 669, this day filed in this court. The record herein further shows: That the defendant, during the period of time he remained in Placerville, maintained a deposit account with the Placerville National Bank in said city in the name of "D. J. Gordon"; that, on the 10th of June, 1922, the day on which he departed from Placerville, he presented the check set out in the indictment, with the name D. J. Gordon indorsed on the back thereof, to Mr. Bordwell, the cashier of said bank; that the latter, in effect, cashed said check by delivering to the defendant travelers' checks for the sum of $100, which, as seen, was the amount the check in question called for, and made the said bank liable for the travelers' checks "by giving credit to our New York correspondent for it," immediately depositing the funds to cover said checks in the New York bank.

Garnett C. Evans, assistant cashier of the Fulton National Bank at Atlanta, Ga., by which bank the check in question purports to have been drawn, issued, and delivered to the defendant, testified that it was within the sphere of his duties to sign and issue checks for said bank. He stated that the figures indicating the number of the check (25792) do not correspond with the numbers on the checks issued by the bank of which he is assistant cashier; that the number of the checks of said bank begin with "6,000 and up"; that the bank with which he is connected does not issue or use the type of check set out in the indictment; that he is the only person by the name of Evans who is connected with said bank; that he did not sign the check in question, and that the signature "Garrett C. Evans" subscribed to said check is not in the handwriting of any person connected with said bank. He testified that the National Park Bank, of New York, was a correspondent of the Fulton National Bank, and that the two banks transact business with each other.

There is evidence of other facts and circumstances than those above narrated which is corroborative of the theory of the prosecution that the defendant without authority, and wrongfully, signed the name of Evans to the check and passed the same on the Placerville National Bank with the intent to defraud the latter institution. With the exception of the point that there is a fatal lack of correspondence between the allegations of the indictment and the proof, the legal propositions advanced herein are precisely the same as those advanced in support of the appeal in People v. Collins, Cr. 669, supra. There is therefore no call for consideration of those points in this opinion, and we refer to case No. 669 as authority against the contentions of the defendant with respect to said points.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; BURNETT, J.

---

60 Cal. App. 234

## WHITEMAN v. ANDERSON-COTTONWOOD IRR. DIST. et al. (Civ. 2522.)

(District Court of Appeal, Third District, California. Dec. 26, 1922.)

**1. Waters and water courses ⊂⊃228¾, New, vol. 17A Key-No. Series—Irrigation district a public agency not liable for negligence of agents, in absence of statute.**

An irrigation district organized under the Wright Act or California Irrigation District Act must be deemed a public agency created for a public purpose, and is not subject to an action for damages resulting from the negligence of its officers or agents, in the absence of a statute expressly imposing such liability.

**2. Waters and water courses ⊂⊃228¾, New, vol. 17A Key-No. Series—No statutory liability for negligence of agents of irrigation district.**

An irrigation district organized under the Wright Act or California Irrigation District Act is not made liable by any statute for negligence of its officers or agents.

**3. Waters and water courses ⊂⊃228¾, New, vol. 17A Key-No. Series—Complaint held insufficient to disclose cause of action against trustees of drainage district for wrongful death.**

A complaint for the wrongful death of a minor child, brought against an irrigation district on the ground of negligence of the agents of the district in leaving sacks of cement on a highway, whereby the automobile in which decedent was riding was overturned, *held* not to state a cause of action against the individual trustees, who did not participate in nor encourage the act of negligence that resulted in the injury nor have any knowledge thereof, whatever negligence existed being the result of the acts of subagents or employees of the district.

Appeal from Superior Court, Shasta County; C. J. Luttrell, Judge.

Action for death of a minor child, brought by J. F. Whiteman against the Anderson-Cot-

tonwood Irrigation District and others. Judgment for defendants, and plaintiff appeals. Affirmed.

W. P. Johnson and James T. Matlock, both of Red Bluff, for appellant.

Carr & Kennedy, of Redding, for respondents.

BURNETT, J. The action was for damages for the death of a minor son of plaintiff, alleged to have been caused by the negligence of defendants. The portions of the amended complaint necessary to an understanding of the contentions of the parties are as follows:

"That on the 1st day of March, 1918, about the hour of 7 o'clock p. m., the said Roy W. Whiteman was being driven with due and proper care in a Ford automobile by one Jesse Selvester in a southerly direction, along and over that certain public road and highway, in the county of Shasta, state of California, known as the Anderson-Redding road and highway. * * * That the defendants and each of them on the said 1st day of March, 1918, by their agents and servants, wrongfully, carelessly, and negligently left and voluntarily permitted to remain in and upon said road and highway, in said supervisor district No. 1, certain sacks of cement and material for construction work, thereby obstructing said highway, by leaving said sacks of cement in and upon said road and highway, and negligently suffered said sacks of cement and material to remain thereon and thereover, obstructing said highway and road, during the nighttime of said day; and to remain thereon and thereover, without any protection, or fence or light, or signal, or anything else to indicate danger, or give notice to travelers, along and over said road and highway, against accident; that by reason of said negligence, carelessness, and improper conduct of the defendants, and each of them, by their said agents and servants, in the nighttime of said day, while the said Roy W. Whiteman, was lawfully traveling on, and being driven over said road and highway * * * the said Jesse Selvester and the said Roy W. Whiteman, and each of them being then and there wholly unaware of danger, was without fault or negligence on their part, driven against the said pile of cement and material, and thereby overturned said automobile, and the same falling on the said Roy W. Whiteman, pinning him to the ground, and that said automobile caught on fire, by reason of being so overturned, and was totally destroyed by said fire, and that the said Roy W. Whiteman died while being burned in said fire, from said automobile."

The defendants Anderson-Cottonwood Irrigation District and W. F. Smith, A. J. Shields, G. H. Nutting, W. H. Brown, and Charles Hampton, the directors thereof, demurred to said amended complaint upon the grounds that it does not state facts sufficient to constitute a cause of action against said defendants, or either of them; that said district was improperly joined as a party; that it "is uncertain in that it does not appear therein and cannot be ascertained therefrom wherein these defendants or any of them were careless or negligent in the premises" and, also, how the machine "was overturned, or caught on fire, or was destroyed by fire as the result of any negligence, or carelessness, or improper conduct of these defendants or any of them; or that the death of Roy W. Whiteman was the result of any negligence or carelessness or improper conduct of these defendants, or any of them."

The demurrer was sustained in the following order:

"It is therefore hereby ordered that the demurrer of said defendants to said amended complaint be, and the same is hereby, sustained, and said plaintiff is given 10 days to serve and file a second amended complaint in said action."

The plaintiff declined to amend, and judgment was thereupon entered for said defendants, from which the appeal has been taken.

The position of the respondent irrigation district, in support of the general demurrer, "is that, being a public corporation, an action does not lie against it, in the absence of a statute expressly imposing liability, for a private injury resulting from negligence on the part of its agents or servants," and as to the directors, "that they are not liable in an action of tort to a stranger for the negligence of their 'agents and servants,' unless they failed to use ordinary care in selecting such agents and servants, which is nowhere alleged in the complaint."

On the other hand, appellant claims:

"That an irrigation district, while in a sense a public corporation, is engaged in work not governmental in character, but for the private advantage and benefit of the landowner in the district. The work that it is engaged in, the irrigation of lands in the district, is similar in kind to the work of municipal corporations when supplying their inhabitants with water, gas, or electric light. When acting in that capacity, it is the rule in California that they are liable for negligence of their agents and servants and it may be remarked that irrigation districts as well as municipal corporations can only act through their agents and servants. Chafor v. City of Long Beach, 174 Cal. 478, 163 Pac. 670, L. R. A. 1917E, 685, Ann. Cas. 1918D, 106; Kellar v. City of Los Angeles, 179 Cal. 605, 178 Pac. 505."

The parties seem to be in accord as to the principle of law that governs any possible theory of the case, but they are in disagreement as to the character of an irrigation district, and whether its functions be of a public or private character.

It is not disputed that the rule as to "public quasi corporations," such as townships, school districts, road districts, and the like, is that they are not liable for the negligence of their officers, unless such liability is created by statute. Dillon, Municipal Corporations (5th Ed.) § 1640; Abbott, Municipal Corporations, § 955.

It is understood, also, that a municipal corporation proper as a government agent in

performing its public or political duties is subject to this same rule, but, in the performance of certain obligations and duties which are of a private, local, or proprietary character, the said rule of liability does not apply, but they are held to the same measure of responsibility as a private corporation. This is made clear by the Supreme Court in the Chafor and Keller Cases, supra. Another principle, also, which qualifies the rule as to public corporations discharging public functions, must be borne in mind to avoid confusion. This is stated in Perkins v. Blauth, 163 Cal. 782, 127 Pac. 50, as follows:

"Wherever the injury complained of is the taking or damaging of private property for public use without compensation then, under the guarantee of the federal Constitution against such invasion of the private rights of property, neither the state itself nor any of its agencies or mandatories may claim exemption from liability."

Manifestly, that principle can have no possible application to the case at bar, but it was of decisive moment in some of the cases cited herein.

[1] As to the character of irrigation districts as organized under our statute, it must be conceded that they are public corporations or public agencies, but not "municipal corporations," as that term is usually understood. In the illuminating discussion of the subject found in the pioneer case In re Madera Irrigation District, 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106, they are treated as "public corporations for governmental purposes" and the act providing for their creation is declared to be for the benefit of the public, and the means by which such benefit is to be attained are held to be of a public character, and it was upon that ground and for that reason that the legislation was upheld. Therein it is said:

"Here are found the essential elements of a public corporation, none of which pertain to a private corporation. The property held by the corporation is in trust for the public, and subject to the control of the state. Its officers are public officers, chosen by the electors of the district, and invested with public duties. Its object is for the good of the public, and to promote the prosperity and welfare of the public. 'Where a corporation is composed exclusively of officers of the government, having no personal interest in it, or with its concerns, and only acting as organs of the state in effecting a great public improvement, it is a public corporation.' Angell and Ames on Corporations, § 32."

In Jenison v. Redfield, 149 Cal. 500, 87 Pac. 62, it is declared that such district when formed is a public corporation for the sole purpose of obtaining and distributing such water as may be necessary for the lands embraced in the district, "thus enabling each one to have for his land in the district, the benefit of a common system of irrigation, and bringing about the reclamation of the land of the district from aridity to a condition of suitability for cultivation." It was furthermore stated therein that such work under such system is for the public benefit and general welfare and that it might never be accomplished if left to individual enterprise; and that such legislation is sustained on the same ground as the levee and reclamation district legislation, that is, "that the land included within the limits of such a district requires, by reason of its situation and condition, the protection or reclamation thus made possible, and that it is for the public welfare that such protection or reclamation should be afforded such land." The court proceeds to point out that the district holds all the property acquired by it for one ultimate purpose, which is for the irrigation of the lands within the district, and that it cannot appropriate water to any other purpose.

In Lindsay-Strathmore I. Dist. v. Superior Court, 182 Cal. 315, 187 Pac. 1056, referring to these districts, the court said:

"They are public agencies of the same character as those particularly named [in subdivision 5, § 170, Code Civ. Proc.], and they are organized for the same general purposes to accomplish similar objects. There is no essential difference in these respects between an irrigation district and a reclamation district or a swamp land or drainage district. The latter are organized to reclaim land by draining off the surplus water. Irrigation districts are organized to reclaim land by supplying water thereto."

In Turlock Irrigation District v. White, 186 Cal. 183, 198 Pac. 1060, 17 A. L. R. 72, the court declares:

"The nature of an irrigation district has been a matter of judicial investigation and interpretation, and it has been held that such a corporation is not a 'municipal corporation,' but a 'public corporation for municipal purposes.' Fallbrook Irrigation District v. Bradley, 164 U. S. 112."

And the court quotes with approval People v. Reclamation Dist. No. 551, 117 Cal. 114, 48 Pac. 1016, wherein it was said that these corporations are "state organizations for state purposes."

In Tormey et al. v. Anderson-Cottonwood Irr. Dist. (Cal. App.) 200 Pac. 814, the Supreme Court, in denying a hearing after the decision of this court, said: "The canal is constructed for public purposes and to serve the purpose of distribution of water to public use." The reference was to the canal which was used by the corporation defendant herein for the purpose of conveying the water for the irrigation of the lands within the district. The case was held to be one falling within the constitutional provision that "private property shall not be damaged for public use."

In fact, it has been consistently held by the Supreme Court from the beginning that

these districts created under the elaborate scheme devised for their organization and operation by the Legislature are public agencies for the promotion of a public purpose. While the primary object is to secure the distribution of water for irrigation, and while the mere furnishing of water for irrigation might involve only the exercise of a proprietary function in the case of a municipal corporation, yet the situation and condition of the land in these districts are so peculiar and the public is so vitally interested in the project that the purpose is regarded, not only as for the advancement of the individual welfare, but for the promotion of the public interest. If appellant's contention be accepted as sound, it would follow that we have the anomalous situation of a *public* agency created for the mere purpose of exercising a *private* right or privilege. This view would necessitate the adoption of an entirely different theory from what has prevailed in this state for the justification of this legislation.

It would also destroy the foundation for the conclusion reached by the United States Supreme Court in the well-considered case of Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369, which decision has been approved and followed by the Supreme Court of this state. Therein the validity of the Wright Act (St. 1887, p. 29, as amended), was assailed upon various grounds, one of which is that it provided for the assessment of lands and the taking of property for a private purpose. Manifestly, this attack challenged the integrity of the whole scheme, and it received careful consideration at the hands of the court. In the opinion it is said:

"Coming to a review of these various objections, we think the first, that the water is not for a public use, is not well founded. * * * Is this assessment, for the nonpayment of which the land of the plaintiff was to be sold, levied for a public purpose? The question has, in substance, been answered in the affirmative by the people of California, and by the legislative and judicial branches of the state government."

The court then calls attention to section 1 of article 14 of our state Constitution, section 12 of said act, as amended in 1891 (St. 1891, p. 145), and the following decisions of the Supreme Court of this state: Turlock Irrigation District v. Williams, 76 Cal. 360, 18 Pac. 379; Central Irrigation Dist. v. De Lappe, 79 Cal. 35, 21 Pac. 825; In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106. After stating that the foregoing considerations are not necessarily binding upon the federal courts, the opinion proceeds:

"It is obvious, however, that what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned. To provide for the irrigation of lands in states where there is no color of necessity therefor within any fair meaning of the term, and simply for the purpose of gratifying the taste of the owner, or his desire to enter upon the cultivation of an entirely new kind of crop, not necessary for the purpose of rendering the ordinary cultivation of the land reasonably remunerative, might be regarded by courts as an improper exercise of legislative will, and the use might not be held to be public in any constitutional sense, no matter how many owners were interested in the scheme. On the other hand, in a state like California, which confessedly embraces millions of acres of arid lands, an act of the Legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power. * * * Viewing the subject for ourselves and in the light of these considerations, we have very little difficulty in coming to the same conclusion reached by the courts of California. The use must be regarded as a public use, or else it would seem to follow that no general scheme of irrigation can be formed or carried into effect. In general, the water to be used must be carried for some distance and over or through private property, which cannot be taken in invitum if the use to which it is to be put be not public, and, if there be no power to take property by condemnation, it may be impossible to acquire it at all. The use for which private property is to be taken must be a public one, whether the taking be by the exercise of the right of eminent domain or by that of taxation. Cole v. La Grange, 113 U. S. 1."

We reiterate that this legislation, involving, as it does, the levying of assessments and the forced sale of property for the payment thereof, the exercise of the right of eminent domain, the issuance of bonds, and the construction of valuable improvements, must fall to the ground if it has been conceived and enacted for the furtherance of a private purpose. But the fact is, and so recognized by the authorities, that what might be under some circumstances a mere private business is under the situation that characterizes these irrigation districts a matter of public concern. It may be added that, even in the case of municipal corporations under some circumstances, the furnishing of water may be regarded as a public or governmental function. Volume 3, § 1303, Dillon, Municipal Corporations.

It is manifest that to uphold the complaint herein as stating a cause of action against the corporation we must take the position that the district is concerned in its operations only with private matters. This follows for the reason that the complaint does not specify for what purpose the cement was to be used. If it could be legally devoted by the district to any public purpose, it would be necessary to negative that condition by alleging facts showing that the district was promoting a proprietary right in the use of the cement at the time of the accident.

There is no such allegation. Indeed, the complaint is so meager in that respect, the allegation being merely that the defendants left and permitted to remain upon the highway in said district "certain sacks of cement and material for construction work," that it may be doubted whether it sufficiently appears that the construction work was to be done in the district, or by defendants, or in pursuance of any purpose that the district might legally prosecute. At any rate, for the reason before declared, the complaint fails to state a cause of action against the district.

[2] We do not understand appellant to contend that the statute has imposed upon the district liability for private injuries resulting from the negligence of its officers or agents. It is true that the statute authorizes suits to be brought by and against them, but it does not purport to extend their liability beyond the general rule. The language authorizing the board of directors "to sue, appear and defend in all courts, actions, suits or proceedings" is to be understood as applying to such actions, etc., as a public corporation might be subject to in carrying out the purposes of the act. If the district, as a public corporation, was not liable for damages under such circumstances as appear in the complaint, the word "actions" is not to be construed as enlarging the liability of the district to include such a case. Markey v. Queen County, 154 N. Y. 675, 49 N. E. 71, 39 L. R. A. 46.

In this connection respondents call attention to the form of expression used by various authorities to denote the necessity for a positive enactment of the Legislature to impose this liability upon such public agencies. Without quotation, it is sufficient to cite them as follows: Kellar v. Los Angeles, supra; Abbott, Municipal Corporations, §§ 955 and 956; Barnett v. Contra Costa, 67 Cal. 77, 7 Pac. 177; Todd v. Kaw Valley Drainage District, 109 Kan. 754, 201 Pac. 1096; Board of Improvement v. Moreland, 94 Ark. 380, 127 S. W. 469, 21 Ann. Cas. 957; Chope v. Eureka, 78 Cal. 588, 21 Pac. 364, 4 L. R. A. 325, 12 Am. St. Rep. 113; Brunson v. Santa Monica, 27 Cal. App. 89, 148 Pac. 950.

[3] The pleading is also radically defective as to the trustees of the district. It appears that they did not personally leave the material thus exposed, and it is not claimed that they had knowledge of the condition, or that it was through their aid or encouragement that the said material was allowed to remain in its unguarded and unsafe situation.

Since it is alleged merely that they performed the negligent acts "by their agents and servants" they can be liable only by reason of the application of the doctrine of respondeat superior. But that principle does not apply to a case like this, where trustees or other public officers are sought to be bound by the negligence of subordinate officers or employees, unless there has been a failure to exercise care in the selection of such inferior officers. This necessary condition of liability does not appear at all in the complaint. Dobbins v. Arcadia, 44 Cal. App. 181, 186 Pac. 190.

In Baisley v. Henry (Cal. App.) 204 Pac. 399, it is said:

"As the agents of the city, defendants are not liable in an action of tort to plaintiff, a stranger, for the negligence of their coservant or agent. The rule is that an agent is not, in general, liable to third persons for the misfeasance or malfeasance of a subagent employed by him in the service of his principal, unless he is guilty of negligence in the appointment of such subagent, or improperly co-operates in the latter's acts or omissions. 2 C. J. 829."

It was therefore held that, since it was sought to charge the officers of the city for the negligence of their employees, the complaint failed to state a cause of action, because there was no allegation of negligence in the selection of such employees.

We may summarize our conclusions as follows: (1) Whatever may be the recognized rule in other jurisdictions under similar legislation, an irrigation district organized under the Wright Act or California Irrigation District Act must be deemed a public agency created for a public purpose. (2) Such agency is not subject to an action for damages resulting from the negligence of its officers or agents, in the absence of a statute expressly imposing such liability. (3) That no such liability is expressly imposed in or by the law providing for the organization and government of such districts or by any other statute of this state. (4) That no cause of action is stated against the individual respondents, for the reason that they did not participate in nor encourage the act of negligence that resulted in the injury, nor have any knowledge of it, and because it appears that whatever negligence existed was the result of the acts of subagents or employees of the district, without any negligence on the part of the trustees in the selection of such subagents or employees.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

60 Cal. App. 339

## WILD GOOSE COUNTRY CLUB v. BUTTE COUNTY. (Civ. 2556.)

(District Court of Appeal, Third District, California. Dec. 30, 1922. Rehearing Denied Jan. 29, 1923. Hearing Denied by Supreme Court Feb. 26, 1923.)

**1. Taxation ⊂=348—Every use to which adapted considered in arriving at value of land.**

In arriving at the value of land for purpose of taxation, it was proper to take into consideration every use to which it was naturally adapted, and which would enhance its value in the estimation of persons generally purchasing in the open market.

**2. Taxation ⊂=485(1)—Burden upon taxpayers to show assessment unfair or fraudulent.**

On hearing before board of equalization, an assessment of land for purpose of taxation is presumed to be fair, and the burden of proof rests on taxpayers asserting unfairness and fraud, and in the absence of evidence tending to show the value of taxpayer's land, or of other lands in the county, the premises are wanting from which a conclusion may be drawn by the board that any inequality of assessments exists.

**3. Taxation ⊂=485(3)—Proof of assessment at higher value does not justify inference of inequality.**

Proof that one taxpayer's land was assessed at a higher value than those of his neighbors does not justify the inference that there is any inequality in the assessments, in the absence of proof of the relative market values of the lands compared.

**4. Taxation ⊂=543(7)—Evidence held to support finding lands not assessed for more than cash value.**

In an action to recover moneys paid under protest as taxes, evidence *held* to support finding that plaintiff's lands were not assessed for more than their cash value.

**5. Taxation ⊂=543(7)—Not presumed that board of equalization had personal knowledge of value of lands.**

In an action to recover moneys paid under protest as taxes, it cannot be presumed, in the absence of proof, that members of the board of equalization had personal knowledge of the value of plaintiff's lands or of the surrounding lands at the time plaintiff presented its case before the board.

**6. Taxation ⊂=537—Failure to raise assessment of surrounding lands held not fraudulent, entitling recovery of tax paid.**

Failure of board of equalization to raise assessment of surrounding lands for purposes of taxation, as it did plaintiff's lands, *held* not to constitute fraud entitling plaintiff to recover taxes paid under protest, in view of fact that time was too short to permit the raising of such assessments.

Appeal from Superior Court, Butte County; J. F. Ellison, Judge.

Action by the Wild Goose Country Club against the County of Butte. Judgment for defendant, and plaintiff appeals. Affirmed.

Lester J. Hinsdale, Butler & Van Dyke, Downey & Downey, and Jos. L. Knowles, all of Sacramento, for appellant.

J. R. Robinson, Dist. Atty., of Chico, and George E. Gardner, Deputy Dist. Atty., of Oroville, for respondent.

FINCH, P. J. Plaintiff brought this action to recover moneys paid under protest as taxes for the fiscal year commencing July 1, 1919, on the alleged ground that the assessment of its property was fraudulently excessive. The defendant was given judgment upholding the assessment, and plaintiff appeals therefrom.

There was a general increase by the county assessor in the assessment of lands in Butte county in 1919. In that year, for the first time, the market value of lands for hunting purposes was taken into consideration in making assessments. The evidence covers a period of four years, during which the lands of plaintiff and those of an adjoining gun club were assessed at the following sums per acre: 1917 and 1918, $5; 1919 and 1920, $50. The assessments of other adjoining lands in 1917 and 1918 were from $4 to $6; in 1919, from $10 to $15; and in 1920, from $25 to $40.

July 5, 1919, the plaintiff filed its petition with the board of supervisors, sitting as a board of equalization, praying that the assessment of its lands be reduced to $10 an acre, on the grounds that $10 an acre was the full cash value thereof, and that other lands in the county of the same quality and similarly situated were assessed at $10 an acre, particularly three adjoining tracts. On the 29th of July, representatives of the plaintiff appeared before the board of equalization in support of the petition. No witnesses were sworn, but the attorney for plaintiff made a statement of the grievances complained of, pointed out the assessment of adjoining holdings, and stated that such lands "were much the same as a large portion" of plaintiff's land. For the purposes of this opinion, no significance will be given to the fact that the representatives of plaintiff were not sworn.

[1] Plaintiff's contention before the board and at the trial in the superior court was that its lands should have been classed as grazing land in making the assessment, without consideration of their market value as a hunting preserve. In arriving at the value of the land it was proper to take into consideration every use to which it was naturally adapted and which would enhance its value in the estimation of persons generally, purchasing in the open market. The question is, not what its value is for a particular pur-

pose, but its value in view of all the purposes to which it is naturally adapted. Sacramento, etc., R. R. Co. v. Heilbron, 156 Cal. 408, 104 Pac. 979; Yolo Water & Power Co. v. Hudson, 182 Cal. 48, 186 Pac. 772.

[2, 3] The evidence shows without conflict, and the court found, that at the hearing before the board of equalization no evidence was presented or offered bearing upon the value of the plaintiff's lands or the value of any property in Butte county or tending to show that any property in the county was assessed at other than the full cash value thereof or that there was "any inequality of assessments between the said property owned by plaintiff and any other property in Butte county, or that the said assessment so placed upon plaintiff's property * * * was excessive, unequal or tended to discriminate against plaintiff or cause plaintiff to bear an excessive or unequal burden of taxation," or "tending to prove or establish any fraud, mistake, arbitrary, willful or capricious action on the part of said assessor." In appellant's closing brief it is said:

"It may be conceded under the authorities that the county board of equalization is a quasi judicial tribunal, and that its decisions may be attacked only upon the ground of fraud or what is termed 'something equivalent to fraud.'"

In Los Angeles, etc., Co. v. County of Los Angeles, 162 Cal. 164, 121 Pac. 384, 9 A. L. R. 1277, it was held that, after the board of equalization has upheld an assessment in a case such as this, any fraud on the part of the assessor becomes immaterial, and that the determination of the board "cannot be avoided, unless the board has proceeded 'arbitrarily and in willful disregard of the law intended for their guidance and control, with the evident purpose of imposing unequal burdens upon certain of the taxpayers,' * * * or unless there be something equivalent to fraud in the action of the board." The assessment is presumed to be fair, and the burden of proof rested upon petitioner in the proceeding before the board. Sunday Lake Iron Co. v. Township of Wakefield, 247 U. S. 350, 38 Sup. Ct. 495, 62 L. Ed. 1154. In the absence of evidence tending to show the value of plaintiff's lands, or of other lands in the county, the premises were wanting from which a conclusion could be drawn by the board that inequality of assessments existed.

Appellant relies on the case of Birch v. County of Orange, 186 Cal. 736, 200 Pac. 647. In that case the plaintiffs appealed from a judgment of nonsuit. The facts proven on the trial therein had been proven at the hearing before the board of equalization. In reversing the judgment the court said:

"The evidence of plaintiff presented on the hearing before the board of equalization, and on the trial, discloses that this tract is surrounded by other oil lands almost identical in character, development, production, and value, compared acre for acre of proved and producing oil lands alone, which, under the same assessment, were valued at a rate from 10 to 15 times less than was placed on plaintiffs' lands."

In Southern Pacific Land Co. v. San Diego Co., 183 Cal. 543, 546, 191 Pac. 931, 933, in holding that the trial court erred in sustaining a general demurrer to the complaint, the court said:

"The complaint substantially charges that the property of plaintiff was assessed at nearly twice its real value, while the other property in the county was assessed, in pursuance of a 'systematic, willful, and intentional' scheme to so do, at not to exceed 25 per cent. of its real value, and that all this was shown to the board of equalization by evidence without substantial contradiction or conflict, * * * and that the board, '*with full knowledge of these facts* and 'without regard to said facts and in disregard of the evidence,' arbitrarily denied plaintiff's application for relief. * * * An entirely different situation would be presented here if the complaint did not show that the board had denied plaintiff's application with full knowledge of all the facts alleged."

Proof that one taxpayer's lands are assessed at a higher value than those of his neighbors does not justify the inference that there is any inequality in the assessments, in the absence of proof of the relative market values of the lands compared. The complaint alleges and the evidence shows that lands generally in Butte county are assessed at sixty per cent. of their market values. If it be assumed that the board had knowledge of such practice, then the question before the board for their determination was twofold: (1) What was the value of plaintiff's lands; and (2) Were they assessed for more than 60 per cent of such value? Under the authorities cited, the determination of that question by the board is conclusive, in view of the facts disclosed by the evidence.

[4-6] The evidence supports the finding that plaintiff's lands were not assessed for more than their cash value. Plaintiff purchased the lands in 1914 at $35 an acre. Defendant's witnesses at the trial placed their value at from $75 to $125 an acre on March 1, 1919. Some of these witnesses placed a valuation of $65 an acre on lands adjoining those of the two gun clubs. One of the supervisors testified that the assessments of such adjoining lands were not before the board for adjustment in 1919; that the board's attention was first called to the alleged inequality in assessment July 29, 1919, when plaintiff appeared, asking that its assessment be reduced; that it was then too late to cite the owners of such surrounding lands to show cause why their assessments should not be increased, because the law required five days' notice and the board of equalization was required to complete its work by the 4th of August, but that in the following year they were so cited and their assessments were raised as set

out in the first part of this opinion. It cannot be presumed, in the absence of proof, that the members of the board had personal knowledge of the value of plaintiff's lands or of the surrounding lands at the time plaintiff presented its case before the board. If the inequality complained of be conceded, and even if it be assumed, contrary to the fact, that the plaintiff offered to prove such inequality before the board, there is high authority to sustain the conclusion that the failure of the board to raise the assessment on surrounding lands in 1919, under the circumstances stated, did not constitute fraud or "something equivalent to fraud." In Sunday Lake Iron Co. v. Township of Wakefield, supra, it appeared that the state board of tax assessors had raised the assessment of plaintiff's property from $65,000 to $1,071,000, the alleged full value thereof, whereas other lands throughout the county were generally assessed at not exceeding one-third of their value. The court said:

"Because of alleged lack of time and inadequate information, it [the board] declined to order a new and general survey of values or generally to increase other assessments, notwithstanding plaintiff in error represented and offered to present evidence showing that they amounted to no more than one-third of the true market values. * * * The record discloses facts which render it more than probable that plaintiff in error's mines were assessed for the year 1911 (but not before or afterwards) relatively higher than other lands within the county, although the statute enjoins the same rule for all. But we are unable to conclude that the evidence suffices clearly to establish that the state board entertained or is chargeable with any purpose or design to discriminate. Its action is not incompatible with an honest effort in new and difficult circumstances to adopt valuations not relatively unjust or unequal. When plaintiff in error first challenged the values placed upon the property of others no adequate time remained for detailed consideration, nor was there sufficient evidence before the board to justify immediate and general revaluations. The very next year a diligent and, so far as appears, successful effort was made to rectify any inequality."

Under the foregoing facts, as found by the court, the plaintiff was not entitled to recover any part of the taxes paid. The other alleged errors have no bearing upon such findings, and a discussion thereof would serve no useful purpose, since the facts found upon uncontradicted evidence preclude a recovery.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

On Petition for Rehearing.

FINCH, P. J. In its petition for rehearing appellant complains that the opinion filed does not accurately state its contention and that "plaintiff never did advance, and does not now advance, the contention" that "its lands should have been classed as grazing lands in making the assessment, without consideration of their market value as a hunting preserve." In its petition to the board of equalization appellant alleged "that the only value agriculturally said land has is for grazing," and made no reference to any other value. Mr. Adams, the secretary and treasurer of the appellant, who verified the petition and personally appeared before the board, testified at the trial that the application before the board was based on the assumption that the land should have been classed as grazing land. Mr. Hinsdale, who was a director of the club and appeared before the board as attorney for petitioner, testified at the trial:

"I made the point there that I doubted very much that the mere fact that a man might satisfy a whim or follow a hobby would establish a value on his land, citing an instance of a man who might enjoy wild life and might pay any price or refuse any price to build a home or watch birds flying around."

Mr. Moore, a member of the club, testified that the market value of plaintiff's land was about $15 an acre, and stated that he based his answer on the revenue which the land would produce for grazing purposes. In its opening brief appellant made the contention that the land "is practically worthless for anything except pasture land" and said:

"In reality the tax which was levied was not a direct tax at all, but an excise tax or license on the privilege of hunting. * * * It would be as reasonable to say that a strip of water on the bay of San Francisco, where there may be fish, would have a market value as land, as to say that worthless land has a value of $50 an acre because ducks are abundant on it."

In view of all the foregoing, counsel's assertion that plaintiff never did make the contention attributed to it is a matter of surprise. Appellant's position here would have been stronger if it had directed its efforts before the board of equalization to a comparison of the market value of its lands with the market values of adjoining lands, rather than to a comparison based on grazing and agricultural qualities.

The question to be determined is whether the decision of the board of equalization was based on fraud or the equivalent of fraud. The conduct of the board must be determined from the evidence produced before it. The hearing was informal, and the evidence was not reduced to writing. Mr. Adams testified at the trial that the assessor's plat book of 1919 was produced before the board; that Mr. Hinsdale pointed out the "$10 assessments around these $50 assessments," stated that plaintiff's and the surrounding lands were of like character, and that they were of like value. Mr. Hinsdale testified that he appeared before the board and—

"made a statement of our grievances, referred to the plat, and * * * pointed out the adjoining holdings and how they were assessed, and called attention to the fact that the adjoining lands were much the same as a large portion of ours, except they were higher. We were the lowest point, and the lands east and north were higher lands, and used, most of them, for the same purpose—pasture and hunting—and that the only line between them was the wire fence * * * and explained that I thought an assessment of $50 on our lands and $10 on the adjoining, a raise of $5 to $50 on ours and to $10 on theirs was unfair, and not according to the provision of the Constitution. * * * Mr. Porter and Mr. Whipple * * * and Mr. Evans and I think one other gentleman asked me various questions, and I was on my feet for * * * maybe half an hour answering their questions about the character of the land, and about its value for duck hunting, and what memberships were worth, and various questions. * * * Mr. Evans asked me if I thought it was not fair that this club should not help to pay with the taxes of the men who ate the ducks. Mr. Porter asked if we didn't have all the ducks over there, and volunteered that when the shots were fired that the ducks went into his ground. * * * The only evidence that was produced was the evidence that I produced, except two or three questions that Mr. Adams answered at my request."

On cross-examination the witness testified:

"Q. Didn't you say * * * that the selling value of the land was not material, because you didn't want to sell it? A. I may have said it so far as I was personally concerned. I couldn't speak for all the club."

Mr. Porter, a member of the board of equalization, testified:

"No one was sworn and gave evidence. * * * Mr. Hinsdale was the principal spokesman, and his was a mere matter of argument as an attorney. We asked him what he considered the value of the land per acre. The answer he made was there was no price upon the land, as they did not wish to sell it. * * * In 1919 a great portion of Butte lands were doubled in assessment, and some of them trebled. * * * The board of supervisors never had looked at what this property (adjoining lands) was assessed at. When the Wild Goose Country Club people came before the board and entered the complaint, it was getting late in the month. The assessor had asked the state board of equalization for an extension of time. They gave him an extension of time, if I remember, to the 19th of July; also that the board of supervisors must finish their work the 4th of August. The Wild Goose, the Country Club, came before the board * * * on the 29th. * * * In order to cite those people to appear, * * * the board of supervisors had to give them a special notice describing their land and five days' notice, and we had to finish our work in five days. * * * It was absolutely impossible in 1919 to cite those people to appear before the board and show why their assessment should not be raised."

The evidence sustains the finding that all the property in the county, including that of plaintiff, was fairly assessed, except these adjoining lands. When the low assessments of adjoining lands were called to the attention of the board, it was too late to raise the assessment on such lands for that year. The members of the board had a choice of three courses: (1) To reduce plaintiff's assessment to that of the adjoining lands, thus relieving plaintiff of a large part of its just share of taxes, at the expense of all other taxpayers whose lands were assessed at the same relative value as plaintiff's. (2) To make a horizontal reduction in the assessment of all property except that which was undervalued. (3) To let the assessment stand, as they did, and correct the inequality the following year. The burden of proof was on the plaintiff to show fraud or its equivalent, and it cannot be said, under the evidence, that the action of the board, in adopting the third rather than either of the other courses open to it, constituted fraud or the equivalent of fraud.

Appellant attempts to distinguish between this case and that of Sunday Lake Iron Co. v. Township of Wakefield, cited in the opinion filed. Each case involved the question of fraud or its equivalent on the part of a board of equalization, and, however much the cases may differ in other respects, the attempt to distinguish between them on the question under consideration is not convincing. Neither is there any conflict between the opinion herein and that in the case of Birch v. County of Orange, 186 Cal. 736, 200 Pac. 647. The facts proved before the board of equalization in this case are so meager as compared with those shown in the Birch Case, as pointed out in the opinion, that there is little in common between the two cases. There is no doubt as to the correctness of appellant's contention that lands "of the same quality and similarly situated" should be assessed at the same value. The quality and situation of the property, however, must be understood to include all the elements which combine to establish its market value. Plaintiff's lands are not of the same quality as the surrounding lands. One of plaintiff's witnesses testified that more than half of its lands are covered with water during the whole year and that three-fourths thereof are covered for three-fourths of the year, while the evidence shows that the surrounding lands are higher than those of plaintiff. One of defendant's witnesses testified that the hunting on plaintiff's land is "many times better" than on the adjoining lands.

Appellant contends "that a radically different method was used in valuing appellant's property, than in the assessment of adjoining lands, in that value for hunting purposes was considered as a factor only in the assessment of appellant's and another gun club's lands. Values of from $25 to $40 an acre were placed on the adjoining lands in 1920 as grazing and farming lands. Their

values for hunting purposes were not considered. It is a fair inference from the evidence that such lands were more valuable for farming and grazing than as hunting grounds, and, being assessed according to their most valuable use, it is immaterial that a less valuable use was not considered. The low assessment of these lands in 1919 was not due to any failure to consider their values for hunting purposes, but failure to give proper consideration to their higher values as farming and grazing lands.

Plaintiff alleged that all the lands in Butte county, with the exeception of its own and those of another gun club, were assessed at 60 per cent. of their cash values and that plaintiff's land was assessed at five times its cash value. There was ample evidence to show that all lands in the county, including plaintiff's, were assessed at 60 per cent. of their cash values, excepting certain adjoining or neighboring lands which were undervalued. Plaintiff then must recover, if at all, not on the express allegations of its complaint that its lands were assessed for more than their value, nor upon the theory that its lands were assessed relatively higher than other lands generally, but on the proof that certain other lands were assessed at less than 60 per cent. of their cash value. In other words, plaintiff's cause of complaint, as disclosed by the evidence, is not that its own lands are assessed too high, but that certain other lands are assessed too low. Plaintiff has no greater cause of complaint on account of these low assessments than has every other taxpayer in the county whose lands were fairly assessed. The law certainly does not contemplate that a taxpayer, whose lands are assessed at the same relative value as other lands generally in the county, is entitled to have his assessment reduced to the level of a comparatively small number of parcels which are assessed at a low figure. If such were the law, but few assessments could be upheld, because absolute equality in the assessment of thousands of parcels of land is impossible of accomplishment. "Unless it is shown that the undervaluation was intentional and systematic, unequal assessment will not be held to violate the equality clause." Southern Railway Co. v. Watts, 43 Sup. Ct. 195, 67 L. Ed. ——.

Plaintiff sought to recover the difference between the sum it actually paid as taxes and the amount it would have been required to pay under a relatively uniform assessment. It will be interesting to ascertain what that difference actually is as shown by the evidence. The total assessment of all property in Butte county for the year 1919 was something over $42,500,000. The evidence shows that the lands claimed to have been undervalued in 1919 were raised to a fair valuation in 1920, the aggregate increase being between $75,000 and $100,000. If it be assumed that such lands were of the same valve in 1919 as in 1920, then in the former year they were undervalued to the extent of not more than $100,000. If these lands had been fairly valued, the total assessment of the county for the year 1919 would have been $42,600,000. Plaintiff alleges that the tax rate was $2.55. The problem, then, is to determine what rate of taxation would have been required on a valuation of $42,600,000 to raise the same amount as was produced on an assessment of $42,500,000 at the rate of $2.55. A simple calculation shows that it would have required a rate of $2.544, and, since plaintiff's total assessment was $87,485, its taxes would have been reduced to the extent of $5.25.

The petition for a rehearing is denied.

We concur: BURNETT, J.; HART, J.

---

(60 Cal. App. 350)

## GUNTHER et al. v. McCORMICK et al.
## (Civ. 4251.)

(District Court of Appeal, First District, Division 2, California. Dec. 30, 1922.)

**1. Mechanics' liens ⟹132(11)—Separate contracts not tacked together to enlarge time for filing.**

Where work for which lien was claimed was performed under three separate contracts, two of which were fully performed four months prior to the filing of notice for lien, and the last work on one of them was performed within about 30 days of the time of filing, the orders cannot be tacked together so as to enlarge the time of filing.

**2. Appeal and error ⟹1008(1)—Finding as to good faith in performance of contract under which lien claimed not disturbed on appeal.**

In action to foreclose a mechanic's lien, finding of court that plaintiff was in good faith in performing contract under which lien was claimed would not be disturbed on appeal.

**3. Payment ⟹68—Burden on payer to show to which account payment was to apply.**

Where work was performed under three separate contracts, and on a named date $10 was paid by defendant, the burden was on him to show on which contract the payment was to be applied.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by J. F. Gunther and another against Lillie H. McCormick and another. From a judgment for plaintiffs, defendant named appeals. Judgment modified, and as so modified affirmed.

Guy V. Shoup and A. A. Jones, both of San Francisco, for appellant.

T. John Butler, of San Francisco, for respondents.

STURTEVANT, J. The plaintiffs commenced an action to foreclose a mechanic's

lien. Judgment was awarded them in the trial court, and the owner of the real estate has appealed under section 953a of the Code of Civil Procedure.

In the fall of 1919 Ella W. Goodrich leased from E. O. McCormick and Lillie H. McCormick, his wife, the house and lot known as 2015 Broadway in San Francisco. The lease was to continue 21 months from the 1st day of December, 1919. As an accommodation to the lessee, the lessors allowed her to enter about the middle of November, and shortly after she entered she commenced making repairs and placing orders therefor. The first order was written down by the plaintiffs on their letter head, and is as follows:

"Nov. 21st, 1919.

"Mrs. Goodrich, 2015 Broadway:

"Front attic, paint 3 coats and closet, on west; middle, same as front; east bedroom, wood 1 coat; west bedroom, wood 1 coat, bath 2 coats; south bedroom, paper walls, paint wood, bath 2 coats; small hall, 1 coat; conservatory, 3 coats, conservatory floor 2 coats; basement and kitchen and pantry, 3 coats of paint, 1 coat enamel. $290.00."

A week or ten days after the plaintiffs had commenced the above-mentioned work, the lessee requested the plaintiffs to do some other work. This second order is most concisely stated by quoting the testimony of Mr. Porter:

"I have notes of the things I done there. We undertook that under a contract of $290, and then they wanted the cement steps and the walls cleaned in there, and that is a very hard thing to estimate, and so I told her I would do that under time and materials, that means that the material that I used amounted to $28, that was not included in the $290. Papering two rooms, $37.75. Painting linen closet, hall closet, basement floor, $21. Painting back stairs, tinting halls and varnishing wood, $31. Painting butler's pantry, floor and shelves, $18.75. Painting floors in basement, hall toilet, and two bedrooms and kitchen, $63.50. Kitchen counters, and sideboard, $20, tables and chairs, $17.50. Kitchen drawers, $5.50. Painting outside of conservatory, $40. Steps and sides of the wall, $65. Touching up in the living rooms, hall, and parlor, $24.75; painting in the basement room, $7. Painting in the wardrobe, $4.50."

Prior to January 29, 1920, the lessee placed a third order which was for repairs on the roof. Mr. Porter did not give the date the order was received, but he testified that the lessee telephoned for him; that he called and that she indicated the work she wanted done. She asked him to do the work, and he told her he would on condition that she would give him a check as soon as he got it done. She gave him a check, which was returned marked "No funds." That check was for $59 and some cents. No work was done in February, none was done in March, and on April 20th Mr. Porter testified that he sent a workman to the house who went there and gave the conservatory floor the second coat of paint. Turning back to order No. 1, it will be noted that the service rendered on April 20, 1920, was included in the first order.

[1] A notice of lien was filed May 24, 1920. By comparison of dates it will be observed that order No. 2 and order No. 3 had been fully done and performed nearly 4 months prior to the filing of the notice of lien. Such being the case, neither of those orders should have been included in the judgment against the appellant. In the case of Fly v. Cline, 193 Pac. 615, 621, Presiding Justice Finlayson, writing the opinion for the District Court of Appeal, Second District, Division 2, says:

"Where labor or materials are furnished under separate building contracts, even though such contracts are between the same persons and relate to the same building or employment, the contracts cannot be tacked together so as to enlarge the time for filing a lien for what was done or furnished under either. The claim of lien must be filed for what was done or furnished under each contract, within the statutory period after its completion."

See, also, 27 Cyc. 144; 2 Jones on Liens (3d Ed.) § 1431; Berkshire v. Hall (Mo. App.) 202 S. W. 414, 416.

[2] The appellant contends most earnestly that the act of the plaintiffs in returning to the property on the 20th day of April, 1920, for the purpose of applying the second coat to the floor in the conservatory, was not done in good faith, but that it was an attempt to extend the plaintiff's time to file a lien. Such matters were for the consideration of the trial court when that court was attempting to determine when order No. 1 was completed. It has made a finding that it was completed on the 20th day of April, 1920. Under the facts before us this court may not disturb that finding.

[3] On April 22d the lessee paid the plaintiffs $10 on account. There is nothing in the record to the effect that the payment was paid on, and was to be applied to, either order No. 1, order No. 2, or order No. 3, or all together. The burden of making that showing rested on the respondents.

In making up the amount of its judgment as against the appellant, the trial court added together orders Nos. 1, 2 and 3, and also $2.40, the cost of verifying and recording the notice of lien, and then deducted the payment of $10 and certain charges the plaintiff had made for painting some pieces of furniture. It thus arrived at the amount of $711.60; whereas, the trial court should have ignored orders 2 and 3, and it should have deducted the payment of $10 from $290, the amount of order No. 1, and then it should have added the recording charge, $2.40, making $282.40.

The judgment is modified by inserting $282.40 in the place and stead of $711.60 in

each place where those figures occur in the judgment, and as so modified the judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

---

60 Cal. App. 383

## HERSOM v. HERSOM. (Civ. 3855.)

(District Court of Appeal, Second District, Division 2, California. Jan. 5, 1923. Hearing Denied by Supreme Court March 1, 1923.)

**1. Appeal and error ⊜1033(7)—When failure to find on question of fraud not reversible error.**

A failure by the trial court to make a finding as to the question of fraud tendered by appellant's answer is not reversible error, where from a consideration of appellant's brief the appellate court finds the evidence was utterly insufficient to support a finding in his favor.

**2. Trial ⊜395(2)—Trial court's finding held not indefinite or uncertain.**

A trial court in a divorce action made a finding, reading: "There is some community property interest belonging to the parties herein, but that said interest consists only of an equity which is a right to redeem certain property which once belonged to the parties, but which property has been foreclosed upon by an assignee of the mortgages." *Held*, though the finding, standing alone, is indefinite and uncertain, it is sufficient, where it is made intelligible and sufficiently exact by a reference to portions of the pleadings; the description of the property in the answer being a part of the finding of the court, and the right referred to being the right to redeem within the time fixed by law from the decree of foreclosure mentioned in the pleadings.

**3. Divorce ⊜179—Objection to hearing had in chambers waived on appeal if not made to trial judge.**

The purpose of an appeal from a trial court being to review some action of the court, the contention that the action of the trial judge in a divorce action in conducting a hearing in his chamber was error is not tenable, where appellant made no objection to the holding of the session in chambers, but participated therein, thus failing to give the trial court an opportunity to pass upon the question urged on appeal.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Milton Hersom against Carrie Hersom. Judgment for plaintiff, and defendant appeals. Judgment affirmed.

C. L. Kilgore, of Los Angeles, for appellant.

Harry K. Smith, of Los Angeles (Rollin L. McNitt, of Los Angeles, of counsel), for respondent.

WORKS, J. This is an action for divorce. The appeal is taken by defendant from an interlocutory decree rendered in favor of plaintiff, and the only points made by appellant relate to the disposition of certain alleged community property of the parties. In addition to various denials contained in her answer, appellant averred affirmatively that respondent and his mother had fraudulently deprived appellant of her interest in the alleged community property. It was averred that the fraud was consummated by respondent's mother purchasing certain mortgages which were outstanding against the property, respondent then fraudulently refraining from making certain payments falling due on the obligations, and thus enabling his mother to foreclose the mortgages for the benefit, as it was alleged, of herself and him.

[1] Appellant contends for a reversal of the judgment on the ground that the trial court failed to find on the issue of fraud tendered by the answer. Passing by other arguments which respondent opposes to this contention, it is enough to say that the evidence on the question of fraud, reproduced in full in appellant's brief, was utterly insufficient to support a finding in her favor. The finding, therefore, must have been adverse to her, if one had been made. Under such circumstances a failure to find is not reversible error. Cross v. Thiele (Cal. App.) 197 Pac. 974.

[2] The point is made that the findings and judgment are so indefinite and uncertain "that it is impossible to determine what community property existed or what rights appellant had therein." The complaint alleges that "the community property which the parties one time owned has been foreclosed upon and taken away from them by law," but no attempt is made in the pleading to describe the property. The answer specifically admits the truth of the allegation that the community property had been "taken away" by foreclosure, and follows the admission with the allegations of fraud to which we have referred. Moreover, the answer supplies the omission made in the complaint, for in the former pleading a description of the property is set forth. The description follows the admission as to the foreclosure and the allegations of fraud, and the described property is referred to as the "said property above mentioned." The finding of the trial court which gives rise to the indefiniteness and uncertainty inveighed against by appellant is that—

"There is some community property interest belonging to the parties herein, but that said interest consists only of an equity which is a right to redeem certain property which once belonged to the parties, but which property has

been foreclosed upon by an assignee of the mortgages."

This finding, standing alone, is indefinite and uncertain, there is no doubt; but it is made intelligible and sufficiently exact by a reference to the above-mentioned portions of the pleadings. Who can doubt, after perusing the allegations of the parties, that in legal effect the description of property in the answer is part of the finding of the court? Who can doubt that the right referred to in the finding was the right to redeem within the time fixed by law from the decree of foreclosure mentioned in the pleadings? The point is not well taken.

[3] After the cause had been submitted for decision the trial court set aside the submission for the purpose of receiving further evidence, and a hearing was had by the judge in chambers. Counsel for both sides were present on the occasion. Appellant contends that the action of the trial judge in conducting a hearing in his chambers was error. Respondent meets this contention by various arguments, but a consideration of one only of them will dispose of the question. Appellant made no objection to the holding of the session in chambers, thus failing to give the trial court an opportunity to pass upon the question she now urges on appeal.

"The purpose of an appeal from a trial court is to review some action of the court, and, as there was no action in this instance, no order which involved the question now sought to be presented, there is nothing to review." People v. Taminago, 35 Cal. App. 238, 169 Pac. 696; People v. Walton (Cal. App.) 199 Pac. 824.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

(60 Cal. App. 289)

## VALENTINI v. GOBBI. (Civ. 4374.)

(District Court of Appeal, First District, Division 2, California. Dec. 28, 1922. Rehearing Denied Jan. 25, 1923. Hearing Denied by Supreme Court Feb. 26, 1923.)

**1. Appeal and error ⟸1001(1) — Appellate court has no power to disturb jury's verdict, except in absence of supporting testimony.**

An appellate court has no power to disturb the determination of the jury, except where there is no testimony supporting it.

**2. Tender ⟸12(2), 14(1), 18—Tender before suit must be sufficient, unconditional, and be deposited as required by statute.**

Where it does not appear that any tender made by defendant had been deposited in accordance with Code Civ. Proc. § 1030, or Civ. Code. § 1500, or that the tender was sufficient or unconditional, it was not good.

**3. New trial ⟸143(5)—Jurors' affidavit regarding manner of arriving at verdict offered in support of new trial because of excessive verdict properly rejected.**

Affidavits of jurors, showing how they arrived at a general verdict, offered in support of a motion for a new trial on the ground of an excessive award, under Code Civ. Proc. § 657, held properly rejected, since, if defendant desired the jury to specify each item of the claim allowed or rejected, he should, under section 624, have adopted a practice to that end.

**4. Evidence ⟸591—Plaintiff, calling defendant to testify, not bound by defendant's testimony.**

Plaintiff, calling the defendant to testify as witness, is not bound by defendant's testimony so given, nor estopped from claiming under other evidence produced regarding the same matter.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Cherubino Valentini against Leander Gobbi. From judgment for plaintiff, defendant appeals. Affirmed.

Weldon & Wessels, of Ukiah, for appellant.

Hale McCowen, Jr., of Ukiah, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to obtain a judgment in the sum of $3,000 as for moneys had and received. The jury returned a general verdict in favor of the plaintiff for $1,056. The defendant made a motion for a new trial; his motion was denied, and the defendant has appealed under section 953a of the Code of Civil Procedure.

[1] Prior to the year 1918 the plaintiff obtained from the defendant a lease on certain farming lands. That lease expired by virtue of its own terms. The plaintiff continued on the premises, holding over from year to year under the lease. This was the plaintiff's status on April 15, 1918, when a meeting was held in the office of his attorney. At that meeting there were present besides the attorney, Mr. Iversen, the plaintiff and the defendant. On the conversations held by those three persons at that time the case largely turned. The plaintiff and Mr. Iversen were both called to the stand as witnesses. Mr. Iversen testified that the plaintiff had come to him for advice, and that thereupon Mr. Iversen sent for Mr. Gobbi, and, pursuant to such request, Mr. Gobbi called. He also testified that the two principals engaged in many disputes on several different subjects. Defendant stated that it was getting late in the season; that the ground was becoming dry, and that it was urgently necessary that the lands occupied by the plaintiff should be plowed at once. It was his claim that many teams should be put on, and

that the work should be done in one day. On the other hand, the plaintiff contended that he had ample time to do his work. The witness then continued:

"I was acting in the nature of mediator and tried to get them together. I saw that they could not get together and I made the propositions that Gobbi pay Valentini for the work and cancel the lease. Gobbi refused to do it. He said he was afraid of cold weather at the time this settlement was going on. He said he was afraid there will be a frost, and if he had to pay for his work, and there comes a frost and kills the grapes, he will lose it all. I then made the proposition myself to Mr. Gobbi that Gobbi should oversee the ranch, and we could divide the proceeds according to the original terms of the lease, and pay Mr. Gobbi for his work. Mr. Gobbi said it was absolutely agreeable to him, and that he would do that."

The plaintiff, while on the stand as a witness, testified to the same effect. The defendant, being called to the stand as a witness, denied that the conversation was as delineated by Mr. Iversen or by the plaintiff, and, continuing, he stated that on the day before April 14th the plaintiff had stated that he would no longer go forward with the terms of the lease, and that he was through with it. These two conflicting theories were addressed to the jury, and it rested with that body to determine which theory had been sustained by a preponderance of the testimony. Notwithstanding that the writer of this opinion might be inclined to accept the theory testified to by Mr. Gobbi, an appellate court must always bear in mind that conflicts in the evidence are for the determination of the jury or the trial court sitting without a jury, and that an appellate court has no power to disturb the determination of the jury, except where there is no testimony in the record supporting the verdict.

After the conversation had in Mr. Iversen's office the plaintiff left Ukiah to enlist in the army. Mr. Gobbi proceeded to farm the land covered by the lease, produced a crop, sold it for $5,933.28, and at the time of the trial testified fully as to the amount of his receipts and the amount of his expenditures.

[2] In his brief the appellant claims that the amounts allowed in the account for services rendered by him in managing the property and for expenses incurred by him were too small. We cannot pass on any of these matters, as the record is insufficient. The complaint was a common count for money had and received in the sum of $3,000. The jury was not asked to bring in any special verdicts, but it was allowed to bring in a verdict general in form, "We, the jury, find for the plaintiff in the sum of $1,056." This court cannot tell by the record whether the jury in making up its verdict allowed the defendant a dollar a day or $250 per month. There was evidence both ways. This court cannot tell whether the jury allowed the defendant all of the expenditures which he claimed he had made, or, if it disallowed some of the items, which ones were disallowed. In this same connection the appellant contends that the item referred to by the witnesses as a lot of "sour wine" was not an issue. The complaint, as we noted above, does not show on its face whether it was or was not. The evidence shows that the plaintiff's claim in this behalf amounted to $268.26; the appellant claims to have tendered in writing $335.95 in payment of that item, and that the defendant, therefore, should not have been taxed with costs. The answer of the appellant contained no allegations of a tender, and the record does not show that the appellant did, after making the tender, do anything in the nature of making a deposit for the purpose of keeping his tender good. Code Civ. Proc. § 1030; Civ. Code, § 1500. Moreover, the record shows that when the tender was made the plaintiff refused to accept it, unless he was paid also for his share of the crop of 1918. As the appellant was at all times disputing the right of the plaintiff to share in the proceeds of the crop of 1918, it is patent that his tender was in effect a conditional tender; that is, that it should be accepted as payment in full of accounts. If it be viewed in that light, then it is equally clear, considering it in connection with the verdict, that the amount of the tender was too small.

[3] The defendant in his notice of intention to move for a new trial alleged, among other things, that the damage was excessive. He stated that his motion would be supported by affidavits, and, as we understand the record, thereafter he prepared, served, and later attempted to use, the affidavits of the individuals who had acted as jurors, showing how they had arrived at their verdict. The trial court refused to consider such affidavits, and such refusal was clearly correct. Code Civ. Proc. § 657; Fredericks v. Judah, 73 Cal. 604, 607, 15 Pac. 305; People v. Azoff, 105 Cal. 632, 634, 39 Pac. 59. If the defendant had desired that the jury by its verdict should specify each item of the account allowed, and each item disallowed, then and in that event, the defendant should have adopted at an earlier stage of the proceeding a different practice. Code Civ. Proc. § 624.

[4] When the plaintiff was introducing his case, among other witnesses he called the defendant to the stand. At this time the defendant contends that the plaintiff should be bound by the testimony so given by the defendant, and that the plaintiff is estopped from claiming under any other evidence produced on the matters testified to by the defendant. In this behalf the defendant cites and relies on 1 Greenleaf on Evidence, § 442. An examination will disclose that the citation is not in point. However, section

443b in the same book does state the rule applicable to the facts. See, also, Norwood v. Kenfield, 30 Cal. 393, 398, 399; Callahan v. Danziger, 32 Cal. App. 405, 408, 163 Pac. 65; Greenleaf v. Pacific Tel. & Tel. Co., 43 Cal. App. 691, 695, 696, 185 Pac. 872. There was no estoppel.

We have found no error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

---

60 Cal. App. 331

## STANDARD LUMBER CO. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (Civ. 2533.)

(District Court of Appeal, Third District, California. Dec. 29, 1922.)

**1. Master and servant ⊂=414—Credibility of testimony in compensation case for Industrial Commission.**

The Industrial Commission, being a fact-finding tribunal, may believe all or part of the testimony in a compensation case.

**2. Master and servant ⊂=375(1)—Injury while acting outside employment not compensable.**

If the injury occurs when the employee is performing an act entirely outside the employment, no award of compensation may be made.

**3. Master and servant ⊂=417(7)—Finding on evidence in compensation case final.**

Where two rational conclusions may be drawn from the evidence in Workmen's Compensation proceedings, one in favor of and one against the Industrial Accident Commission's award, such award may not be disturbed.

**4. Master and servant ⊂=405(4)—Finding of compensable injury supported by evidence.**

In a proceeding under the Workmen's Compensation Act by an employee, injured after quitting work when a railroad push car on which he was riding ran away on a trip between the place of work and employer's central camp, *held* that there was substantial evidence to support the findings of the Industrial Accident Commission that he was employed to take the car in, and that his negligence, if any, was within his employment so as to entitle him to compensation.

Proceedings for compensation under the Workmen's Compensation Act by Thomas Truman, employee, opposed by the Standard Lumber Company, employer. An order awarding compensation was made by the Industrial Accident Commission of California, and the employer applied for certiorari. Affirmed.

Morrison, Dunne & Brobeck, of San Francisco, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

ANDERSON, Justice pro tem. The proceeding is to review an award made by the Industrial Accident Commission to respondent Thomas Truman on account of injuries alleged to have been suffered by him while acting as the employee of the petitioner, Standard Lumber Company. Our consideration is limited to the determination of the question as to whether there was evidence to support the jurisdiction of the Commission to make the award—whether at the time Truman was injured he was an employee, working in the course of his employment. The word "respondent" when used herein will refer particularly to the respondent Truman.

The respondent was injured during the running away of a push car belonging to the petitioner. The push car had been placed on a railroad track at a place where petitioner was having work done upon its railroad. The car ran away on a trip over the portion of the railroad track between the place of work and a central camp or headquarters, maintained by petitioner. No one testified directly as to exactly how the respondent suffered injury. The respondent could not recall what occurred immediately before he was hurt, and he was unconscious for 40 hours after the accident.

Petitioner's points are as follows: First, that the injured employee, Truman, was not employed to operate and make use of the push car, and was guilty of willful misconduct in so doing; secondly, that if he was originally employed to operate the push car, he was, at the time of his injury, operating the same in a manner that made his acts wholly without the course of his employment. The latter contention is that the conduct of Truman was not merely negligence in the operation of the push car, within the scope of his employment, but was of such an exceptional and unusual nature as that it was really not related to the employment at all. Petitioner would concede that, if Truman had been employed to use the push car in furtherance of the employer's business and had used the push car in the usual way and injury had resulted through some act of neglect on his part the employer would be liable to compensate him under the Workmen's Compensation Act (St. 1917, p. 831). Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35.

While the testimony taken before the Commission was brief and not particularly clear, it did cover the essential matters in a case of this kind.

It appeared that the petitioner, Standard Lumber Company, was engaged in the lumbering business in the county of Tuolumne. It operated the railroad mentioned in connection with that business. Respondent Truman and about 40 other men were employed by petitioner in changing the rails

of the railroad to rails of heavier weight. At one point on this railroad petitioner maintained a camp which the men left in the morning, and to which they returned in the evening. They traveled on foot. The places of work were a considerable distance from the camp, and on leaving camp in the morning the men took their lunches with them. It was down hill from the places of work to the camp. It seems that, at least in some sections, there was a very considerable grade to the railroad. No map of the line of railroad showing grades or curves was introduced by petitioner or respondent. The employees worked in at least two crews. Burns was foreman of all the work and superintendent of all the employees. The respondent, Truman, was a subforeman, and in charge of the bending crew, the crew that bent the rails being laid. He was injured in the evening after quitting time. During the day he and his crew had been engaged in their work at a point somewhat more distant from camp than where the main body of workmen under the immediate control of Burns were working.

At or in the region of the camp supplies would be obtained for use in the work which the men were engaged upon. There were two push cars used along the line of the railroad where the work was going forward. The injured employee, Truman, stated in parts of his testimony facts from which it could be argued that one push car was left in the control of his crew, and that occasionally he and his crew used a push car on returning to the camp in the evening for the purpose of bringing out, on the following morning, the lunches of the men or supplies needed in the doing of the work. His explanation as to the practice that prevailed as to such use of the push car by the members of his own crew was very much qualified or practically nullified by other portions of his own testimony and by the testimony of other witnesses. Probably the only fair inferences to be deduced from the entire testimony was that the push car in question was taken in from the work in the evening only in the event the foreman, Burns, directed this to be done; that the car taken in would usually be in charge of a man by the name of Pete Shotelle; that the foreman would have the man last named and a special crew of three others, whose names are not given in the testimony, take in the car when the work was over at the end of the day in the event supplies were to be sent out from the camp the next morning; that this push car was not used necessarily to bring out lunches for the men. As before stated, Truman's recollection of the circumstances of his injury was, according to the testimony, wholly destroyed. He repeatedly stated that he could not remember what transpired during the trip or during the period of about one-half hour prior to the time of the trip, on which he was injured. But the award does not depend on his testimony.

The petitioner contends that Truman had no business upon the push car at the time of his injury, that he was not employed to operate the push car, and that in fact before the push car started on its journey Truman was told that the car was not to go in. This is petitioner's first point. Truman admitted in one part of his testimony, that the particular car which was going into camp on the evening when he was injured probably started from the place where the men were working who were under the immediate supervision of Burns; that the crew under Truman had been working at a point further along the railroad. The facts last mentioned were testified to moreover by other witnesses. So the issue was finally narrowed down to the question of Truman's authority to be upon or to use the push car which was with the crew at work directly under Burns.

[1] It appeared that Truman left his place of work and arrived at the point along the line of railroad where Burns was and where the push car in question was. The men, Burns and Truman, were in speaking distance of each other. Certain witnesses testified specifically that they heard Burns say "Men, take the car in." Burns and another witness contradicted this. Burns declared that he told Truman not to take the car in. Burns was superintendent, a vice principal. He admits that it was Truman to whom he talked. The Commission could believe him as to that. It could believe him in part and the other witnesses in part in arriving at the facts bearing on the issue of employment. Such is the privilege of a fact-finding tribunal. Starck v. Pacific Electric Railway Co., 172 Cal. 277, 281, 156 Pac. 51, L. R. A. 1916E, 58.

It was testified to, and not denied, that at least one of the men with the car at the time of the accident worked under the immediate supervision of Burns, that is to say, in what was described as "Burns' Gang." It would not be unreasonable to assume that this Burns' man, so called, was in charge of the crew that took the car in. Neither side called any of these men. They had disappeared. Without question these men, including Truman, who was Burns' subordinate, "straw boss" as they called him, could rightfully obey Burns' command, although they might not have been the regular crew. Items of testimony tending to show that others than Burns' special crew took the push cars to the camp when occasion for their use existed, may be disregarded. The Commission, in view of the conflict in the testimony before it, could find that Truman was employed to take the car in.

Truman and three other men started to camp with the car after the command referred to; the testimony was that "it usually required * * * four men" to take the car in. At

this time the brakes belonging to the car were not upon it. Before the Commission Truman claimed that the company was to blame for failure to supply the car with brakes. The testimony showed that the push car was a platform on four wheels. It evidently was similar to the low, flat car commonly used by section hands. Its brakes consisted of two pieces of timber. These would be set against the wheels to retard or stop the movement of the car. One witness testified that, "there is two sticks and an opening in the platform, and you press that down" The men got on the car and, in going with it to the camp it ran away, and they were injured—Truman seriously. When Truman claimed before the Commission that the car had no brakes, Burns spoke up and stated that Truman or the men on the car had used his (Burns') "gauge" for a brake and broken it. It is not clear from the record what this gauge was, or how serviceable it might have been. The usual "brakes" were later found —it is not clear where, with respect to the starting point of the car. They had not been used on the trip. The men may have negligently failed to note the absence of the brakes. They probably undertook to operate the car without using good brakes, but the record is not clear that the four men could not have taken the car to the camp without the usual brakes. The railroad was steep in places, but the grade was a railroad grade. Except as the men might be upon it, the car was not loaded. While there was testimony that a motor would be used to shove a loaded car upgrade to the place of work, the testimony also showed that the car was not a large car; that it would hold but a few men. The car was so low that a man could readily step from it. If the men were negligent, the Commission could find their negligence was within their employment.

Petitioner earnestly contends that this was a "push car," to be propelled by pushing; that the men were not supposed to get on the car; that the accident happened because they did get upon the car; that as a result they lost control of it; and that the car ran away down a steep grade and they were injured. The trouble with this argument is that the evidence does not show that the workmen never got upon the car in taking it on a trip of the length of a trip to camp. If there was no such practice, it would not result that the Commission could not infer and find that Truman's acts were but negligence within the scope of his employment. It is easy to infer and may be forcibly argued that these cars were ordinarily pushed about at the places of work in order to carry or distribute rails, supplies, and heavier tools used by the men. It is not easy to accept as conclusive the argument that men would always take the empty car on a long trip to camp without sitting upon it part of the time, particularly where the railroad grade appeared such as to permit of the practice without great risk. There was testimony that the men did ride on the push cars which were being run into camp. So far as the method of construction is concerned, the car, as revealed by the evidence, was as simple as a car could be made; the method of braking it was primitive. It would seem the most unskilled person might have quickly learned to operate it. There is nothing in the evidence to indicate the necessity for having a special crew to handle it. And the claim that the men had no right or duty on the platform of the car is not persuasive in the light of the testimony that "there is two sticks and an opening in the platform, and you press that down." In the absence of any better explanation in the record of the braking device, the conclusion is a fair one that a man must be on the platform of such a car to effectively manipulate these sticks through the "opening in the platform." Otherwise the car might speed beyond the reach of the man on the ground, before he could even have time to adjust the sticks in the "opening in the platform," or a sudden lurch of the car, if he were standing on the ground, might pull the brake sticks out of his hands. When Truman started on the trip he, according to Burns' testimony, was sitting on the car, shoving with his feet. It was evidently difficult for the Commission to understand Burns' failure to reprimand Truman or discharge him on the spot when he stated to Burns, "This is the way we go." It could well be urged that Burns' failure to say a word in reply to this remark showed: First, that it was likely that Truman was ordered to take the car in on the company's business; and, secondly, that he was not, at least, when and where the car was starting on its journey, doing an amazingly foolhardy thing in riding upon it. If the argument was not sound Burns, the man in authority, was allowing the company's property to be taken where it was not wanted, and from a place where it would be needed on the ensuing day. Evidently he was not worried over any great possibility of peril to Truman and the other three men. It appeared affirmatively that Truman had always been a faithful, reliable, and obedient employee. The terms or expressions, "course of employment" and "scope of authority," are referred to in 26 Cyc. 1533, 1534. This very significant declaration is there made: "The purpose of the act, rather than its method of performance, is the test of scope of employment." Of course, the act of an employee, even though it was intended to forward the purpose of the employer, might be of such an exceptional and unusual nature as that a court would hold that it was not reasonably within the scope of the employment. Here the employee was using the very device he had been ordered to use; he was

taking it into camp but was not careful in doing so.

[2] If the injury occurs when the employee is performing an act entirely outside the employment, no award may be made. Engels Copper Min. Co. v. Industrial Acc. Comm., 183 Cal. 714, 192 Pac. 845, 11 A. L. R. 785.

[3] Where two rational conclusions may be drawn from the evidence, one in favor of and one against the award made by the Commission, the award may not be disturbed. Eastman Co. v. Industrial Accident Commission, 186 Cal. 587, 200 Pac. 17; Southern Pacific Co. v. Industrial Accident Commission, 177 Cal. 378, 170 Pac. 882.

In the case next mentioned an award had been made by the Commission in favor of one Coelho. He lost his life while employed as a deck hand on a barge. He had nothing to do with the operation of the barge, but he and the other deck hands were transported thereon from place to place where the barge was loaded and unloaded. Coehlo exposed himself to a risk of falling from the barge by unnecessarily taking a position near its edge at a time when the waters of the estuary, where the barge then was, were somewhat rough. One of the other deck hands specifically warned him of his danger. He remained leaning against an upright near the edge of the barge. That was the last seen of him alive. His body was found in the water. When warned, he did not go inside the cabin on the barge. That would have been the safe place for him to be, and there was evidence to show commands had been given to the deck hands to be there. His body was found in the bay and no one testified as to exactly what occurred immediately preceding the accident. The record left that matter to inferences, as does the record here. The decision was by the Supreme Court in bank, and the remarks of the court have a bearing on the question of claimant's conduct:

"Nor can we say that his position was so perilous that he displayed a spirit of bravado and reckless foolhardiness by occupying it. Taking the trip from San Francisco to Oakland on that barge so that upon arrival at the latter city he might be ready to assist in removing the cargo was a part of Coelho's duty. Therefore he was in the course of his employment when the accident occurred if he was not either recklessly or in defiance of orders occupying a place of great peril. While his conduct was not careful and was not characterized by such caution as would be entirely commendable in one afloat upon such a craft, we cannot say that it amounted to willful misconduct. * * * As Coelho was going on his employer's business by the very conveyance furnished by the employer for that purpose, there can be no question of the correctness of the finding that the accident occurred in the course of and arose out of his employment. In re Donovan, 217 Mass. 76 (Ann. Cas. 1915C, 778, 104 N. E. 431)." W. R. Rideout Co. v. Pillsbury, 173 Cal. 132, 159 Pac. 435.

[4] We think there was substantial evidence supporting the findings of the Commission, and that the award should be affirmed. It is so ordered.

We concur: FINCH, P. J.; BURNETT, J.

---

60 Cal. App. 354

## ROBERTSON et al. v. MELVILLE et al.
(Civ. 3879.)

(District Court of Appeal, Second District, Division 2, California. Jan. 4, 1923.)

**1. Reformation of instruments ⟸8—Any valuable consideration will support action.**

While equity will not reform a purely voluntary deed, a valuable consideration, however small, will support a conveyance, and ordinarily entitle grantee to maintain an action to correct a mutual mistake in the deed.

**2. Reformation of instruments ⟸36(1)—Allegations as to consideration held sufficient to warrant reformation of deed; "sold."**

A complaint, alleging that defendant "sold" all of certain property represented as having a total frontage of 65 feet, but that the deed omitted a 5-foot strip, which defendant refused to convey on plaintiff's demand, and that plaintiff paid all of the agreed consideration, *held* sufficient to warrant reformation of the deed, though no facts showing the adequacy of the consideration were alleged; the necessary inference from the allegation that defendant "sold" the land being that there was a pecuniary consideration.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sold.]

**3. Pleading ⟸34(1) — Allegations liberally construed, and defects not affecting parties' substantial rights disregarded.**

The allegations of a pleading must be liberally construed, with a view to substantial justice between the parties, and any error or defect not affecting their substantial rights must be disregarded, under Code Civ. Proc. §§ 472, 475.

**4. Reformation of instruments ⟸36(3)—Complaint, alleging facts from which fraud or mistake may be inferred, is sufficient.**

To state a cause of action, under Civ. Code, § 3399, for reformation of a deed, which, through fraud, mutual mistake or mistake of one party known to or suspected by the other, does not truly express their intention, it is not necessary that the word "mistake" appear in the complaint, it being sufficient if the facts alleged, or the fair inference from them, show fraud or mistake.

**5. Reformation of instruments ⟸36(3)—Complaint held sufficient to authorize reformation of deed for mutual mistake.**

A complaint, alleging that defendant "offered for sale" and "actually sold" a lot having a total frontage of 65 feet, that she "repre-

sented' to plaintiff that she was selling and conveying "all of the above-described property," that she "intended" to convey the total frontage of 65 feet, and that plaintiff "acted under the belief" that all of the property had been conveyed to her, *held* sufficient to state a cause of action, under Civ. Code, § 3399, for reformation of a deed, which omitted a 5-foot strip, on the ground of mutual mistake, though the word "mistake" did not appear.

**6. Reformation of instruments ⟸46—Finding that strip of land agreed to be conveyed was omitted from deed through mistake held warranted, though word "mistake" did not appear in complaint.**

Where the court found that all the allegations of a complaint, in which facts necessary to entitle plaintiff to reformation of a deed for mutual mistake in omitting a 5-foot strip were directly stated or necessarily inferable from those stated, were true, it was warranted in finding that such strip was omitted through "inadvertence or mistake," though the word "mistake" did not appear in the complaint, it being its duty to determine from the facts alleged and proved whether defendant's conduct was the result of a concealed, fraudulent intent or of mistake.

**7. Appeal and error ⟸1071(5)—Findings going beyond language of issues tendered by complaint, stating facts sufficient to constitute cause of action, not prejudicial to defendants.**

Where the complaint states all the essential facts necessary to constitute a cause of action for reformation of a deed, and the facts alleged are found to be true, findings going beyond the language of the issues tendered by the complaint are not essential to support a judgment for plaintiff, and hence are not prejudicial to defendants.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Helen Robertson and husband against Ida M. Melville and husband. Judgment for plaintiffs, and defendants appeal. Affirmed.

Edward Winterer, of Los Angeles, for appellants.

Turnbull, Heffron & Kelley, of Los Angeles, for respondents.

FINLAYSON, P. J. Defendants, who are husband and wife, appeal from a judgment reforming a deed which the wife, Ida M. Melville, as grantor, had executed to the plaintiff Helen Robertson, as the grantee. The deed was reformed by correcting a misdescription of the land. The evidence is not in the record; the case coming here on the judgment roll alone.

The allegations of the complaint are substantially these: The defendant Ida M. Melville was the owner and in possession of a parcel of land in the city of Los Angeles having a total frontage of 65 feet. It consisted of lot 3 of the G. M. Lashley tract, having a frontage of 60 feet, and the south 5 feet of the north 345 feet of the east 117.8 feet of lot 3 of Towner and Garbutt's subdivision of the S. W. Little tract. All of the property—i. e., lot 3 of the G. M. Lashley tract and the adjoining 5-foot strip in Towner and Garbutt's subdivision—was "offered for sale and actually sold by said Ida M. Melville to the plaintiff Helen Robertson." The vendor represented to the vendee that she was selling and conveying all of the above-mentioned property, and at all times referred to the property sold as having a total frontage of 65 feet. The deed which the vendor executed to the vendee described and conveyed all of lot 3 in the G. M. Lashley tract, but failed to make mention of the 5-foot strip in Towner and Garbutt's subdivision, with the result that the land conveyed had a frontage of but 60 feet, instead of the 65-foot frontage which the vendor had offered for sale and had "actually sold" to the vendee. Mrs. Melville "intended to convey to said Helen Robertson all of the property purchased" by the latter, and until two days prior to the commencement of the action Mrs. Robertson "acted under the belief that there had been conveyed to her by said Ida M. Melville all of the property so purchased." Immediately on ascertaining that the deed omitted the 5-foot strip, Mrs. Robertson demanded a conveyance thereof from Mrs. Melville, but the latter has refused all compliance with the demand. Mrs. Robertson paid to Mrs. Melville all of the agreed consideration. The complaint does not allege what was the consideration that was paid for the property, but the trial court found that it was $4,500.

[1, 2] Though no demurrer was filed in the court below appellants now claim that the complaint does not state a cause of action. In support of this contention it first is asserted that the action was brought and intended as one for specific performance, and that, since the complaint nowhere alleges facts showing the adequacy of the consideration received by Mrs. Melville, the pleading is insufficient as a complaint for specific performance. The argument rests on a false premise. The cause of action alleged in the complaint is one for the reformation of the deed, and not for the specific performance of the contract whereby the land had been sold. It is a cause of action for the reformation of a deed which had been executed in an attempted performance of the contract. It is true the complaint is by no means a model, and it doubtless could have been successfully demurred to on the ground of uncertainty in the allegation respecting the nature of the consideration given for the land. Nevertheless, it does appear that the consideration was valuable; i. e., that it was a pecuniary consideration. This is a necessary implication of the allegation that

Mrs. Melville "sold" the land to Mrs. Robertson; the word "sold" importing a pecuniary consideration. Since, therefore, the complaint shows, by necessary inference, that there was a pecuniary consideration, there is a sufficient allegation of consideration to warrant a reformation of the deed. It may be conceded that equity will not reform a purely voluntary deed; for one who accepts another's bounty cannot be heard to say that something else should have been given. Enos v. Stewart, 138 Cal. 112, 70 Pac. 1005. But a valuable consideration, however small, will support a conveyance, and a consideration which will support a conveyance ordinarily is sufficient to entitle the grantee to maintain an action to correct a mutual mistake in the deed. It is alleged that Mrs. Melville received the consideration which it was agreed should be paid for the total frontage of 65 feet. This being the case, the vendor cannot now insist on keeping all of the consideration that was paid for a piece of property having a 65-foot frontage, and while conveying a portion of the land, refuse to convey the whole. Having received and kept the consideration that was paid to her for the whole parcel, she is bound, in conscience, to correct the mistake. In Mason v. Moulden, 58 Ind. 1—an action to reform a deed by correcting the description of the land intended to be conveyed—the court said:

"The case is not entirely like one where specific performance of a contract is sought. Here the vendor attempted to perform the contract, and executed a deed for that purpose. The aid of the court is required only to correct a mistake into which the parties mutually fell in the execution of their purpose, the one to convey, and the other to receive, the title to the land."

In this same case the Indiana court further said:

"Elizabeth was a purchaser for a valuable consideration, and mere inadequacy of consideration is no ground for withholding relief by way of reforming the deed, and thus giving her what she bought, and what her vendor intended to convey, and would, but for the mistake, have conveyed."

To the same effect are Baker v. Pyatt, 108 Ind. 61, 9 N. E. 112; Comstock v. Coon, 135 Ind. 640, 35 N. E. 909; Citizens' National Bank v. Judy, 146 Ind. 322, 43 N. E. 259; and Rea v. Wilson, 112 Iowa, 517, 84 N. W. 539.

[3, 4] It next is urged that the complaint does not state a cause of action for reformation because there is no allegation of fraud, or of mutual mistake, or of a mistake by one of the parties known to or suspected by the other, citing section 3399 of the Civil Code, which reads:

"When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value."

While, as we have stated, the complaint is by no means to be commended as a precedent, we think it would have withstood the test of a general demurrer had one been filed. In the absence of a demurrer great liberality has been indulged in order to sustain faulty complaints in actions to reform written instruments. Newton v. Hull, 90 Cal. 487, 495, 27 Pac. 429; Seegelken v. Corey, 93 Cal. 92, 95, 28 Pac. 849; Peasley v. McFadden, 68 Cal. 611, 616, 10 Pac. 179; Ward v. Waterman, 85 Cal. 488, 24 Pac. 930; Higgins v. Parsons, 65 Cal. 281, 3 Pac. 881. As was said in Peasley v. McFadden, supra:

"In the construction of a pleading for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties, and in every stage of an action, the court must disregard any error or defect in the pleadings which does not affect the substantial rights of the parties. Code Civ. Proc. §§ 472, 475."

It is true that the word "mistake" nowhere appears in the complaint; but if the essential facts have been alleged it was not necessary that plaintiffs should have characterized them. It is the *facts*, and not the pleader's conclusions, from which the chancellor is to draw the conclusion that there was a mistake in which both parties participated, or that there was a mistake on the part of one known or suspected by the other, or that the erroneous description was due to the vendor's fraud. In other words, it is sufficient if the facts alleged, or the inference to be drawn from them, by fair intendment show fraud or mistake.

[5] Here all the facts necessary to entitle plaintiffs to a reformation of the deed which are not directly stated are necessarily inferable from those which are stated. It appears from the complaint that Mrs. Melville "offered for sale" and "actually sold" the total frontage of 65 feet; that she "represented" to Mrs. Robertson "that she was selling and conveying *all* of the above-described property"; that she "intended" to convey to Mrs. Robertson the total frontage of 65 feet; and that Mrs. Robertson "acted under the belief" that there had been conveyed to her all of the property. From these allegations it clearly appears that the true agreement was well understood by both parties, but that, contrary to the vendee's belief, the deed, which presumably was drafted by the vendor of by a scrivener employed by her, did not correctly embody all of the agreement, in that it omitted a part of the land which the vendor represented she was selling and which she *intended* to convey and which was "actually sold." The fair inference from the allegation that the ven-

dor "intended" to convey the total frontage of 65 feet, and that the vendee "believed" that all of it had been conveyed to her, is that the 5-foot strip was omitted from the deed through mistake on the part of the vendor in which the vendee participated; that is, that the misdescription was the result of mutual mistake. The facts having been clearly stated, the pleading cannot be held defective merely because the plaintiffs did not know and could not allege what was passing in the grantor's mind at the time of the conveyance. They knew that the vendor had "offered for sale" and had "sold" all of the 65-foot frontage, and that she had represented that she was selling all of it, and that therefore the 5-foot frontage could have been omitted from the deed only through fraud or mistake—but which, it ordinarily would be impossible to say.

[6, 7] The trial court found, in substance and effect, that all the allegations of the complaint are true. In other findings that court went somewhat beyond the precise language of the issues as tendered by the complaint. Thus, it is expressly found that the 5-foot strip was omitted from the deed through "inadvertence and mistake," notwithstanding that the word "mistake" nowhere appears in the complaint. This the court was warranted in doing; for it was its duty to determine from the facts alleged and proved whether Mrs. Melville's conduct was the offspring of a concealed fraudulent intent or whether it was the progeny of mistake. As to the other findings in which the court somewhat amplifies the facts as alleged in the complaint, it may be said of them that they cannot possibly prejudice the appellants. For the reasons already given, the complaint states all of the essential facts necessary to constitute a cause of action for reformation of the deed. And since the facts as alleged in the complaint are found to be true, it follows that such of the other findings as may go beyond the language of the issues as tendered by the complaint are not essential to the support of the judgment.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

190 Cal. 416

## Ex parte JORDAN. (Cr. 2549.)

(Supreme Court of California. Feb. 16, 1923.)

**Criminal law ⊜1208(9)—Indeterminate sentence held not void.**

An indeterminate sentence for robbery is not void for uncertainty, since in effect it is for the maximum term provided by law, which is life imprisonment, notwithstanding Pen. Code, § 213, making robbery punishable by imprisonment for not less than one year, section 671, providing that, where a crime is punishable by imprisonment for a term not less than a specified number of years, and no limit to the duration of such imprisonment is declared, the court may impose a life sentence, nor section 1168, providing for indeterminate sentences.

In Bank.

Application by John Jordan for a writ of habeas corpus to be directed to the warden of San Quentin prison to secure release of petitioner as improperly sentenced. Writ denied.

John Jordan, in pro. per.

PER CURIAM. The petitioner was given an indeterminate sentence for robbery. The petitioner claims that the sentence is void for uncertainty, citing People v. Sama (Cal. Sup.) 207 Pac. 893; People v. Mendosa, 178 Cal. 509, 173 Pac. 998; In re Lee, 177 Cal. 690, 171 Pac. 958; Penal Code, §§ 213, 671, and 1168. The sentence was, in effect for the maximum term provided by law. In re Lee, supra. The maximum term provided by law was life imprisonment.

The petition is denied.

WILBUR, C. J., and MEYERS, SEAWELL, WASTE, and KERRIGAN, JJ., concur.

---

190 Cal. 401

## In re KERR et al. (S. F. 10573.)

(Supreme Court of California. Feb. 13, 1923.)

**Mandamus ⊜3(8)—Writ to compel hearing of petition for distribution denied, where other statutory remedy existed.**

An application for a writ of mandamus to compel a judge of the superior court to hear a petition for distribution, where money has been paid to the state treasurer under Code Civ. Proc. § 1737, by a public administrator, will be denied, petitioner's remedy being by a proceeding in the superior court under section 1272a as added by St. 1917, p. 254, § 2, relating to proceedings after judgment by persons claiming estates.

In Bank.

Application by Thomas J. Kerr and others for a writ of mandate to be directed to the Superior Court, City and County of San Francisco, Thomas F. Graham, Judge, requiring him to hear and determine a petition for distribution. Writ denied.

H. H. Eaton, of San Francisco, for petitioners.

PER CURIAM. The application for a writ of mandamus to compel the respondent to proceed and hear the petition for distribution in this case, where money has been paid to the state treasurer under provisions of section 1737 of the Code of Civil Procedure, is denied, on the ground that petitioners' remedy is by proceedings in the superior court of Sacramento county under the provisions of section 1272a of the Code of Civil Procedure (Stats. 1917, p. 254).

All concur.

---

190 Cal. 389

## GRIFFITH v. OAK RIDGE OIL CO. et al. (L. A. 7301.)

(Supreme Court of California. Feb. 9, 1923.)

**1. Negligence ⊜56(1) — Defendant's negligence need not be sole cause of injury.**

The negligence of defendant need not be the sole cause of the injury to entitle plaintiff to damages therefor; it being sufficient that it is a proximate cause of the injury.

**2. Trial ⊜296(4, 5)—Instruction held not to require contributory negligence to be sole cause of injury in view of other instructions.**

A portion of an instruction, which stated that negligence on the part of either plaintiff or defendant was of no consequence unless it was the proximate cause of the injury—that is, the efficient cause which necessarily sets the other causes in operation—was not erroneous as stating that contributory negligence was no defense unless it was the sole cause of the injury, where it followed a statement that, to find a verdict for plaintiff, the jury must not only find that defendant was negligent and his negligence was the proximate cause of the injury, but also that plaintiff was not guilty of negligence contributing proximately thereto, and the court also gave 12 other instructions upon the subject of contributory negligence, in several of which the jury were told the plaintiff could not recover if his negligence contributed in the slightest degree towards the accident.

**3. Appeal and error ⊜1066—Abstract instruction that operation of automobile at unlawful speed was negligence held not erroneous.**

In an action for injuries received in an automobile collision, an instruction that the operation of an automobile at an unlawful speed was in itself negligence was not prejudicial error, even if there was no evidence defendant was operating his car at a prohibited speed, where the instruction was merely introductory to the portion immediately following that it was not necessarily permissible to operate

the car at the speed limit fixed by law, for a less rate of speed might, under the particular circumstances, be negligent.

**4. Trial ⊂260(10)—Instruction denying recovery for loss of wages properly refused as not in issue and as excluded by other instructions.**

In an action for personal injuries, where the complaint made no claim for loss of wages, and plaintiff testified upon the trial that he lost no wages because his employers continued payment thereof while he was disabled, and the court explicitly enumerated the elements for which they might award compensation, not including loss of wages, it was not error to refuse to give a requested instruction not to award anything on account of loss of wages.

**5. Trial ⊂315 — Verdict by averaging not agreed to in advance is not misconduct.**

It is not misconduct by the jury to strike an average of the opinions of each juror as to the amount of damages, where there was no agreement in advance to abide by the average as the verdict of the jury, but it was accepted as the proper verdict after discussion.

**6. Damages ⊂132(8)—$8,363 for permanent injuries to arm of pianist held not excessive.**

Where plaintiff's injuries prevented him from lying down for four weeks immediately following the accident, and at the time of the trial, 11 months after the accident, his right arm was crooked at the elbow, two fingers on his left hand were paralyzed, and he could not raise that hand to the back of his neck, his occupation had been the demonstration of pianos, and he could play after the accident with one hand only, and some at least of his injuries were permanent, a verdict awarding $8,363 was not excessive.

In Bank.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action by J. J. Griffith against the Oak Ridge Oil Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Kemp, Mitchell & Silberberg, of Los Angeles, for appellants.

Harry K. Sargent and Floyd L. Anderson, both of Los Angeles, for respondent.

MYERS, J. This was an action to recover damages for personal injuries arising out of a collision at the intersection of two highways, between an automobile driven by the plaintiff and one driven by the defendant Buzzard as employee and agent of the defendant Oak Ridge Oil Company. Defendants' answer, in addition to denying the allegations of the complaint, pleaded contributory negligence as an affirmative defense. Verdict was for plaintiff and defendants appeal, upon the grounds of error in the instructions, misconduct of jury, and excessive damages.

It is conceded that the evidence is sufficient to support the implied findings of defendants' negligence and plaintiff's freedom from contributory negligence, and it is also conceded that there was substantial evidence tending to prove contributory negligence, so that error in the instructions upon that issue would be material.

Defendants complain of the following language in one of the instructions given:

"Negligence on the part of either the plaintiff or defendant is of no consequence in the case unless you also find that such negligence was a proximate cause of the injury. By proximate cause is meant the efficient cause; the one that necessarily sets the other causes in operation. It is that which is the actual cause of the loss, whether operating directly, or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which the loss is produced; it is the cause to which such loss should be attributed."

[1-2] It is claimed that this instruction told the jury, in effect, that negligence on the part of either party, to be of consequence in the case, must be the sole cause of the injury, and defendants assert that such a rule would be correct as applied to the negligence of the defendant and incorrect as applied to contributory negligence of the plaintiff. That is not the law. The law does not require that negligence of the defendant must be the sole cause of the injury complained of in order to entitle the plaintiff to damages therefor. All that is required in either respect is that the negligence in question shall be *a* proximate cause of the injury complained of, and that is precisely what the instruction told the jury. The language quoted was but a small portion of a long general instruction given upon the subject of negligence and contributory negligence, which first defined negligence and then correctly stated the rules as to the burden of proof of negligence and contributory negligence. Then followed the portion quoted, and ended as follows:

"In order, therefore, to find a verdict for the plaintiff you must not only find from a preponderance of all the evidence that the defendant was negligent, but also that such negligence was the proximate cause of the injury to the plaintiff; and you must further find that the evidence fails to show by a preponderance thereof that the plaintiff was guilty of negligence contributing proximately thereto; otherwise your verdict must be for the defendant."

If the jurors could have had any doubt, after reading that instruction concerning the rule that contributory negligence of plaintiff, in order to defeat his cause of action, need not be the sole cause of the injury, that doubt must have been dispelled by the 12 additional instructions given them upon the subject of contributory negligence, in several of which the jurors were told, in effect, that if negligence of the plaintiff "contributed in the

slightest degree towards such accident, then your verdict must be for the defendants." This does not present the situtation claimed by appellants of two conflicting instructions upon the same subject, one correct and the other erroneous.

[3] Appellants also complain of the following instruction:

"The court instructs you as a matter of law that it is negligence to operate a motor vehicle at any rate of speed prohibited by law. If, therefore, you find that the defendant operated the vehicle in question at a rate of speed greater than the speed limit fixed by law, to wit, 30 miles per hour at the place in question, you will find as a matter of law that the defendant was negligent in operating such vehicle at such speed,"

on the ground that there was no evidence to support such a finding, and that the giving of the instruction under those circumstances was prejudicial error, citing Wallis v. Southern Pacific Co., 184 Cal. 662, 195 Pac. 408, 15 A. L. R. 117. It is undoubtedly true that the giving of an instruction predicated upon a hypothetical finding which would be wholly unsupported by evidence may, under some circumstances, be prejudicial, as in the Wallis Case, wherein the defense chiefly relied upon was contributory negligence, and the court instructed the jurors under the last clear chance rule as to circumstances whereunder they might return a verdict for the plaintiff, notwithstanding his contributory negligence, and this court determined that there was no evidence to justify the application of the last clear chance rule. In the instant case, however, the language above quoted was but a portion of an instruction, and was immediately followed by the following:

"But this does not mean that it is necessarily permissible to operate at the speed limit so fixed by law, for a less rate of speed may under the particular circumstances be negligent,"

and the court thereupon proceeded to carefully and correctly advise the jurors of the circumstances and conditions under which they might find a rate of speed less than the maximum fixed by law to be negligent. It thus becomes apparent that the language complained of was intended to be introductory and explanatory of that which immediately followed it, and that the jury could not have been misled thereby.

[4] Appellants complain of the court's refusal to give an instruction requested by them, to the effect that in assessing damages the jurors could not award anything on account of loss of wages. This was properly refused, for the reasons that nothing was claimed in the complaint for loss of wages, and the plaintiff testified upon the trial that he lost no wages, because his employers continued the payment thereof during all the time that he was disabled, and, lastly, because the court did explicitly enumerate to the jury the elements for which they might award compensation, and in this enumeration it excluded the element of the loss of wages.

[5] It is claimed that the jurors were guilty of misconduct, in that they arrived at the amount of their verdict by the system of averages; that is, that they agreed in advance to ascertain the average of the amounts proposed by each, and to abide by the result so ascertained as their verdict. Upon the hearing of the motion for new trial affidavits of two jurors were presented which tend to support this claim. In opposition thereto affidavits of five jurors were presented by the respondent, each to the effect that there was no agreement to accept the average until after it was ascertained how much the average amounted to, and then only after further discussion and deliberation. If the latter affidavits were true, there was, of course, no misconduct on the part of the jurors, and no basis in their action for the granting of a new trial (McDonnell v. Stage Co., 120 Cal. 476, 52 Pac. 725), and the trial court so found, in effect, by denying the motion.

[6] Lastly, it is claimed that the damages awarded were excessive. The amount awarded for general damages was $8,363. It appeared from the evidence that for three or four weeks immediately following the accident it was absolutely impossible for the plaintiff to lie down; that during all of that period he was compelled to sit on the edge of a chair, night and day, suffering intensely, and never able to sleep longer than 30 minutes at a time; that at the time of the trial, 11 months after the accident, his right arm was crooked at the elbow, two fingers on the left hand paralyzed both as to sensation and as to motion, the thumb drawn and without sensation; that he could not raise his left hand to the back of his neck, and was unable to dress himself; that for six years he had been in the employ of a piano factory, in whose services it was necessary for him to play the piano to demonstrate the instruments, and that as a result of the accident he is able to play with one hand only. It was also testified that his injuries were to some extent permanent; the extent of permanency not being definitely stated. The amount awarded by the jury was approved by the trial judge in denying the motion for new trial. Under these circumstances it is clearly apparent that we cannot say that the verdict was "so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury." Howland v. Railway Co., 110 Cal. 523, 42 Pac. 986;

Scott v. Times-Mirror Co., 181 Cal. 366, 184 Pac. 672, 12 A. L. R. 1007.

The appeal is without merit, and the judgment is affirmed.

We concur: WILBUR, C. J.; KERRIGAN, J.; LAWLOR, J.; LENNON, J.; WASTE, J.; SEAWELL, J.

---

190 Cal. 384

## HALPERN v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.
## (S. F. 8427.)

(Supreme Court of California. Feb. 8, 1923.)

**1. Certiorari ⟸58—Record must be taken as true.**

The province of certiorari is to review the record of an inferior court or tribunal, and to determine therefrom whether jurisdiction has been exceeded, and the reviewing court is bound by the record, which must be taken as true.

**2. Courts ⟸116(3)—Have jurisdiction to correct mistakes in entry of orders.**

The Superior Court, like other courts, has inherent power over its records, and may at all times correct mere clerical errors made by the clerk in entering an order in the minutes, so that the record may truly state what was the order of the court.

**3. Evidence ⟸82—Correction or amendment of record conclusively presumed to have been proper on collateral attack.**

Any correction or amendment of its record made by the superior court is conclusively presumed to have been properly made when such record is collaterally drawn in question.

**4. Appeal and error ⟸440—Appeal does not deprive lower court of jurisdiction to correct record.**

The right of a lower court to amend its record to conform to the truth is not suspended or impeded by an appeal, where the amendment does not affect any substantial rights of the appellant, and consists in the correction of a clerical mistake appearing upon the face of the record, or where the lower court has found that the record disclosed that the entry on the minutes did not correctly state what was the order of the court.

**5. Certiorari ⟸58 — Allegations of petition and counter affidavits cannot be considered.**

Allegations in the verified petition for certiorari to review the entry nunc pro tunc of an order amending an order granting a new trial, and the counter affidavits of the judge to the true order originally made by the court, cannot be considered where the record stated that the order as originally entered was not correct, and the amendment was made so that the entry would conform to the true order.

**6. Certiorari ⟸29—Does not lie to review failure to give notice of correction of record.**

An objection that an order correcting the record which petitioners sought to review by certiorari was in excess of jurisdiction because made ex parte without notice to petitioner cannot be considered in certiorari proceeding, which does not lie to review errors in the exercise of jurisdiction, however gross or glaring they may be.

In Bank.

Certiorari by Jacob Halpern against the Superior Court in and for the County of Alameda and A. F. St. Sure, the Presiding Judge of Department No. 2 thereof, to review an order amending nunc pro tunc an order granting a new trial. Writ discharged.

Jacob Halpern, Wm. M. Abbott, K. W. Cannon and J. E. Reardon, all of San Francisco, for petitioner.

Ford & Johnson, of San Francisco, for respondents.

WASTE, J. This is a proceeding in certiorari to review an order of the superior court of Alameda county purporting to amend, nunc pro tunc, a previous order of the court granting a new trial in the action of Clarence Garns, by his guardian ad litem, versus Jacob Halpern, who is the petitioner here. It appears from the return that the action was one for damages for personal injuries alleged to have been sustained by reason of the purported negligence of the defendant. Judgment was entered in favor of the minor and against the petitioner, whereupon the plaintiff, being apparently dissatisfied with the amount of the judgment, made a motion for a new trial, specifying as grounds of the motion, first, insufficiency of the evidence to justify the verdict, and, second, that said verdict was against law.

On the 17th day of February, 1922, the clerk of the court entered a minute order in the records thereof, which is as follows:

"It is ordered by the court that the motion for a new trial in the above-entitled cause be, and the same is hereby, granted and the cause continued to February 24, 1922, at 10 o'clock a. m. of said day, to be reset."

On March 2 following, the defendant took an appeal from this order. In his petition for the writ here he alleges that thereafter, and on August 14, 1922, and after the appeal was duly taken and perfected, and after the petitioner, as such appellant, had filed his opening brief, upon an ex parte application made by the plaintiff's attorneys in the cause, and in the absence of petitioner and any of his counsel, and without any notice to petitioner and his attorneys, or any one representing him, the lower court made and entered an order purporting to modify the previous order granting the new trial. The amendatory order reads as follows:

"[Title of court and cause.] Order amending order granting new trial. It appearing to the court that plaintiff heretofore upon due notice therefor moved said court for a new trial of said cause, and that the court granted said motion upon the grounds stated in said notice, and that the record made by the clerk of said court does not correctly show the order which was in fact made by the court, and that said record discloses that the entry on the minutes does not correctly give what was the order of the court, it is hereby ordered, that the order granting said motion be, and the same is hereby, amended nunc pro tunc by adding to the order heretofore entered after the word 'granted' the following to wit: I. 'Insufficiency of the evidence to justify the verdict.' Dated this 14th day of August, 1922."

It is the contention of the petitioner here that the Superior Court exceeded its jurisdiction in making the amendatory order of August 14th. Briefly, the position of the petitioner is that the original order was not made inadvertently, or by mistake, nor did the order as entered contain any clerical misprision; further, that the order is an attempt to correct a judicial error, which may not be done in the manner followed by the court in this instance.

[1] Whether the contentions of the petitioner are right or wrong is not a question material to the consideration of this application. Neither are we now concerned with the question whether the lower court should have made the amendment to its previous order without notice thereof being given to the petitioner. The province of certiorari is to review the record of an inferior court, board or tribunal, and to determine from the record whether such court, board, or tribunal has exceeded its jurisdiction. The reviewing court is bound by the record, which must be taken as true. If the contrary is the fact, it must be corrected by motion or suggestion to the court below. Roe v. Superior Court, 60 Cal. 93. If the court had jurisdiction, and the recitals of the judgment or order are sufficient to sustain it, those recitals are conclusive. 4 Cal. Juris. p. 1107, § 69; White v. Superior Court, 110 Cal. 60, 64, 42 Pac. 480. As was said in Central Pac. R. R. Co. v. Placer County, 46 Cal. 667, 670:

"It has been settled by a long series of decisions in this state that a writ of certiorari brings up for review only the question whether the inferior officer, court, or tribunal, has exceeded its jurisdiction, and cannot be used as a mere writ of error for the correction of mistakes, either in law or fact, committed by the inferior tribunal within the limits of its jurisdiction."

See Buckley v. Superior Court, 96 Cal. 119, 120, 31 Pac. 8.

[2, 3] In the matter before us, it must be conceded that the superior court had jurisdiction of the subject-matter. Courts have inherent power over their records, and may at all times correct mere clerical errors made by the clerk in entering an order in the minutes, so that it may truly state what was the order of the court, by setting forth all its terms.

"The right of a court of general jurisdiction to amend or correct its records so that they shall speak the truth is too well recognized to need any argument (Crim v. Kessing, 89 Cal. 486, 23 Am. St. Rep. 491); and any correction or amendment of its records is conclusively presumed to have been properly made, when such record is collaterally drawn in question, or is used as evidence, or relied upon in support of any other proceeding (Paige v. Roeding, 96 Cal. 391; Cockrill v. Clyma, 98 Cal. 123)." Garoutte v. Haley, 104 Cal. 497, 500, 38 Pac. 194.

That any error or defect in a record occurring through acts of omission or commission by the clerk in entering of record the judgment or proceedings of the court may be corrected at any time by the court, on its own motion, or on motion of either party, was held in Brush v. Pac. Elec. Ry. Co. (Cal. App.) 208 Pac. 997, in which case a hearing in this court was denied.

[4] The right of a lower court to amend its record to conform to the truth is not suspended or impeded by an appeal, where the amendment does not affect any substantial rights of the appellant, and consists of the correction of a clerical mistake appearing upon the face of the record. Fay v. Stubenrauch, 141 Cal. 573, 575, 75 Pac. 174. The same rule should apply where, as here, the lower court has found "that said record discloses that the entry on the minutes does not correctly give what was the order of the court."

[5] In answer to the contention of the petitioner that the omission does not appear from the record, and that the amendment, in fact, amounted to the correction of a judicial error, and was one affecting the substantial rights of the appellant because it changed the effect of the order granting the new trial, and also because it was made after appellant had gone through the formality and incurred the costs of an appeal, it is only necessary to repeat that, upon an application to this court for a writ of certiorari, the record sought to be reviewed imports absolute verity, and the allegations of the petition that the record does not speak the truth may not be considered. If the minutes of the court below do not correctly show the proceedings had, an application should be made in that court to correct the error. Hoffmann v. Superior Court, 79 Cal. 475, 476, 21 Pac. 862; Borchard v. Supervisors, 144 Cal. 10, 14, 77 Pac. 708. The allegations of the verified petition here and the counter affidavits of the trial judge filed in the court below are therefore dehors the record, and may not be considered by us in this action.

[6] Petitioner contends that, as he had no

notice, by motion or otherwise, of the ex parte application, and of the action of the trial court in amending the order granting the new trial, such action of the court was in excess of its jurisdiction. Like the other contentions made by the petitioner, this objection has no place in this hearing for a writ of certiorari, for the reasons we have already given. As the court had undoubted jurisdiction to amend its records, errors in the exercise of such jurisdiction, however gross or glaring they may be, may not be examined into in this proceeding (Sherer v. Superior Court, 94 Cal. 354, 29 Pac. 716; Roberts v. Police Court, 185 Cal. 65, 195 Pac. 1053), but only, as has been pointed out, in a proceeding in the lower court for that purpose (Roe v. Superior Court, supra; Hoffmann v. Superior Court, supra). On an appeal from any judgment necessarily affected by the order of the lower court correcting its records, or on direct appeal from the order itself, if it be one specially made after judgment, a review can be had of errors of law occurring in connection with the making of such correction. Since in this case we are not permitted to consider any matters dehors the record, and as there is nothing in the record to show that the lower court has exceeded its jurisdiction in any of the matters complained of, no question of law is presented. Barber v. Board of Supervisors, 42 Cal. 630, 635.

The writ is discharged.

We concur: WILBUR, C. J.; KERRIGAN, J.; MYERS, J.; LENNON, J.; LAWLOR, J.; SEAWELL, J.

---

190 Cal. 395

## LUCKENBACH v. LAER et al. (L. A. 7047, 7048.)

(Supreme Court of California. Feb. 9, 1923.)

**1. Appeal and error ⟸113(1)—Orders refusing to vacate orders not appealable.**

Orders refusing to vacate former orders are not appealable unless so designated by the Code.

**2. Appeal and error ⟸82(3)—Orders after judgment refusing to vacate orders appointing receiver and authorizing him to sue are appealable.**

Special orders, after final judgment against a corporation, refusing to vacate orders appointing a receiver and authorizing him to sue certain persons, are appealable. Code Civ. Proc. § 963, subd. 2.

**3. Appeal and error ⟸148—Persons injuriously affected may appeal from orders refusing to vacate orders in action to which they were not parties.**

Persons injuriously affected by appealable orders in an action to which they were not parties may make themselves parties to the record by moving to set aside the orders and may appeal from orders refusing to do so, not being entitled to appeal from the original orders.

**4. Appeal and error ⟸151(1)—Persons who may move to vacate orders in proceedings to which they were not parties not entitled to relief on appeal unless aggrieved.**

Persons entitled to lay the foundation for an appeal by motion to vacate orders made in proceedings to which they were not parties are not entitled to relief on appeal from orders refusing to vacate, unless aggrieved. Code Civ. Proc. § 938.

**5. Appeal and error ⟸151(2)—Stockholders cannot appeal from order refusing to vacate order appointing receiver after due notice to corporation.**

An order appointing a receiver for a corporation after due notice to it *held* binding on stockholders sued by the receiver under Civ. Code, § 309; the corporation being the aggrieved party, and hence the only one entitled to appeal from an order refusing to vacate such order.

**6. Appeal and error ⟸151(2)—Debtors not parties to nor interested in controversy resulting in order appointing receiver for corporate creditor cannot appeal from order refusing to vacate such order.**

An order appointing a receiver for a corporation *held* inoperative against debtors who were not parties to, nor interested in, the controversy or subject-matter thereof, so that, not being aggrieved by such action, they could not appeal from an order refusing to vacate the order.

**7. Appeal and error ⟸151(2)—No appeal from orders merely permitting actions by receiver.**

Persons against whom a receiver appointed for a corporation was authorized by orders, made after judgment against it, to institute actions for sums due it, *held* not aggrieved parties, and hence not entitled to appeal from orders refusing to vacate such orders, which were merely permissive and did not purport, by their own force, to work a deprivation of property or legal rights.

**8. Appeal and error ⟸151(2)—Right invaded must be immediate to entitle party to appeal.**

To render a party aggrieved by an order, so as to entitle him to appeal therefrom, the right invaded must be immediate, not merely some possible, remote consequence.

**9. Receivers ⟸169—Defendants in receiver's action may interpose any defense against corporation.**

A receiver being merely the minister of the corporation acting under the court's direction in attempting to enforce liabilities thereto, defendants in any action by him may interpose every defense they would have against the corporation.

**10. Appeal and error ⊂874(3)—Validity of order appointing receiver not considered on appeal by parties he is authorized to sue from order refusing to vacate such order.**

Whether an order appointing a receiver for a corporation is void on its face for want of jurisdiction, as not having been made in such a case as the statute specifies, or in a case where receivers are customarily appointed, need not be considered on appeal from an order refusing to vacate such order on motion by debtors against whom the receiver is authorized to bring suit; such objection being available in the receiver's action against them.

**11. Appeal and error ⊂874(3)—Receiver's right to sue cannot be determined on appeal from orders appointing him and granting such authority.**

A receiver's right to sue as such must be determined in such action itself and cannot be determined on appeal by parties he is authorized to sue from orders refusing to vacate orders appointing him and granting permission to bring such actions.

In Bank.

Appeals from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by John Luckenbach against John B. Laer and others. Judgment for plaintiff. From orders denying motions to vacate orders made after judgment, Chris Krempel and others appeal. Appeals dismissed.

See, also, 204 Pac. 591.

John T. Jones, Norman A. Bailie, and Henry J. Stevens, all of Los Angeles, for appellants.

Alfred McAdoo, of Los Angeles, for respondent.

WASTE, J. Appellants are dissatisfied with certain orders, made after judgment denying their motions to vacate and set aside previous orders of the trial court, also made after judgment, appointing a receiver and advising him to institute certain actions against them, after the judgment was returned unsatisfied. The appellants are Chris Krempel, Anna Krempel, Lucy Hauerwaas, and William H. Preston, not one of whom was a party to the action.

The plaintiff, Luckenbach, instituted an action against the defendants Laer, Trueblood, and the Krempel-Preston Company, a corporation, to recover an ordinary money judgment upon certain promissory notes. Judgment was entered in his favor, which, with attorney's fees and costs, amounted to approximately $6,000. The judgment was returned unsatisfied. No statutory proceedings in aid of execution were had, but the plaintiff applied to the court, in this same action, for the appointment of a receiver of the defendant corporation, upon the ground that the corporation refused to apply its property in satisfaction of the judgment, and had suffered its right to do business to become suspended by reason of its failure to pay the license tax due the state. In support of the motion the plaintiff set forth in his affidavit that the corporation had a claim and demand against William H. Preston, one of the appellants here, in an amount in excess of $23,000, which was unpaid and owing, and that an agreement and understanding had been arrived at between Preston and the Krempel-Preston Company, by which the indebtedness was to be paid and discharged in such way as to prevent plaintiff from securing a satisfaction of his judgment. The motion was granted over the opposition of the defendant corporation, and Willard L. Goodwin was appointed receiver; the order of his appointment also advising him to institute an action against Preston. A further authorization of the court was granted the receiver to institute an action against Chris Krempel and Mrs. Lucy Hauerwaas, upon the allegation of the receiver that they, also, were indebted to the suspended corporation. Some time later the receiver applied for and was granted permission to institute an action against Preston, Krempel, Mrs. Hauerwaas, and Anna Krempel, upon the ground that, as directors of the Krempel-Preston Company, they had divided and paid out to themselves (other than to Anna Krempel), as stockholders, out of the capital stock of the corporation, more than $164,000, in violation of the provisions of section 309 of the Civil Code. No appeals were taken from the order appointing the receiver or from the various orders granting permission to institute suits.

Of the various actions sanctioned by the court, the only one actually commenced was the one to recover from appellants upon the joint and several liability imposed by section 309, supra. Aside from the filing of one answer and an amendment thereto, the record does not disclose what further proceedings were taken. The bill of exceptions discloses merely that the action is still pending.

Subsequently Preston, and later Krempel, Anna Krempel, and Lucy Hauerwaas, interposed motions, upon due notice, in the original action of Luckenbach v. Laer et al., the one in which these appeals are being prosecuted, to have vacated and set aside the order appointing Goodwin as receiver and permitting him to institute the various actions. The motions were denied, and it is from the action of the lower court refusing to vacate and set aside such orders that these appeals are prosecuted. By stipulation the appeals were ordered consolidated and will be disposed of in this one opinion. Pending such disposition this court, after due application, granted a writ of supersedeas staying all proceedings in the superior court

in the action begun by the receiver against these appellants.

[1-3] The first question to be considered is the right of the appellants to an appeal from orders made in an action to which they were not parties. These appeals are not taken from the order appointing the receiver, or from the orders granting the receiver permission to institute the action against the appellants, but are from the orders refusing to vacate its prior action. Orders refusing to vacate cannot, under any circumstances, be made the subject of direct appeal, unless they themselves be of a class of orders designated by the Code as appealable. Title Ins. & Trust Co. v. Calif., etc., Co., 159 Cal. 484, 487–489, 114 Pac. 838. The reason for the rule, succinctly stated in the case cited, is that—

"An order denying a motion to set aside a former order amounts to no more than a refusal by the court to reconsider an action already taken and the appeal should be taken from the original order."

But these orders were special orders made after final judgment (section 963, subd. 2, Code Civ. Proc.), and are therefore appealable. The appellants were not parties to the proceedings resulting in the original orders, and for that reason could not appeal therefrom, which is a circumstance authorizing an appeal from an order refusing to vacate or set aside, in cases where an appeal is otherwise permissible. Title Ins. & Trust Co. v. Calif. Dev. Co., supra. For the purpose of an appeal they have followed the procedure allowed by our practice to one whose rights or interests are injuriously affected by any appealable order made in an action to which he is not a party, through the process of making themselves parties by moving to set those orders aside. Est. of McDermott, 127 Cal. 450, 452, 59 Pac. 783. Their motions being denied, they may, on this appeal, have the proceedings of which they complain reviewed. Elliott v. Superior Court, 144 Cal. 501, 509, 77 Pac. 1109, 103 Am. St. Rep. 102; Tattenham v. Superior Court, 155 Cal. 205, 206, 100 Pac. 248. Such proceeding can scarcely be said to make them parties to the action, but it does make them parties to the record, and as such entitled to appeal. 2 Cal. Juris. p. 209, § 52. Unless appellants were permitted to move in the court below to set aside the orders, they would be left without the remedy of an appeal. People v. Grant, 45 Cal. 97, 99; 2 Cal. Juris. p. 209, § 52. Whether there is merit in the appeal depends upon other considerations.

[4-6] Notwithstanding the right of persons who are neither parties to the proceeding nor to the record to move in the court below for the purpose of laying the foundation for an appeal, it does not necessarily follow that they will be entitled to any relief here. Only aggrieved parties may appeal. Section 938, Code Civ. Proc. The rights of appellants Chris Krempel and Lucy Hauerwaas as stockholders were fully cared for and protected in the proceedings which resulted in the appointment of the receiver. it was only after due notice to the Krempel-Preston Company of an actual controversy in open court that the receiver was appointed. The action of the lower court in that matter was therefore binding upon such appellants, as stockholders of the corporation. Baines v. Babcock, 95 Cal. 581, 592, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158. The corporation was the aggrieved party in that matter and had the right of an appeal from the order. Winsor Pottery Works v. Superior Court, 13 Cal. App. 360, 363, 109 Pac. 843. So far as the record indicates, the appellants Anna Krempel and William H. F. Preston were not parties to nor interested in the controversy which resulted in the appointment of the receiver, and had no interest in the subject-matter of that proceeding. Consequently, that order was inoperative against them and they were not aggrieved by the court's action. Miller v. Bate, 56 Cal. 135, 136.

[7-9] Neither were any personal rights nor property interests of any of the appellants so affected by the action of the lower court in granting the receiver permission to institute actions against them as to render them aggrieved parties. Those orders which the appellants subsequently sought to have vacated and set aside were merely permissive in character. Nothing was attempted thereby to be taken away from the appellants, which feature distinguishes the situation here from the relation of the parties disclosed in those cases cited in support of appellants' contention. In each of the cases we have examined, the parties seeking relief were directly affected and aggrieved by the judgment or order complained of, in that such judgment or order, by its own force, purported to work a deprivation of property or legal rights. We find no cases holding that some remote consequence which may flow from an order will render a party aggrieved thereby. The right invaded must be immediate. Adams v. Woods, 8 Cal. 306, 315. The appellants were in exactly the same position after the appointment of the receiver and the granting of permission to sue as they were before. They were, or were not, liable to the Krempel-Preston C[illegible]pany and to its creditors, as the facts exist. The receiver is merely the minister of the corporation, acting under the direction of the court, in attempting to enforce such liability. In any action brought thereon by him, the appellants may interpose every defense they would have against the corporation. If they have a meritorious defense, they will, we may assume, defeat any recovery. Barth

v. Enger-Kress Co., 92 Wis. 225, 65 N. W. 1035.

[10] In answer to the contention that the order appointing the receiver is void on its face for want of jurisdiction, it not having been made in such cases as the statute expressly specifies, or in a case where receivers have heretofore been appointed by usages of courts of equity (Miller v. Oliver, 174 Cal. 407, 410, 163 Pac. 355), we need only say that if the point is well taken appellants may avail themselves of that objection in the action brought by the receiver against them.

[11] The question of the right of the receiver to maintain the action in the capacity in which he sues is a question that must be determined in such action itself. Preston (one of these appellants) v. Superior Court of Los Angeles County, 184 Cal. 658, 195 Pac. 916.

For the foregoing reasons, the appellants are not parties aggrieved, and the appeals are dismissed.

We concur: WILBUR, C. J.; LENNON, J.; KERRIGAN, J.; MYERS, J.; SEAWELL, J.; LAWLOR, J.

---

190 Cal. 382

## WRIGHT v. BOARD OF SUP'RS OF SONOMA COUNTY et al. (S. F. 10388.)

(Supreme Court of California. Feb. 8, 1923.)

**Pleading ⊜8(2)—Complaint held demurrable as stating conclusion of law.**

Where plaintiff's complaint, in a proceeding against the board of supervisors to enjoin the sale of bonds of the city of Santa Rosa high school district, failed to allege that he is a taxpayer within the city of Santa Rosa high school district, but on the contrary affirmatively alleged that he is a resident and taxpayer in the Wright elementary common school district, and that said Wright district is no part of the high school district, the allegation that plaintiff's land is "subject to taxation to meet payment of the bonds hereinafter referred to in this complaint" was a mere conclusion of law.

In Bank.

Appeal from Superior Court, Sonoma County; Percy S. King, Judge.

Suit by Sampson B. Wright to enjoin the Board of Supervisors of Sonoma County and others from selling bonds. From an order sustaining a demurrer to his complaint, plaintiff appeals. Affirmed.

J. A. Barham and H. W. A. Weske, both of Santa Rosa, for appellant.

G. W. Hoyle, of Santa Rosa, for respondents.

WILBUR, C. J. Plaintiff brought this action to restrain the board of supervisors from selling bonds of the city of Santa Rosa high school district, claiming that the election authorizing such bonds was illegally conducted, and that the bonds were therefore illegal and void. A demurrer was interposed to his complaint, alleging that the facts stated therein were insufficient to constitute a cause of action; that the plaintiff had not the legal capacity to sue; that the complaint is ambiguous and is also unintelligible because the boundaries of the district cannot be ascertained therefrom; that it does not appear that the plaintiff is a citizen of the United States, or that he is in any way interested in the subject of said action. The demurrer was sustained with leave to amend, but the plaintiff declined to amend, and judgment was rendered against him, from which he appeals.

It is only necessary to consider one proposition advanced by the respondents in support of the judgment of the trial court. It affirmatively appears from the complaint that the plaintiff is a resident and taxpayer in the Wright elementary common school district. This district and 24 other elementary common school districts are named in the notice of election attached to the complaint. In regard to said elementary school districts the plaintiff alleged:

"That said 25 elementary common school districts named in said exhibit do not now, and never did, constitute or form a part of the city of Santa Rosa high school district, nor did either of them."

It was further alleged:

"That the said trustees of said city of Santa Rosa high school district are not now, and never were at any time mentioned herein, trustees or representatives of any of the 25 elementary common school districts mentioned in Exhibit B, attached hereto, and that neither of said elementary school districts ever at the time mentioned herein became or formed any part or portion of said city of Santa Rosa high school district, and that said trustees never at any time had control of or jurisdiction over or any power or right to function for any of said elementary school districts."

It was thus apparent that plaintiff not only fails to allege that he is a taxpayer within the city of Santa Rosa high school district, but, on the contrary, affirmatively alleges that he is a resident and taxpayer in the Wright elementary common school district, and that said district is no part of the high school district. Under these circumstances the allegation that plaintiff's land is "subject to taxation to meet payment of the bonds hereinafter referred to in this complaint" is a mere conclusion of law.

The attention of the plaintiff was called to the insufficiency of his complaint by the

general demurrer and by the specifications therein, and, notwithstanding that fact, he declined to amend. The demurrer was properly sustained.

Judgment affirmed.

We concur: LENNON, J.; KERRIGAN, J.; WASTE, J.; LAWLOR, J.; SEAWELL, J.; MYERS, J.

---

60 Cal. App. 360

## GAUSE v. PACIFIC GAS & ELECTRIC CO.
(Civ. 2515.)

(District Court of Appeal, Third District, California. Jan. 4, 1923.)

**1. Contracts ⟸186(3)—Sublessee not in privity as to contract for water between lessee and company.**

In an action by a sublessee against a company for failure to deliver water to leased lands in accordance with a conditional contract between plaintiff's lessor and the company where complaint did not show privity of contract between plaintiff and the company, it was bad on demurrer.

**2. Pleading ⟸49—Nature of action determined by allegations of complaint.**

The nature of an action must be determined from the allegations of the complaint.

**3. Waters and water courses ⟸158½(1)—Allegation of breach of contract to deliver water held insufficient.**

Where a contract to furnish water for irrigation purposes provided that defendant would furnish water if it had any left or was able to do so after using what was necessary for development of electric energy, a complaint for failure to deliver water in accordance with the contract that did not show that the water was not needed for the purpose stated was not good as against demurrer.

**4. Pleading ⟸8(6), 214(5)—Allegation that defendant acted willfully and wrongfully held conclusion of law not admitted on demurrer.**

In action by a sublessee for failure to deliver water to leased lands in accordance with a conditional contract, allegation, that defendant "willfully and wrongfully" and in violation of its contract between plaintiff's lessor and the company did not furnish water, involved a conclusion of law not admitted on demurrer.

**5. Waters and water courses ⟸158(2)—Conditional contract to furnish water held not to vest water right.**

Where a contract between an electric company and a landowner to furnish water for irrigation did not convey a water right, but was executory and provided for a conditional sale of a named amount of water, and the company's obligation thereunder could be modified or canceled by happening of named conditions, no water right was thereby vested in the landowner.

**6. Waters and water courses ⟸158(2)—Conditional contract for water held not to create servitude on electric company's system.**

In a contract between an electric company and a landowner to furnish a named amount of water for irrigation, where no land was described to which a right might attach and the owner could utilize the water on any lands then owned or which he might thereafter own or lease, the contract being for the owner's personal benefit with a provision against assignment without permission of the company, and there being no ditch or other fixed source mentioned in the contract to which any water right could attach as a servitude, the rights conferred were too indefinite to constitute a water right which could be held as a servitude on the company's water system.

**7. Pleading ⟸312—Intention of parties revealed from contract and not from allegations of complaint.**

In action by a sublessee for failure to deliver water to leased lands in accordance with a conditional contract between plaintiff's lessor and defendant, the intention of the parties must be revealed by the contract itself, rather than by allegations of the complaint.

**8. Pleading ⟸192(2) — Complaint demurrable for uncertainty.**

In action by a sublessee for failure to deliver water to the leased lands in accordance with a conditional contract between plaintiff's lessor and defendant which provided that defendant should sell and deliver a named amount of water to lessor for irrigating land owned or leased by him, where the complaint did not purport to be based on an assignment of any water right but on an indefinite portion of the water called for by the original contract, it was subject to special demurrer for uncertainty.

**9. Assignments ⟸58—Partial assignment not enforced against debtor not consenting thereto.**

A partial assignee has no legal standing to enforce a partial assignment against a debtor who has not consented thereto.

**10. Assignments ⟸129—In equity partial assignee may bring all parties before court.**

In equity a partial assignee has the right to bring all the parties before the court and have his rights under an assignment determined.

**11. Assignments ⟸129—Assignor proper party in assignee's action on assigned contract.**

In an action by a sublessee as assignee of rights for failure to deliver water to leased lands in accordance with a conditional contract between plaintiff's lessor and defendant, the failure of plaintiff to make his lessor, as assignor, a party defendant, furnished reason for sustaining demurrer for misjoinder of parties.

**12. Estoppel ⟸107—Company not estopped from shutting off water.**

In an action by sublessee for failure to deliver water to leased lands in accordance with a conditional contract between plaintiff's lessor and defendant, where plaintiff alleged that defendant was estopped from taking the position that he was not entitled to water under the contract and did not allege false statements or intention of defendant to deceive or mislead him or that plaintiff in taking a sublease or in planting his crop relied on statements of de-

fendant, no cause of action was stated against defendant as of estoppel.

**13. Waters and water courses ⇐154(1)—One cannot use water of another so as to make it appurtenant to land.**

In view of Civ. Code, § 662, providing that a thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, a person may not without right use on his land water belonging to another and by such use make it appurtenant to the land.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by W. S. Gause against the Pacific Gas & Electric Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Robert H. Schwab, of Sacramento, for appellant.

Thos. J. Straub and Wm. B. Bosley, both of San Francisco, and Richard Belcher, of Marysville, for respondent.

BURNETT, J. By his second amended complaint plaintiff sought to recover damages from defendant for the latter's alleged failure to deliver water for rice irrigation upon land which had been subleased by plaintiff from one Levisee. The complaint is in three counts, the last two incorporating by reference practically all the allegations of the first count. Indeed, the first count sets forth the basic facts of the obligation and breach of respondent, if any, and to this count extended consideration may be given. It pleads a certain written contract between said Levisee and respondent, a copy of which is attached to the complaint and made a part thereof. By the terms of said contract respondent on the conditions therein stated agreed to sell and deliver not to exceed 600 miner's inches of water to Levisee for irrigating land owned by or leased to him in the county of Sutter, and to deliver such water at a fixed point designated in said contract; said water "to be used only by the consumer upon his said lands for the purpose of raising rice and beans thereon." No lands were described in the contract further than the specification that the water was to be used on "seven hundred and fifty acres of land owned by or leased to the consumer (Levisee) in said county of Sutter." The source from which said water was to be furnished was not mentioned, and the contract was made unassignable by Levisee except by the written consent of respondent. It also appears that the water "to be furnished hereunder will first be utilized by the company for the generation of electric energy, which is the primary use to which the same will be put. Therefore anything herein contained to the contrary notwithstanding, it is agreed by and between the parties hereto that the company shall have the right, without incurring any liability to the consumer by reason thereof, to discontinue delivering water hereunder whenever in the opinion of its engineer in charge such discontinuance is necessary in order to conserve the company's stored waters required for the generation of electric energy." The contract further provided that respondent was to commence the delivery of the water at the beginning of the irrigating season of 1919 at which time Levisee was to pay one-half of the sum due under the agreement and respondent reserved the right to cancel the contract or to discontinue the delivery of the water upon default of the consumer in making his payments as required.

After pleading said contract of January 20, 1919, the complaint alleged that on February 21, 1919, and April 3, 1919, Levisee leased two certain tracts of land from the owners thereof, and that on or about March 20, 1919. "Levisee sublet all of the above described parcels of land to plaintiff * * * for the crop season of 1919, * * * for the planting and growing of rice, which facts the defendant well knew." This is followed by an allegation that plaintiff entered into possession of said land and prepared it for the cultivation of rice and thereafter sowed rice thereon and—

"VIII. That it was upon the direct assurance of defendant that water would be supplied pursuant to said contract to said land that said C. W. Levisee entered into said leases herein referred to. That said water right was acquired for use upon said land and was necessary for its beneficial enjoyment and said land could not be so advantageously used without it. Said water right was an adjunct to said land and was used with it for its benefit up to the time when defendant ceased delivering water to said land as herein alleged."

As to this allegation it may be observed in passing that no "assurance" is claimed to have been made by defendant to plaintiff, but only to Levisee, and it was simply to the effect that the water would be supplied "pursuant to said contract"; and, furthermore, the allegation that "said water right was an adjunct to said land" is obviously a mere conclusion, and was so regarded by the trial court. It is further alleged that at the proper time respondent began delivering the water and plaintiff applied it to the irrigation of said rice, and as a result thereof the rice crop was in a healthy and flourishing condition. "That no water was supplied to said lands prior to the time that this plaintiff took possession, and planted the same to rice, and that at no time was any water supplied under said contracts to any other person than this plaintiff."

It further appears that at the time of the execution of said contract between respond-

ent and Levisee, the former "was advised and well knew" that the latter's purpose was to sublease said premises and to install an irrigation system for the distribution of the water to be furnished by respondent and that said water was to be used upon the lands subleased to plaintiff, and it was upon the direct assurance of respondent that the water would be furnished according to the contract and in an amount adequate to irrigate said lands that said plaintiff and Levisee entered into said agreement of March 20, 1919, and it was upon the full belief and faith on the part of the parties to said agreement or lease that said lands would receive an adequate supply of water that said agreement of March 20, 1919, was executed and the land planted to rice and "the parties to said contract treated and regarded" said water as being made "a part or appurtenant to said lands during said term and for said purposes aforesaid."

It is further alleged that plaintiff had no other means of irrigating said land, and that without a continuous supply of water sufficient to flood all of said lands from January 1st to November 1st to a depth of several inches it would be impossible to grow and mature a rice crop on said lands or any part thereof, which was well known to defendant; that respondent "without any notice to said plaintiff on or about the 9th day of July, 1919, willfully and wrongfully and in violation of the terms and provisions of its said contract aforesaid, shut off all water from said lands, turned and diverted its water supply in other directions and completely deprived said plaintiff and all of said lands from any further water for irrigation thereof."

Then follow allegations that said lands were referred to and contemplated by said contract, that Levisee duly performed all covenants and conditions imposed upon him by said contract, including the payment of all moneys required of him, and that, as a consequence of "said defendant ceasing to furnish water, the said rice crop growing on said premises became a total loss, all to the damage of plaintiff in the sum of $165,025."

The second count adopts the foregoing allegations and makes the additional specific charge:

"That on or about the 20th day of March, 1919, said C. W. Levisee assigned to plaintiff such portions of the water as called for in and by virtue of said contract entered into between the defendant and C. W. Levisee as was necessary to irrigate said lands for the purpose of growing rice thereon."

The third count attempts to set forth an estoppel in the following language:

"That as herein alleged, said defendant well knew that said plaintiff could not raise rice on said lands without the application of said water as contracted for as herein stated. That knowing that said plaintiff had planted said lands to rice, furnished the said plaintiff with the necessary amount of water for the purpose of growing said rice. That at no time did said defendant object to or refuse to give plaintiff the necessary amount of water for raising said rice under and pursuant to said contracts made and entered into by and between said C. W. Levisee and said defendant.

"That said plaintiff continued on with the cultivation of said rice during all of said times and that said defendant well knew said facts and raised no objection thereto.

"That said defendant is now estopped from taking the position that said plaintiff was not entitled to water under and by virtue of said contracts by reason of the facts as herein alleged."

To said second amended complaint and to each count thereof the defendant demurred upon the general ground, for a defect of parties in that said Levisee was not joined either as plaintiff or defendant, and separately that each count was uncertain, ambiguous, and unintelligible for various reasons that were carefully enumerated. The trial court sustained the demurrer in the following order:

"The court being fully advised in the premises hereby orders that the demurrer to said second amended complaint, and to each alleged cause of action therein contained, be, and the same is hereby sustained without leave to amend."

From the judgment entered thereupon in favor of defendant the appeal has been taken.

As to all these counts, it will not be disputed that no cause of action is stated against defendant unless it appears that some legal obligation was imposed upon said defendant in favor of plaintiff and that said obligation has been violated to the injury of the latter.

[1] According to the first count, whatever obligation existed is based upon and is created by the covenants and promises contained in said contract between respondent and said Levisee. No other duty than that arising from said contract is disclosed or even hinted at, and it must be conceded that to the terms of that contract and to them alone we must look for the character and measure of that obligation. When we do that, the result is not involved in any doubt or obscurity whatever. The obligation undertaken by respondent was to furnish water under certain conditions to said Levisee. Plaintiff was not a party to said contract and was not referred to in any manner. There is some pretense that the parties to said agreement had in view other persons and contemplated the irrigation of certain lands, but no attempt has been made to reform said contract, nor has any mistake or fraud been alleged or claimed. We must be guided, therefore, by the intention of the parties as expressed in said written instrument and conclude that

said obligation was created in favor of Levisee and him alone, or one in privity with said contract. There is no claim, however, of privity. Indeed, appellant in his closing brief declares that "this action is predicated upon a tort and not a contract," and that "if this action was in any wise dependent upon a privity of contract we would not now be here." Furthermore, referring to said contract between Levisee and respondent, appellant says that he "is not a party to that contract and his rights are in no wise predicated thereon." If appellant is to be taken at his word, it is plain that at least his first count reveals no cause of action for the reason that Levisee is the only person who could demand the performance of any duty under said contract, and also that no obligation from respondent to any one is revealed except by virtue of said contract.

In view of this claim and admission of appellant it is not necessary to consider any further the proposition that the duty and obligation arising out of a contract are due only to those with whom or for whom it is made, and that the application of this rule makes it plain that the covenants of respondent were in favor of Levisee and not of plaintiff. We may add, however, that this same contract was under investigation in the case of Diggs v. Pacific Gas & Electric Co. (Cal. App.) 206 Pac. 765, and this question was considered and many authorities cited which illustrate the application of the principle.

In this connection we may emphasize the evident fact that the only pretense of a cause of action in the first count is based upon said contract between Levisee and respondent. Strike out the allegations in reference to said contract and it is manifest that there would be left no foundation for the claim of any liability on the part of respondent for the damage suffered by appellant. Certain legal conclusions, implying wrongdoing on its part, would remain; but no fact would appear to justify such conclusion. It matters not whether the action be regarded as on contract or in tort, since the only basis for any obligation of respondent is found in said contract, and we have seen, this did not create a duty in favor of appellant. But, as pointed out by respondent, the first count contains all the characteristic features of an action on contract. It pleads said agreement between Levisee and respondent and attempts to establish appellant's privity therein. This is followed by the only allegation which purports to disclose any act or omission tending to charge respondent with liability for appellant's damages, as follows:

"That said defendant without any notice to said plaintiff, on or about the 9th day of July, 1919, willfully and wrongfully and in violation of the terms and provisions of its said contract, aforesaid, shut off all water from said lands."

[2] Of course, the nature of the action must be determined from the allegations of the complaint (Busch v. Interborough, etc., Co., 187 N. Y. 388, 80 N. E. 197, 10 Ann. Cas. 460), and the allegations herein leave no uncertainty as to the proper interpretation of the cause of action.

[3, 4] Another reason for holding the first count fatally defective is that the allegation of the breach of the water contract is insufficient. It is apparent that therein respondent agreed to furnish water upon certain conditions. It was expressly stipulated that it should first be used for the generation of electric energy which was declared to be its primary purpose. In fact, the fair interpretation of the covenants of the parties is that the company would furnish Levisee with water, if it had any left or was able to do so after using what was necessary for the development of the requisite electric energy. That circumstance or contingency therefore became an inseparable part of the promise, and in order to state a cause of action it would be necessary to show that such water was not needed for that purpose. In view of the absence of any allegation to that effect it will be presumed that respondent discontinued the delivery of the water for the reason that, in the opinion of its engineer, it was necessary to conserve it for the development of electric power. Manifestly, the words "willfully and wrongfully and in violation of the terms and provisions of its said contract as aforesaid" must be disregarded as stating a mere conclusion (Diggs v. Pacific Gas & Electric Co., supra), and in view of the conditional promise, the mere failure to deliver the water cannot be deemed a breach of the contract.

In Fisher v. Pearson, 48 Cal. 473, the defendant agreed to pay all bills against a certain house or litigate the same before paying them if he deemed them unjust, and it was held to be insufficient to allege that he had failed to pay said bills and, furthermore, that having agreed to pay all bills for which the plaintiff had not made himself liable, it was necessary in order to state a cause of action against him to recover such bills to allege that plaintiff had not made himself personally liable therefor.

In Salisbury v. Shirley, 53 Cal. 461, the lease in question provided, in effect, that during the last six months of the term the lessee would pay the monthly rent and all taxes, rates, and assessments which, during the six months, should be levied or assessed upon the demised premises, provided the net income from the property should be sufficient for said purposes, and it was held that in suing to recover the taxes levied during that period, it was incumbent upon the plaintiff to show in the complaint a breach of the covenant by an averment that the net income from the property during the six months was

sufficient to pay the rent, taxes and assessments.

In Van Buskirk v. Kuhns, 164 Cal. 472, 129 Pac. 587, 44 L. R. A. (N. S.) 710, Ann. Cas. 1914B, 932, the defendant had agreed to pay a certain sum "when able" and plaintiff did not allege ability to pay. In holding the complaint insufficient the court said:

"If the promise is conditional upon such ability, it is, as is said in Rodgers v. Byers, 127 Cal. 528 (60 Pac. 42), incumbent upon the plaintiff to allege and prove that the condition has been complied with. This is not, like the plea of the statute of limitations, matter of defense. It is a substantive part of the cause of action, and the burden of proof with respect to it, is upon the plaintiff."

The situation herein is similar, and for that reason the allegation of breach is insufficient.

[5] The foregoing would seem to be a sufficient answer to the suggestion that a water right was created by said contract and that it became appurtenant to the land subleased by appellant. There was no conveyance of a water right, but the contract was executory and provided for the sale of so much water under conditions therein enumerated. It was not a sale but an agreement to sell, and respondent's obligation thereunder could be modified, suspended, or fully canceled by the happening of the conditions mentioned in said contract. The situation was therefore entirely inconsistent with the view that a water right was thereby vested in Levisee. The principle is the same as though there had been an agreement to sell in the future upon certain conditions any other kind of property. Respondent engaged, "for a price, to transfer to another (Levisee) the title to a certain thing" (water), (section 1727, Civ. Code), but did not actually transfer the title as contemplated by a sale (section 1721, Civ. Code).

[6, 7] Furthermore, the terms of said contract are inconsistent with the theory that any supposed water right was intended to be appurtenant to any land. In the first place no land was described to which such right might attach, and the water could be utilized by Levisee on any lands that he might then own or lease or might thereafter own or lease in Sutter county. The contract was also for the personal benefit of Levisee with a provision against assignment without the written permission of respondent. If it was intended to make a water right appurtenant to any tract of land, there would be manifestly no reason in putting in this reservation. There was also no ditch or other fixed source mentioned in the contract to which any water right could attach as a servitude. The rights conferred upon Levisee were also too uncertain and indefinite to constitute a water right which could be held as a servitude on respondent's water system. These and other considerations are related by respondent as indicative of the purpose of the parties not to create an appurtenance to any land, and as we must be controlled by the intention of the parties as revealed by the contract itself rather than by the allegations of the complaint as to what the parties intended (Barney v. Indiana R. Co., 157 Ind. 228, 61 N. E. 194), we conclude that said suggested theory is entirely untenable.

Attention is directed to the decision of the Supreme Court in Copeland v. Fairview Land, etc., Co., 165 Cal. 148, 131 Pac. 119, wherein plaintiff, as successor of the Fairview Company, claimed a water right as against the Hemet Company through a contract made between said companies, wherein the former agreed to furnish the latter "water * * * upon the same terms and price it furnishes water to other persons * * * and will deliver such water into the pipes of said parties of the second part on their said lands at such points on the line of its pipe or pipes to which said parties of the second part may lay their pipes." The Supreme Court said:

"This clause does not operate to transfer to the Fairview Company any property right or interest in the supply of the Hemet Company. At most, it is a mere executory agreement for sales of water, to be effective at the option of the Fairview Company. As an agreement to sell an interest in property, it lacks the essential element of certainty as to the property which is to be delivered. It does not state the quantity of water to be furnished, nor give any means of determining that quantity. The precise act to be done in its performance is not clearly ascertainable. It is therefore incapable of enforcement against any specific property."

The contract herein is equally executory, as we have seen, and equally indefinite as to the amount of water to be delivered, since it depended upon the need of respondent for development of electric power. We deem it incredible that such contract can operate to vest a water right or create an appurtenance to land.

But if by any rule of construction such effect could be given to it, then the interest was to continue only so long as respondent did not need the water for its own use and it was subject to termination when the supply became insufficient. We must assume, as before stated, in the absence of an allegation to the contrary, that respondent exercised the privilege reserved in said contract. Of course, plaintiff cannot claim that any water right was actually appurtenant to the land at the time he subleased it, since he alleges that the water had not then been supplied to said land; it being plain that water must be actually used by right with the land for its benefit to constitute an appurtenance. Section 662, Civ. Code. His claim must be that it became appurtenant thereafter by its use, basing his right upon said contract between Levisee and respondent, but this view

we think cannot be maintained. Moreover, if any water right by virtue of said contract could and did become appurtenant to said land after the execution of said sublease, there is nothing in the complaint to show that it was transferred to plaintiff and we must assume that it remained vested in Levisee, with whom the contract was executed.

We may add that in our opinion some of the grounds of the special demurrer to this count were well taken, but we deem it unnecessary to consider them specifically.

[8] The second count is based upon an alleged assignment, but it is to be observed that it does not purport to be an assignment of any water right but of an indefinite portion of the water called for by the original contract. The allegation can amount to nothing more than that there was a subcontract between plaintiff and Levisee whereby the latter agreed to furnish the former with water which he should receive from respondent. It is at least doubtful whether this allegation would show any privity between plaintiff and respondent under said contract. 5 Corpus Juris, § 6, p. 841; 3 Page on Contracts, p. 1933. At any rate, the allegation is so uncertain as to be subject to the special demurrer on that ground. Berg v. Yakima Co., 83 Wash. 451, 145 Pac. 619, L. R. A. 1915D, 292, 297.

[9-11] Moreover, the allegation is, at best, only of a partial assignment, and the rule at law is that "a partial assignee has no legal standing to enforce a partial assignment against a debtor who has not consented thereto." 3 Cal. Jurisprudence, p. 273; Clancy v. Plover, 107 Cal. 272, 40 Pac. 394; Buckeye Refining Co. v. Kelly, 163 Cal. 8, 124 Pac. 536, Ann. Cas. 1913E, 840. In equity, though, the partial assignee has the right to bring all the parties before the court and have his rights under the assignment determined. Goldman v. Murray, 164 Cal. 419, 129 Pac. 462. If we apply the rule in equity, it would seem that the plaintiff should have made Levisee a party defendant, and his failure to do so furnished a reason for sustaining the demurrer for misjoinder of parties.

Other grounds of special demurrer were enumerated, but we pass them by, as we hold the foregoing sufficient to justify the court's action; besides, the general demurrer was good for the reason that, as in the first count, there was no sufficient allegation of the breach by respondent of its conditional promise to furnish water.

[12] As to the third count, based upon the theory of estoppel, the pleading is also fatally defective. The general elements of equitable estoppel have been often considered by the authorities, and it would seem hardly necessary to notice them in detail. We may refer, though, to the following citations of respondent: Section 1962 of the Code of Civil Procedure; Boggs v. Merced, etc., Co., 14 Cal. 279; Davis v. Davis, 26 Cal. 38, 85 Am. Dec. 157; Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; Griffeth v. Brown, 76 Cal. 260, 18 Pac. 372; Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64; Newhall v. Hatch, 134 Cal. 269, 66 Pac. 266, 55 L. R. A. 673; Nilson v. Sarment, 153 Cal. 524, 96 Pac. 315, 126 Am. St. Rep. 91; Bids v. Reed, 169 Cal. 33, 145 Pac. 516; Treat v. Treat, 170 Cal. 329, 150 Pac. 53, 57; Staniford v. Trombly, 181 Cal. 372, 186 Pac. 599; 2 Pomeroy, Eq. Jur. (3d Ed.) § 805. As indicated by respondent, to constitute an estoppel within the well established meaning of that term, respondent must have made some statement to plaintiff respecting the water in question or done something implying a statement, which was untrue, intending plaintiff to act thereon to his damage. 1 Wiel, Water Rights (3d Ed.) § 593; Bigelow Estoppel (6th Ed.) p. 774; Diggs v. Pac. Gas & Elec. Co., supra. Nothing of the kind appears in the complaint. No false statement nor statement of any kind by respondent, no concealment or conduct amounting to false statement or concealment appears. There is no allegation of any intention upon the part of respondent to deceive or mislead appellant, or that the latter in taking a sublease, or in planting his crop of rice relied upon any statement or conduct of respondent. In brief, no showing of deceit or any element of fraud, actual or constructive, is disclosed, and manifestly the doctrine of estoppel cannot be grounded upon the single fact that respondent had knowledge of the use of the water by appellant and made no objection to it. Appellant would naturally suppose that the use was in accordance with and with knowledge of the terms of said contract with Levisee. Indeed, it is alleged to have been in accordance with said contract. It would be a singular doctrine that one could not insist upon his rights under a contract because of his knowledge that another was seeking to appropriate benefits which he claimed thereunder.

The third count can have no greater force than if it alleged specifically that defendant had knowledge that plaintiff was using the water and claiming the right to use it as against respondent under the terms of said original contract. Respondent is not responsible if appellant misconceived its effect and there is nothing to show that it has not the legal right to insist upon its provisions.

Instances, no doubt, occur wherein the use of property belonging to another with the knowledge and acquiescence of the owner gives rise to the principle of estoppel; but it can have no application to a case like this, where the use is claimed to be in accordance with and in reliance upon the terms of a definite contract.

The cases cited by appellant in this connection involve a different situation and were no doubt correctly decided. For instance, in

Seymour v. Oelrichs, 156 Cal. 782, 106 Pac. 88, 134 Am. St. Rep. 154, it was held inequitable to permit defendants to rely upon the statute of frauds, since by their conduct they had induced plaintiff to believe, and to act upon the belief, that they would enter into a written contract of employment. The gist of the decision as to estoppel is stated in the syllabus as follows:

"Where the defendants verbally promised the plaintiff, who was at the time occupying practically a life position in a police department, that if he would surrender his position and enter their employ they would engage him for a period of ten years at a stated salary, and would give him a written contract embodying the terms of his employment at a stated future time, and the plaintiff, in full reliance on such promise, irrevocably surrendered his position and entered the defendants' employ, such promise, in the eye of equity, constituted a binding contract, the subsequent repudiation of which by the defendants would constitute such a manifest fraud as would estop the defendants from asserting the invalidity of the oral contract."

It was declared that the conduct of defendants involved "fraud and falsehood" and therefore could not be tolerated by a court of equity.

Other objections were raised by the demurrer; for instance, that the allegation that respondent supplied water to the subleased lands in accordance with the contract between Levisee and respondent is inconsistent with its provision specifying that the water was to be delivered to a point in Auburn Ravine (which was not upon the land subleased to plaintiff), thence to be conveyed by Levisee in his own aqueducts to the points where he desired to use it, and that said count negatives the claim that plaintiff was injured by any act of respondent inasmuch as it alleges that at no time did respondent refuse to give appellant the necessary amount of water for raising rice under and pursuant to said contract. There is merit in these and other objections made by respondent; but, as this count is manifestly based upon an inadequate and invalid claim of estoppel, the other considerations become unimportant.

[13] Finally, appellant is mistaken in his claim that, under said section 662 of the Civil Code, the mere use of water with land for its benefit makes the water appurtenant to said land. The section provides that "a thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit," etc. It would be subversive of the constitutional privilege of property ownership to hold that a person may without right use upon his land water belonging to another and by such use make it appurtenant to his land. Manifestly, the use must coexist with the ownership of the water right to make it appurtenant to his land. There is nothing in the complaint to show that plaintiff owned any water right which he could assert against respondent, and the use therefore of said water could not and did not constitute it an appurtenance to his land.

We feel satisfied that appellant has not shown by his complaint any violation of duty owed by him to respondent, and the judgment is therefore affirmed.

We concur: FINCH, P. J.; HART, J.

---

60 Cal. App. 327

## RANSOME-CRUMMEY CO. v. THURBER et al. (Civ. 4356.)

(District Court of Appeal, First District, Division 2. California. Dec. 29, 1922. Hearing Denied by Supreme Court Feb. 26, 1923.)

**1. Municipal corporations ⟸569 — Findings held sufficient to sustain judgment for defendant in action to foreclose improvement lien.**

A finding in certain consistent and uncontradictory language that a purported assessment for public improvements was made, that it was made against particular property, that the owner appealed, and his appeal was sustained and the assessment ordered corrected, but that it had not been corrected, *held* sufficient to support judgment for defendant in an action to foreclose an assessment lien.

**2. Municipal corporations ⟸493(1)—Common council has jurisdiction to determine whether diagram on which assessment was made is correct.**

Under the Vrooman Act, § 11, the common council has jurisdiction to determine whether or not a diagram on which an assessment for public improvements was based was correct.

**3. Municipal corporations ⟸493(6)—Presumed that common council did not perform idle act, and that proceedings were fair and regular.**

It is presumed that the common council did not perform an idle act, and that, in sustaining an appeal from an improvement assessment, the proceedings had and done were fair and regular.

**4. Municipal corporations ⟸493(1)—Question of title properly decided by common council when before it as relating to improvement assessment.**

Though the question of title is ordinarily a judicial question for the courts, nevertheless, when the question comes before the common council as relating to the ownership of property liable for an improvement assessment, such tribunal is not ipso facto divested of its jurisdiction, but may properly proceed to determine the question.

**5. Municipal corporations ⟸493(2)—Appeals to common council from improvement assessment based on same notice of appeal not controlled by each other.**

Where two persons have joined in a notice of appeal to the common council from an im-

provement assessment, a denial of the appeal of one will not retract and defeat the appeal of another previously sustained, nor would a denial of an appeal first heard prevent proceeding and hearing on the other.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by the Ransome-Crummey Company against Helen M. Thurber and another. Judgment for defendants, and plaintiff appeals. Affirmed.

R. M. F. Soto, of San Francisco, for appellant.

Ralph C. McComish, of San Jose, for respondents.

STURTEVANT, J. The plaintiff commenced an action against the defendants to foreclose a street assessment lien. The defendant had judgment, and the plaintiff has appealed, bringing up the judgment roll and a bill of exceptions.

In the year 1912 the proceeding was commenced for the improvement of the intersection of Fourteenth street (now Seventeenth street) and Santa Clara street in the city of San Jose. Thereafter such proceedings were had that a purported assessment was made and filed, and Agnes Beggs, on November 18, 1912, appealed to the common council of the city of San Jose. In her notice of appeal she set forth many grounds, and, among others, that the cost and charges for said improvement were illegally and improperly and not proportionately divided among the lots of land liable for the assessment, and that said assessment includes lots of land not legally liable for said assessment. Thereafter, on the 21st day of November, 1912, F. A. Curtis also appealed to the common council, and in his notice of appeal contended that in the assessment his property was included in lot No. 14, together with other property which he did not own, but that a bill for the total charge had been presented to him. And in his notice of appeal he also joined in the appeal of Agnes Beggs. Thereafter, the appeals coming on regularly for hearing, the appeal of F. A. Curtis was sustained, and the superintendent of streets was directed to correct the assessment, and in levying the same to treat San Fernando street as a main or intersecting street, joining a block on the east side of Fourteenth street. Thereafter the appeal of Agnes Beggs was denied.

The plaintiff in its amended complaint pleads a cause of action to foreclose the assessment lien levied against the property owned by the defendant Helen M. Thurber. The complaint is full, complete, and regular in every respect so far as any objection to it has been called to our attention. In her answer thereto the defendant put in issue the allegations of plaintiff's complaint, and then pleaded the order of the common council sustaining the appeal of F. A. Curtis, and directing the assessment to be corrected, and that the assessment had never been corrected, but remained as it was before said appeal. On the trial of the case the plaintiff introduced evidence which constituted a prima facie case. Thereupon the defendant introduced proof of the proceedings and order made on the appeal of F. A. Curtis.

[1] In preparing its findings the trial court did not make specific findings on the paragraph of the amended complaint pleading the regularity of the assessment. The appellant now contends that the finding as made is uncertain, inconsistent, and contradictory, and does not support the judgment for the defendants. The ultimate material fact involved was whether or not there was in force and effect an assessment against the property of the defendant. The findings are certain, consistent, and not contradictory in any respect in holding that a purported assessment was made; that it was made on the property of F. A. Curtis, among others; that he appealed; that his appeal was sustained and the assessment was ordered corrected; but that the assessment had not been corrected. We think a mere reading of the finding shows the attack is without merit.

The parties do not question the rule that an appeal by one owner suspends proceedings until that assessment appealed from is sustained, or another, in its place, is sustained. Williams v. Bergin, 108 Cal. 166, 172–173, 41 Pac. 287. The importance in this case, therefore, of Curtis' appeal, is apparent.

[2, 3] The appellant assumes that the order of the common council sustaining the appeal of Curtis attempted to determine that a street exists where the evidence shows it never existed, and that the determination by the common council was a nullity. The first answer to that contention is that it assumes the record shows facts which are not contained in the record. In the second place, the most that can be said is that the order of the common council was to the effect that the diagram on which the assessment was made was an incorrect diagram. Whether it was correct or incorrect was a question of fact which the common council had jurisdiction to hear and determine. Vrooman Act (St. 1885, p. 156) § 11. The record does not show that the assessment of the lot owned by Curtis was void, nor that such invalidity appeared on its face, nor did these matters appear on the face of the record of the common council. We must presume that the common council did not perform an idle act, and that, in sustaining the appeal of Curtis, all proceedings before the common council were had, done, and taken in a fair and regular manner.

[4] As to whether Curtis owned all of lot 14, as that expression was used on the face of the assessment was a question of fact com-

ing regularly before the common council, and which the statute commanded the common council to hear and determine. Although the question of title is ordinarily a judicial question for the courts, nevertheless when the question comes before a tribunal which is duly and regularly proceeding to exercise its jurisdiction, such tribunal is not ipso facto divested of its jurisdiction, but may proceed to determine the question before it. That is all that was done in the instant case. If the superintendent of streets, in making up his assessment, had any doubt as to the ownership of any lot, the statute authorized him to write on the assessment "Unknown," but it also commanded him to write thereon the pro rata part of the assessment. If both of these things had been done the question of title would not have arisen.

[5] The appellant contends that, because the appeal of Agnes Beggs was denied, such denial carried with it the appeal of F. A. Curtis, and that the common council should have entered an order merely dismissing his appeal. We think this contention cannot be sustained for several reasons. F. A. Curtis had the right to adopt the notice of appeal of Agnes Beggs. The board ruled thereon, sustaining the appeal. The rights of the appellant became fixed by virtue of that ruling. Thereafter the board denied the appeal of Agnes Beggs, but such denial did not have the retroactive effect of undermining the appeal of F. A. Curtis which had already been disposed of.

Assuming, as appellant contends, that the first act on the part of the board was to deny the appeal of Agnes Beggs, then such denial it may be conceded terminated her rights growing out of her appeal, but it did not annihilate the paper known as her notice of appeal. The paper continued in existence for the purpose of the appeal of F. A. Curtis, and there was no irregularity on the part of the common council in proceeding to hear and determine his appeal.

We find no error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

---

60 Cal. App. 293

## PACIFIC SLOPE SECURITIES CO. v. LLOYD. (Civ. 4353.)

(District Court of Appeal, First District, Division 2, California. Dec. 28, 1922.)

**1. Appeal and error ⟸1011(1) — Appellate court cannot disturb lower court's finding on conflicting evidence.**

The appellate court is not at liberty to disturb a finding of the trial court upon conflicting evidence.

**2. Corporations ⟸314(2) — Corporation held entitled to recover from manager secret profits received from another employed to buy stock of a competitor.**

Where one while acting as manager of a corporation receives secret profits from one employed to buy the stock of a competitor, and concealed the fact from it and the stockholders, the corporation is entitled to recover the same from him.

Appeal from Superior Court, City and County of San Francisco; H. D. Burroughs, Judge.

Action by the Pacific Slope Securities Company against Fred B. Lloyd. From judgment for plaintiff, defendant appeals. Affirmed.

A. B. Weiler, of San Francisco, for appellant.

Cooley & Crowley and A. E. Cooley, all of San Francisco, for respondent.

STURTEVANT, J. The plaintiff brought an action against the defendant to recover a judgment for moneys had and received, the trial court entered a judgment in its favor, and the defendant has appealed and has brought up the judgment roll and a bill of exceptions.

The pleadings contained numerous irrelevant matters, the findings are subject to the same criticism, and much irrelevant and immaterial testimony was received. We shall touch on only those matters that seem to us to be material.

[1] For a time prior to the month of December, 1909, the Pacific Slope Securities Company and the Pacific Surety Company were competitors doing business in the state of California. In the early part of December a campaign was launched looking toward the purchase of the stock of the Pacific Surety Company by its rival, the plaintiff in this case. By pledging its own properties, and by others pledging their properties, $475,000 was borrowed and placed on deposit in the Western National Bank of San Francisco. On the 13th day of December, 1909, the Board of Directors of the plaintiff corporation passed a resolution as follows:

"Resolved, that the Western National Bank of San Francisco be, and it is hereby instructed to disburse all moneys borrowed by this corporation and through the notes of others for the use of this corporation, directly or indirectly, for the purpose of bringing about the purchase of shares of stock in the Pacific Surety Company, on the order of William V. Lloyd, he being hereby appointed agent and trustee for this corporation in said transaction with full authority and power."

The way that William V. Lloyd came to be named in the resolution is best stated in the language of the witness:

"I am the brother of the defendant, Fred B. Lloyd. I did not, on or about December 13, 1909, have any connection with the Pacific Slope Securities Company, and never to my knowledge acted for that company on any behalf whatever. The way I came to be named in the resolution was that Fred B. Lloyd asked me to act as a trustee in protection of his interest. He told me also that some resolutions had been passed, or something whereby the Western Metropolis Bank required my signature; that the affair had been withdrawn, but that the bank required my signature anyway, and that I should go over and sign a paper with Mr. Childers. I did go to the bank. Mr. Childers signed a paper, and then pointed out where I was to sign, and I signed. That was the extent of my connection with the matter. I do not know what the paper was. I had never been advised of any purchase of stock of Pacific Surety Company, and I had no connection with it. I knew nothing about any resolutions. I had never been told or requested to disburse moneys on account of Pacific Slope Securities Company and never received any of the money or knew of the disbursement. The only thing I ever did or knew about was the signing of my name."

E. N. Childers, the person mentioned by William V. Lloyd, was the president, and F. C. Ballentine was the secretary of the plaintiff corporation. By other resolutions E. N. Childers as president, and F. C. Ballentine as secretary, were authorized to contract for the purchase of the stock of the Pacific Surety Company to an extent not less than one-half thereof on such terms as they might deem advisable. On the same day the Pacific Slope Securities Company, through its president and secretary, in writing, contracted to purchase from O. L. Van Laningham stock of the Pacific Surety Company at $190 per share, and to pay Van Laningham $36,000 commission. Thereupon Van Laningham proceeded to obtain options to purchase the stock; to cause the options to be sent to the Western National Bank for the purpose of being taken up; to cause the purchasers to duly examine the options, the amounts, etc.; and generally to get the block of stock, so accumulated, ready for sale and delivery. In making his purchases from the stockholders he paid $150 per share. After a sufficient amount of stock had been conditionally purchased, the options were taken up and paid for at the rate of $150 per share. After the options had been so taken up, and after Van Laningham's commission of $36,000 had been paid, there was remaining on deposit in the bank $100,000, which sum was made up by the difference between $150 and $190 on each share of the stock so transferred. Out of the said deposit in the bank, $36,000 was set aside to cover a claim in favor of A. P. Redding. That item is not in controversy. The remaining sum of $64,000 was drawn out of the bank on checks presented by the defendant Fred B. Lloyd and O. L. Van Laningham. Those two men appeared at the bank window together. After they had drawn that sum of money, O. L. Van Laningham testified that he turned over to the defendant $37,250. The defendant denied that fact. The conflict in the testimony was for the trial court, and this court is not at liberty to disturb that finding. The conflict just noticed is the only conflict in the story related above. The record does not show the checks nor the form of the check on which the Western National Bank disbursed; however, the resolution, authorizing that bank to disburse the same on the order of William V. Lloyd, was in regular form, and it must be presumed at this time that the bank regularly and duly followed the directions contained in the resolution placed before it.

When the $64,000 was collected, as above recited, Van Laningham could have retained the whole because he was within the clear terms of his contract, but the question remains as to the rights of the defendant to receive from Van Laningham and retain for his own use any part of the $64,000.

When William V. Lloyd was appointed trustee for the plaintiff, he was at liberty to accept or reject the appointment. If he accepted the same he accepted the appointment with all of the duties arising out of such appointment. He had no legal right to assume the duties of such trusteeship for the plaintiff and at the time of entering upon the discharge of his duties to assume the obligation "in protection of his (Fred B. Lloyd's) interest" unbeknown to the plaintiff. When William V. Lloyd was appointed trustee there is some testimony in the record to the effect that Fred B. Lloyd was the manager of the plaintiff corporation. He so stated at Los Angeles to its secretary, F. C. Ballentine, and immediately before December 13, 1909. True it is that the defendant gave testimony to the effect that he was not an officer of the plaintiff corporation until December 29, 1909, but the conflict in the testimony was determined by the trial court against the defendant. There is no claim on the part of the defendant that the plaintiff or any of its officers knew that the defendant was to receive or did receive any moneys from Van Laningham. On the other hand, as we have stated, the defendant at the trial denied that he did receive any of such moneys.

[2] In view of what has been said, it does not appear that the trial court erred in rendering the judgment which it rendered. The case is ruled in all particulars by the case entitled Western States Life Ins. Co. v. Lockwood, 166 Cal. 185, 135 Pac. 496. While acting as manager of the plaintiff corporation the defendant received from Van Laningham secret profits, and concealed from the plaintiff and its stockholders the fact

that he had received such moneys. The corporation was clearly entitled to recover the same.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

---

60 Cal. App. 412

**PEOPLE v. FARRELL et al. (Cr. 657.)**

(District Court of Appeal, Third District, California. Jan. 11, 1923.)

**1. Larceny ⟸65—Evidence held to support conviction of grand larceny.**

In a prosecution for stealing a box of carpenter tools, evidence *held* sufficient to support conviction of grand larceny.

**2. Criminal law ⟸1044, 1129(1)—Questions as to other offenses not reversible error, where no motion to strike or assignment of error.**

Where questions relative to other crimes of defendant were improper, but no motion was made to strike them out, nor was the court requested to instruct the jury to disregard them, and the matter is not assigned as error, there was no sufficient ground for reversal.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

John Farrell, F. W. Clayton, and another were convicted of grand larceny, and defendant Clayton appeals. Affirmed.

F. W. Clayton, in pro. per.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendants were convicted of the crime of grand larceny. Clayton prosecutes this appeal from the judgment of conviction and the order denying his motion for a new trial. The appellant was represented by an attorney at the trial, but has conducted his own case on appeal. As is usual under such circumstances, many of his assignments of error relate to matters not appearing in the record and therefore beyond the power of this court to consider.

[1] It is contended that the evidence is not sufficient to warrant a conviction. The defendants were accused of stealing a box of carpenter tools. The owner, who had left the tools in a Sacramento hotel, testified that they had been stolen and were of the value of $150. The proprietor of a secondhand store testified that the defendants appeared at his place of business and attempted to sell him the box of tools for $22; that the box was locked; that the defendants claimed to own the tools and that they had brought them from Stockton; that they said they had lost the key; that they then broke the lock to open the box; that while the tools were being examined a policeman entered, whereupon defendant Farrell "made a rush forward to try to get out of the store," but that the policeman "stopped him from going out." The policeman testified:

That "Farrell tried to get out the door on me, and I shoved him back and says: 'What's the matter here?' He says: 'I want to get out to get a piece of rope.' * * * I questioned him and asked him where the tools came from, and he said he met a fellow named O'Brien, and he wanted him to sell them, and said he was to get a couple of dollars out of them"; that appellant "had gone back and sat down in a chair and held a newspaper in front of him, and he denied ever being with Farrell, and said he never had anything to do with the tools."

There is no doubt as to the sufficiency of the evidence to support the verdict.

[2] Appellant complains of certain questions propounded by the district attorney. Farrell was asked on cross-examination if he did not know that Clayton was charged in Los Angeles county with the crime of being a member of the I. W. W., and answered in the affirmative. On his cross-examination, Clayton was asked if he did not know that Farrell was charged in San Francisco with the same crime. He answered that he knew "for a fact that he is not an I. W. W." Counsel for defendant then made objection to this line of examination and the objection was promptly sustained. The questions were highly improper, but no motion was made to strike them out, nor was the court requested to instruct the jury to disregard them. The conduct of the district attorney in asking the questions was not assigned as error. Under the circumstances disclosed by the record, it uniformly has been held that such conduct is not sufficient ground for reversal.

It is claimed that "the court misdirected the jury in the matters of law." No instruction is pointed out as erroneous. A careful reading of the instructions shows that they are free from error.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

---

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

60 Cal. App. 386

## SHARP v. EAGLE LAKE LUMBER CO. et al.
(Civ. 2507.)

(District Court of Appeal, Third District, California. Jan. 8, 1923.)

**1. Corporations ⊜617(1), 630(1)—Dissolved corporation legally dead, and not capable of suing or being sued or transacting other business.**

When a corporation has been dissolved according to the provisions or mandates of the law, or its charter has been legally revoked, from the date of either event such corporation no longer exists as a legal entity; it is then legally dead, and it is no more capable of suing or being sued or of transacting any other business in its corporate name than is a natural person after passing from this life.

**2. Corporations ⊜630(6)—Judgment entered against defunct corporation void.**

A judgment, entered in an action instituted against a corporation after it has become defunct, and which is still nonexistent at the time of the trial of the action and entry of such judgment, may be impeached as void and its invalidity shown by any one interested, such as one entitled as a creditor or stockholder to participate in the assets of the corporation, or a stockholder liable for the debts of the corporation.

**3. Corporations ⊜617(1)—Corporation an artificial person whose right and power to do things law declares it may do cease when right to exist as such terminates.**

A corporation is an artificial person, to which (in a business sense) certain of the attributes and powers of a natural person are imparted by the lawmaking authority, and its right and power to do the things which the law has declared it may do cease the moment its right to exist as an artificial person or legal entity is terminated, just as the powers of a natural person to take part in mundane affairs cease to exist upon his death.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Corporation.]

**4. Corporations ⊜630(3)—Service on vice president of defunct corporation without effect.**

The service of summons on the individual who was vice president of a corporation while it had previously existed as a corporation was no service at all; the corporation having become defunct.

**5. Judgment ⊜336—Remedy by motion to set aside on collateral ground such as fraud, held proper, if innocent third persons are not affected.**

Where a judgment, though not void on its face, is for some collateral reason void, as, for instance, where it has been procured by means of fraud extrinsic to the merits of the case, and innocent third parties have acquired interests through or by virtue of the judgment, the more orderly course is to proceed by an independent suit in equity to set it aside or to restrain and prevent the party in whose favor the judgment has thus been procured from making an inequitable use thereof; but, where no innocent third parties are affected by the judgment, a motion in the case itself is a proper method of attack.

**6. Judgment ⊜521—Motion to set aside not a collateral attack.**

A motion to set aside a judgment in the court which rendered it is a direct, and not a collateral, attack, under Code Civ. Proc. § 1916.

**7. Judgment ⊜386(3)—Motion made to set aside held within proper time.**

Where a judgment was rendered December 1, 1920, and no rights of interested third parties intervene, a motion to vacate it, made August 26, 1921, a little over eight months after the rendition of the judgment, or within a year thereafter, was made within a reasonable time the judgment being void, but not appearing so upon its face; movant not being governed as to time by Code Civ. Proc. § 473.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by J. T. Sharp against the Eagle Lake Lumber Company. Judgment for plaintiff, and from an order denying his motion to vacate the judgment and to recall execution and for perpetual stay, Frank L. Spencer, a stockholder in the defendant, appeals. Reversed, with directions.

Grover C. Julian, of Susansville, for appellant.

Butler & Van Dyke and Ben P. Tabor, both of Sacramento, for respondent.

HART, J. This is an appeal from the order denying appellant's motion to vacate the judgment entered in the case of J. T. Sharp, Plaintiff, v. Eagle Lake Lumber Company, Defendant, to recall the execution issued upon said judgment and to grant a perpetual stay of execution thereon.

On October 18, 1919, the plaintiff, as assignee of the Burton Lumber Company, a corporation, brought this action against the defendant, Eagle Lake Lumber Company, a corporation organized and existing under and by virtue of the laws of the state of Utah, to recover upon a promissory note for the sum of $1,000 executed by the Eagle Lake Lumber Company to the plaintiff's assignor and (as a second cause of action) to recover the further sum of $2,749.04, alleged to be a balance due from the Eagle Company, as we shall hereinafter refer to the Eagle Lake Lumber Company, for cash advanced, supplies furnished, services, etc., rendered by plaintiff's assignor to and for the former.

Summons was served on J. E. Solderholm, as vice president of the Eagle Company, the said summons having been served within the state of California. Said Eagle Company, through said Solderholm, answered the complaint, admitting the existence of the defend-

ant as a corporation, admitting the execution of the promissory note as alleged and set out in the first count of the plaintiff's pleading, denying certain other allegations, including the averment that said note had not been paid, and denying the allegations of the second count of the complaint. The defendant also set up a special defense by way of confession and avoidance. As will later be perceived, it is unnecessary to the decision of this appeal to state herein the specific nature of the special defenses so pleaded.

The issues as made by the pleadings were tried by the court sitting without a jury, and the decision was in favor of the plaintiff on both counts or causes of action set up by him. Judgment passed accordingly. Thereafter execution was issued on said judgment and levied on certain lumber claimed by the appellant and one Thomas Coulter, who filed a third party claim. The levy was thereupon released, and the execution returned by the sheriff nulla bona.

When the levy was made, the appellant, Spencer, who, at the time of the rendition of the judgment, was, and "ever since has been," a stockholder of the Eagle Company, filed in the above-entitled action a verified petition and a notice of motion to recall the said execution and to vacate and set aside the judgment entered in said action and to perpetually stay execution thereon on the ground that, at the time of the commencement of the action and the purported service of summons on the Eagle Company, the said company was nonexistent, having previously to said times forfeited its charter. Annexed to and made a part of the petition was a certified copy of the proclamation of the Governor of the state of Utah, proclaiming that, pursuant to the provisions of an act of the Legislature of said state, approved March 22, 1909 (Laws 1909, c. 106), the said Eagle Lake Lumber Company, because of having defaulted in the payment of its license tax, which became due on the 15th day of November, 1918, had forfeited its right to carry on business in said state, and declaring that the right of said corporation so to carry on business was and is forfeited and the charter thereof revoked. This proclamation was made on and dated the 8th day of April, 1919, a trifle less than six months prior to the date of the institution of the above entitled action and the service of summons therein on the purported vice president of defendant.

The petition and the motion came on for hearing on the 30th day of August, 1921. At the hearing there was introduced in evidence the certificate of Frank C. Jordan, secretary of state of the state of California, certifying that the Eagle Lake Lumber Company, having failed to pay to the state of California the license tax due it, as required by an act of the Legislature of said state, approved May 10, 1915 (St. 1915, p. 422), and "relating to the terms and conditions upon which corporations may transact business in this state, * * * thereupon the right of said corporation to transact interstate business in this state became forfeited" on the 28th day of February, 1920.

It was stipulated by and between the parties, at the hearing of the petition, that the charter of said Eagle Company had not been revived, nor its right to do business as a corporation restored, since the date of the proclamation of the Governor of Utah declaring forfeited its rights to carry on business in said state and revoking its charter, viz. the 8th day of April, 1919.

As seen, upon the hearing and the argument of the matter by the attorneys for the respective parties in the above-entitled action, the court made an order denying the motion or petition.

The attorney for the plaintiff has not filed a brief herein, nor when the case was called for hearing by this court, was there any appearance for the plaintiff or oral argument made in support of the order appealed from. We must therefore decide the question presented without aid from the attorney for the plaintiff as to the hypothesis upon which it was maintained in the court below that the order should not be granted and upon which it still may be assumed that the order appealed from should be affirmed. We are of the opinion, however, that the motion should have been granted.

[1, 2] These legal propositions are thoroughly established and unassailable: (1) That when a corporation has been dissolved according to the provisions or mandates of the law, or its charter has been legally revoked, from the date of either event such corporation no longer exists as a legal entity, it is then legally dead, and it is no more capable of suing or being sued or of transacting any other business in its corporate name than is a natural person after passing from this life; (2) that a judgment entered in an action instituted against a corporation after it has become defunct, and which is still nonexistent at the time of the trial of the action, such judgment may be impeached as void and its invalidity shown by any one interested, "such as one entitled either as creditor or stockholder to participate in the assets of the corporation, or a stockholder liable for the debts of the corporation." Crossman v. Vivienda Water Co., 150 Cal. 575, 579, 581, 89 Pac. 335, 337.

[3, 4] As to the proposition first above stated, it would seem wholly unnecessary to cite authorities in support thereof. A corporation is an artificial person to which (in a business sense) certain of the attributes and powers of a natural person are imparted by the lawmaking authority, and its right and power to do the things which the law has declared it may do cease the moment its right

to exist as an artificial person or legal entity is terminated, just as the powers of a natural person to take part in mundane affairs ceases to exist upon his death. In either case, obviously, there is no such person in existence. But, as already intimated, the proposition is entirely too banal to require its further discussion. It has been stated, though, in many cases, of which the following may be mentioned: Crossman v. Vivienda Water Co., 150 Cal. 575, 578, 89 Pac. 335; Newhall v. Western Zinc Co., 164 Cal. 380, 128 Pac. 1040; Slayden v. O'Dea (Cal. App.) 189 Pac. 1062; Van Landingham v. United Tuna Packers (Cal. Sup.) 208 Pac. 973. It, of course, follows from the proposition thus considered that the service of summons in the action upon the individual who was vice president of the Eagle Company while it still existed as a corporation was no service at all. Indeed, there could be no vice president or any other officer or agent of the corporation at the time of such service. With the death of a person, natural or artificial, the power or authority of his or its agents or officers as such ipso facto ceases or terminates. Of course, the purported service of process in this case was an absolute nullity, and the proceedings in the action and a judgment therein entered were coram non judice and void.

There remain to be considered, however, two other propositions, to wit: (1) Whether a motion to set aside the judgment in this case is the appropriate or the proper remedy; and, if so, (2) whether the motion to vacate the judgment was made within a reasonable time after the rendition and entry thereof.

[5, 6] 1. It is the general rule that, where a judgment, though not void upon its face, is for some collateral reason void, as, for instance, where it has been procured by means of fraud extrinsic to the merits of the case in which such judgment has been entered, and innocent third parties have acquired interests through or by virtue of the judgment, the more orderly course is to proceed by an independent suit in equity to set it aside or to restrain or prevent the party in whose favor the judgment has thus been procured from making an inequitable use thereof. In this case, however, there are not, as seen, innocent third parties affected by the judgment, and, besides, while the nullity of the judgment is not apparent from an inspection of the judgment roll, the proceeding, by way of petition or motion, looking to its vacation on the ground that it is void, was initiated in the action itself in which the judgment was rendered and entered. The relief asked was not only that the judgment be set aside, but that the execution thereupon issued be recalled and the issuance of execution thereon perpetually stayed. It would seem that a more direct attack against a judgment could hardly be thought of. It appears to be as direct as an appeal. It has, indeed, been held in this state that a motion to set aside a judgment in the court which rendered it is a direct and not a collateral attack. People v. Mullan, 65 Cal. 396, 4 Pac. 348; People v. Applegarth, 64 Cal. 229, 30 Pac. 805; People v. Greene, 74 Cal. 400, 16 Pac. 197, 5 Am. St. Rep. 448; People v. Pearson, 76 Cal. 400, 18 Pac. 424; Norton v. Atchison, etc., R. R. Co., 97 Cal. 388, 392, 30 Pac. 585, 32 Pac. 452, 33 Am. St. Rep. 198. See, also, Dane v. Daniel, 28 Wash. 165, 68 Pac. 446; Morrill v. Morrill, 20 Or. 96, 25 Pac. 362, 11 L. R. A. 155, 23 Am. St. Rep. 95; 12 Am. & Eng. Ency. of Law, 147J; note by Judge Freeman, 23 Am. St Rep. 103 et seq.; Code Civ. Proc. § 1916.

In Norton v. Atchison, etc., R. R. Co., supra, wherein the motion was made upon a showing dehors the case itself, the invalidity of the judgment for want of jurisdiction of the person of the defendant not appearing from an inspection of the judgment roll, it is said:

"It is admitted that a motion to vacate a judgment is a direct and not a collateral attack; and if, as we hold, a motion was the proper proceeding in the case, of course any fact going to show the invalidity of the judgment could be presented at the hearing of such motion. Where a return shows that a nonresident was personally served with summons within the state, and it is made to appear to the court that such return was false, it would be strange if, within a reasonable time, the court could not, upon application, set aside the service, or the false return of service, and vacate the judgment. There is no reason why, in such a case, the nonresident should be put to the necessity of an independent action."

The Norton Case has been approvingly cited in a number of subsequent cases, of which we will mention only the case of Waller v. Weston, 125 Cal. 201, 57 Pac. 892, in which the motion, based upon the ground that the defendant had never been served with summons, and that the court consequently never acquired jurisdiction of his person, was supported by affidavits; such want of jurisdiction not being apparent from an inspection of the judgment roll.

[7] We now come to the question:

2. When, after the rendition of the invalid judgment, must a party prejudiced thereby take steps in the court in which it was rendered to destroy its apparent force before he will be held estopped by laches from proceeding by motion to set it aside? In other words, what is a reasonable time after such judgment has been rendered within which a party should so proceed in order to save his right to have the judgment vacated and so set at naught? As is readily to be understood, the appellant has not proceeded in pursuance of the provisions of section 473 of the Code of Civil Procedure; but it has been held in a number of cases that, where a motion is made to set aside a judgment not

void upon its face, but which for some reason is invalid, the court has no power to grant the motion unless the same is made within a reasonable time, and that, while what is a "reasonable time" in such a case is not definitely determined by statute, "it will not extend beyond the time limit fixed by section 473 of the Code of Civil Procedure." People, etc., v. Temple, 103 Cal. 447, 453, 37 Pac. 414, 415.

In Norton v. Atchison, etc., R. R. Co., supra, it is said, speaking of the time within which a motion such as the one here should be made after judgment rendered:

"Perhaps, following the analogy of section 473 [Code Civ. Proc.], six months might be considered the extent of a reasonable time."

In the case at bar, it will be noted, the judgment was rendered December 1, 1920, and a motion to vacate it made August 26, 1921, a little over eight months after the rendition of judgment or within a year thereafter.

We think that, under the circumstances of this case, the appellant was reasonably prompt in the taking of legal steps looking to the vacation and setting aside of the judgment. The judgment assailed had not been transferred to innocent third parties, nor had it been satisfied. Vested rights in innocent third parties had not grown out of the judgment. It was, as seen, substantially conceded by the plaintiff or his attorney at the hearing of the motion that the corporation was nonexistent when the action was brought and a summons purported to be served, and this concession necessarily carried with it the further concession that the judgment was absolutely void. In brief, it was not contended at the hearing below, nor is it contended here, that the judgment is not absolutely void.

Section 473 of the Code of Civil Procedure provides, among other things, that the court may relieve a party from a judgment, or order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect:

"Provided, that application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order or proceeding was taken."

The time limit fixed by said provision of section 473 seems to be the criterion by which the appellate courts have generally determined what is a reasonable time for moving to set aside a judgment when such motion is not made under or by authority of such section. That particular part of said section, however, is not, it is obvious, appropriate to a motion to set aside a judgment. In other words, had the appellant, in seeking the relief asked for by him, invoked section 473, he would not and, indeed, could not, found his motion on that part of said section. But section 473 also contains this provision:

"When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action to answer to the merits of the original action."

Upon the foregoing provision, in our opinion, the appellant here could have founded his motion, presenting or tendering therewith an answer setting up the fact, which appears clearly to be true, that the "defendant" was never personally served with summons, etc. It is plainly manifest, therefore, that that part of said section provides the only remedy to which the remedy invoked in this case bears any analogy, and thus we are led to inquire: Since the Legislature has in said section declared that a defendant not personally served may have a year from the time of the rendition of a judgment against him within which to move for permission to answer to the merits of the action in which such judgment has been rendered, why is it not the proper and, indeed, the only logical conclusion that the time limit thus fixed establishes the criterion by which it is to be determined what a "reasonable time" is for the institution of an analogous proceeding, in nature and effect, independently of or not founded upon said provision? A satisfactory negative reply to the question, it is believed, cannot be made; for we can conceive of no logical theory upon which it can be held that the six-month limitation prescribed by the section is alone applicable to a remedy whereby an entirely different object is intended to be accomplished, or, in other words, should be accepted as fixing the criterion for determining what is a "reasonable time" for instituting such a proceeding as we have here instead of the year limit prescribed by the same section as applicable to a proceeding substantially similar in nature and the object to be accomplished.

Our conclusion is that, in view of the circumstances of this case, the appellant should not be driven to an independent suit for the purpose of getting rid of the judgment in the present action, and that he proceeded for the accomplishment of that result in a proper way and within a reasonable time after the judgment had been rendered. This conclusion, we think, is not only legally warranted, but is in the interest of justice.

The order is reversed, with directions to the trial court to order the judgment vacated and set aside and the execution thereupon issued recalled and quashed.

We concur: FINCH, P. J.; BURNETT, J.

60 Cal. App. 260, 797

## J. NAKATA v. GUARANTEE MORTGAGE CO.

## K. ISHII v. SAME.

(Civ. 4373, 4370; S. F. 10048, 10062.)

(District Court of Appeal, First District, Division 2, California. Dec. 27, 1922. Rehearing Denied Jan. 25, 1923. Hearing Denied by Supreme Court Feb. 21, 1923.)

**1. Venue ⟹8—Tort action for fraud in sale of corporate stock is maintainable where stock was sold.**

An action in tort to recover damages caused to plaintiff by defendant's fraudulent representations in the sale of its corporate stock to plaintiff is maintainable under Const. art. 12, § 16, in the county where the stock was sold, which was the place where the tort was committed.

Opinion of Supreme Court Denying Hearing.

**2. Venue ⟹7—Action to rescind contract for fraud may be brought where contract made.**

Even though an action by the buyer of corporate stock claimed to be damaged by fraudulent misrepresentations, whereby he was induced to purchase the stock, was an action for rescission of the contract and recovery of the money paid, it may be brought in the county where the contract was made under Const. art. 12, § 16.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Separate actions by J. Nakata and by K. Ishii against the Guarantee Mortgage Company. From an order in each action denying defendant's motion for change of venue, defendants appeal. Affirmed.

Leo J. McEnerney, of San Francisco, for appellants.

Iener W. Nielsen, of Fresno, for respondent.

Opinion in J. Nakata's Case.

STURTEVANT, J. This is an appeal from an order refusing to change the place of trial.

The plaintiff alleges in his complaint that he is a resident of Fresno county; that the defendant is a corporation; that on the 1st day of October, 1920, in the county of Fresno, plaintiff and defendant entered into a written agreement for the sale to the plaintiff of ten shares of the capital stock of the defendant corporation; that the price was to be $100 per share, and was to be paid by two promissory notes of even date, one in the sum of $875, and one in the sum of $1,625. That on the 1st day of December, 1920, plaintiff paid the note for $875, and he alleges that the defendant still holds the other note. It is alleged that the defendant's agent, for the purpose of inducing the plaintiff to make the purchase, represented at and in the county of Fresno "that within 90 days from date the selling price of said shares of capital stock would be $120 each"; that the stock had "a ready sale throughout the state of California," and that the defendant had sufficient moneys on hand "to make loans on real estate in the county of Fresno," and that the defendant "would pay the plaintiff 12 per cent. per annum" on the stock so purchased. It is then alleged that the said representations were false, and were knowingly made to deceive the plaintiff. The plaintiff then alleges "that, immediately upon discovering said representations so made by said agent of said defendant corporation, said plaintiff demanded of said defendant repayment of said sum of $875, together with interest, so paid by said plaintiff as aforesaid," etc. Thereupon the plaintiff prays judgment for the sum of $875, together with interest thereon from the 1st day of October 1920.

[1] From what we have just quoted it is patent that the plaintiff attempted to allege a cause of action as for fraud; that the tort was committed in Fresno county, and that he sued in that county for the damage which he incurred by the commission of the wrong complained of. Under this theory he was clearly within his rights. Const. art. 12, § 16; Tingley v. Times-Mirror Co., 144 Cal. 205, 206, 77 Pac. 918; George Cople Co. v. Hindes, 34 Cal. App. 576, 580, 170 Pac. 155. The appellant attempts to avoid the above position by claiming that the plaintiff's complaint pleaded an action as in rescission; that the notice of rescission was presumptively given to the defendant at its principal place of business in San Francisco; that, as the giving of that notice was the last step going to perfect the plaintiff's cause of action as for rescission, therefore the action should have been commenced in San Francisco, the residence of the defendant. Hammond v. Ocean Shore Dev. Co., 22 Cal. App. 167, 133 Pac. 978. But the frailty of this contention is presented by an examination of the complaint. It does not purport to allege that any notice of rescission was given, that plaintiff has acted promptly, or that he has restored, or offered to restore, anything to the defendant. Civ. Code, §§ 1689–1691. The position of the appellant seems to be a second thought. It now contends that the plaintiff's cause of action, if anything, is on an implied contract. However, when the appellant prepared its papers to move for the change of venue, it stated in its notice of motion that the motion would be made on the ground "that the liabilities sued on in the complaint" arose in San Francisco. The same expression was contained in the demand for change of place of trial. And the affidavit accompanying the notice and demand contained the positive statement that the plaintiff never "demanded of defendant the repayment" of the initial deposit $875.

The trial court did not err in denying the motion to change the place of trial, and the order appealed from is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

Opinion in K. Ishii's Case.

STURTEVANT, J. This is an appeal from an order refusing to change the place of trial. The pleading in form is identical with the pleadings discussed in the opinion this day filed in the case of Nakata v. Guarantee Mortgage Co., No. 4373. The two cases were submitted on the same briefs.

For the reasons stated in the case cited, the order of the trial court is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

Opinion of Supreme Court in Bank Denying Hearing in Both Cases.

PER CURIAM. [2] In denying the petitions for a transfer to this court, we deem it proper to say that we are inclined to agree with the petitioners that the action is one for the rescission of contract, for the prayer of the complaint is for the amount of money already paid and for the cancellation of the plaintiffs' promissory note. Kelley v. Owens, 120 Cal. 502, 510, 47 Pac. 369, 52 Pac. 797. Such an action may be brought in the county where the contract sought to be rescinded was made. Const. art. 12, § 16.

Petition denied.

WILBUR, C. J., and WASTE, MYERS, LENNON, LAWLOR, KERRIGAN, and SEAWELL, JJ., concur.

---

60 Cal. App. 374

## YRACEBURN et al. v. CAPE. (Civ. 4196.)

(District Court of Appeal, First District, Division 1, California. Jan. 5, 1923.)

**1. Replevin ⟸93—Trial court's finding that all allegations of complaint true covers every issue of fact presented by averments.**

In replevin for recovery of sheep, with damages for their wrongful taking and detention by defendant, who set up a counterclaim for damages for their trespassing, alleging the sheep were estrays, *held* a finding of a trial court that all of the allegations of a complaint were true is sufficient in form to cover every issue of fact presented by its averments, and amounts to a finding that the plaintiffs' possession of the property sought to be replevied was rightful at the time of the defendant's taking of the same into his possession, and that the defendant's taking possession and detention thereof were and each of them was wrongful, and, being wrongful, such taking could not become a foundation for that portion of defendant's counterclaim based upon the provisions of the estrays laws, since it amounted in fact to a finding that plaintiffs' sheep, when taken by the defendant, were not estrays.

**2. Replevin ⟸12(2)—Counterclaim for damages for trespassing of sheep held not permissible in replevin.**

A counterclaim by defendant in an action for replevin for recovery of sheep, embracing a claim for damages for the trespass of the sheep upon the defendant's real estate, is not permissible.

**3. Appeal and error ⟸1071(5)—When additional finding of trial court stated conclusion of law immaterial.**

Whether in an action for replevin for recovery of sheep, alleged by defendant to have trespassed on his lands as estrays, an additional finding of the trial court that the plaintiff's sheep at the time of defendant's taking of them were not estrays was merely a conclusion of law is immaterial, where the general finding that defendant's taking of the sheep was wrongful amounted necessarily to a finding that the sheep were not liable to such taking and impounding as estrays.

**4. Animals ⟸61—Evidence held to sustain finding sheep were not estrays trespassing on premises of impounder.**

In replevin to recover sheep impounded by defendant as estrays trespassing on land, *held* that the court's finding that they were not "estrays" was sustained by conflicting evidence as to defendant's right to the possession of the premises upon which he claimed the sheep were trespassing, so as to entitle him to impound them under the Estray Laws (St. 1915, p. 636).

**5. Animals ⟸61—Evidence held to sustain finding sheep were not estrays wandering at large.**

In replevin for recovery of sheep impounded by defendant as "estrays" under the Estray Laws (St. 1915, p. 636), *held* that a finding that they were not "estrays," wandering at large when impounded, was sustained by conflicting evidence as to whether they were in charge of a herder.

**6. Animals ⟸61—"Estrays" defined.**

The term "estrays" at common law had had the well-defined meaning of animals found wandering at large, whose ownership was unknown, and animals are not to be classed as estrays or as animals running at large within the distraint statutes when such animals are in charge of a herder.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Estray.]

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Replevin by William Yraceburn and another against J. C. Cape. Judgment for plaintiffs, and defendant appeals. Affirmed.

Fulstone & Rogers, of Fresno, for appellant.

W. D. Crichton, of Fresno, for respondents.

RICHARDS, J. This is an action in replevin for the recovery of the possession of

about 690 sheep, with damages for their wrongful taking and detention by the defendant. The complaint is in the usual form in such actions, alleging that on a certain date in January, 1921, the plaintiffs were the owners and entitled to the possession of said sheep, and that thereafter, and while the said plaintiffs were so entitled to the same, that the defendant wrongfully and without plaintiffs' consent came into the possession of said personal property, and still retains the same and refuses to deliver the same to the plaintiffs upon their demand, to their damage in the sum of $1,000. The value of the sheep so taken and so held is alleged to be the sum of $8,625, for which sum together with such damages, plaintiffs pray alternative judgment in case the possession of said property cannot be obtained. The answer of the defendant consists of specific denials of the possession or right of possession of said sheep or any of them on the part of said plaintiffs; denies that their value is a sum in excess of $1,500, denies any wrongful taking or possession of the said property or the detention thereof to the plaintiffs' damage in any sum whatever. The defendant then proceeds to allege that on the date in January, 1921, alleged as the date of his wrongful taking of said property, he found said sheep trespassing and estrays upon certain real property then in his possession, and that he then and there took up and impounded said sheep under and by virtue of the estray laws of the state of California, and became and thereafter continued to be lawfully entitled to the custody and possession of the same for the satisfaction of his lien thereon thus acquired. The defendant also presented a counterclaim for damages in the sum of $400 for the trespass of said sheep upon his said lands, and also for the additional sum of $931.50, to which sum he alleged himself to be entitled for the impounding and custody of said sheep under the estray laws. To this counterclaim the plaintiffs filed an answer, denying all of its averments and praying that the defendant take nothing thereby. The cause came before the court, sitting without a jury, for trial upon the issues thus framed, and upon the conclusion thereof the court made its findings of fact and conclusions of law. The findings of fact were brief, and were in the following form:

"The court finds that all of the allegations in plaintiffs' complaint are true and sustained by the evidence. The court further finds that all the said sheep and lambs described in plaintiffs' complaint, at the time they were taken up by the defendant, were not estrays."

As its conclusions of law from the foregoing findings of fact the trial court found that the plaintiffs were entitled to the possession of said sheep and to their costs, and entered its judgment accordingly. The court gave no alternative judgment, the sheep having been taken by the plaintiffs at the inception of the action under the provisions of the Code relating to claim and delivery. The defendant's motion for a new trial was denied, whereupon he took and now prosecutes this appeal.

[1, 2] The appellant's first contention is that the judgment must be reversed for the reason that the trial court had failed to find upon the material issues raised by the counterclaim. This contention is without merit for several sufficient reasons. The finding of the trial court that all of the allegations of the plaintiffs' complaint were true is sufficient in form to cover every issue of fact presented by its averments. Hayne, New Trial and Appeal, vol. 2, p. 1334 (Rev. Ed.). It amounted, therefore, to a finding that the plaintiffs' possession of the property in question was rightful at the time of the defendant's taking of the same into his possession, and that the defendant's taking possession and detention thereof were and each of them was therefore wrongful. Being wrongful, such taking could not become the foundation for that portion of the defendant's counterclaim which is based upon the provisions of the estray laws, since it amounted, in effect, to a finding that the plaintiffs' sheep when so taken by the defendant were not estrays. In so far as the defendant's counterclaim embraces a claim for damages for the trespass of the sheep upon the defendant's real estate, such counterclaim is not permissible in an action for replevin. Glide v. Kayser, 142 Cal. 419, 76 Pac. 50.

[3] The contention of the defendant that the additional finding of the trial court that the plaintiffs' sheep at the time of his taking them up were not "estrays" was merely a conclusion of law may or may not be true, but in any event it is immaterial, since the general finding of the trial court that the defendant's taking of said property was wrongful amounted necessarily to a finding that said property was not liable to such taking and impounding as "estrays."

[4] The appellant's next contention is that the finding of the trial court, whether express or implied, to the effect that the plaintiffs' sheep at the time of the defendant's taking and impounding of the same were not "estrays," is not sustained by the evidence in the case. As to this contention the evidence in the case is conflicting in two main aspects. The first of these relates to the right of the defendant to the possession of the premises upon which he claims the plaintiffs' sheep were trespassing and taken and impounded by him. The lands in that region are pasturage and unfenced lands, adaptable in the main only to the grazing of cattle and particularly of sheep. The defendant was not the owner of the lands to which he claims the right of possession, but based his claim of right thereto upon a lease which he had received from the owner for the previous year, and which had expired upon the last day of December of that year; and upon an alleged

verbal renewal of said lease through the payment of a certain sum as rental for the year 1921 to a relative of the owner of the land. He failed, however, to show any right in such person to either receive such rental or extend such lease while, on the other hand, the owner of the land took the stand to testify that he had received no such rental, and had authorized no such renewal of the lease, but, on the contrary, had leased the lands to a person other than the defendant for grazing purposes for the year 1921. From such conflicting evidence the trial court may well have found that the defendant was not entitled to the possession of the premises upon which he claims the plaintiffs' sheep were trespassing, in which event the defendant would have no right to take up and impound said sheep under the estray laws. Stats. 1915, p. 636.

[5] The evidence is also conflicting as to whether at the time defendant took possession of the sheep they were "estrays" or were trespassing upon the premises claimed by the defendant. The evidence showed that up to a very short while before the defendant undertook to impound the sheep in question, they had been in the immediate custody of the plaintiffs' herder upon adjoining lands, to the possession of which the plaintiffs were entitled. The said herder, at the noon hour, had gone to his camp about a quarter of a mile from where the sheep were feeding, but within sight of the same, to eat his noonday meal. While his vigilance was thus temporarily relaxed, some of the sheep crossed the invisible and unfenced boundary line between the lands of the plaintiffs and those claimed by the defendant, whereupon the defendant, who was watching the same through a spyglass, sent two of his employees to take possession of and impound said sheep. While so doing, and while as yet a portion of the sheep were still upon the plaintiffs' premises, the herder returned and objected to the taking, but was warned off by the defendant's employees with threats of violence. The entire band of sheep were then taken possession of and impounded by the defendant, who refused to deliver the same to the plaintiffs upon their demand without payment of damages and the statutory costs assessable upon the impounding of estrays. Plaintiffs thereupon commenced this action, and took the sheep under claim and delivery. We are satisfied that upon this state of the evidence the trial court was justified in its finding to the effect that the said sheep, at the time of their attempted impounding by the defendant, were not "estrays" within the meaning of the act of 1915, under the provisions of which the defendant claimed the right to so impound said sheep.

[6] The term "estrays" at common law had the well-defined meaning of animals found wandering at large, whose ownership was unknown. Bouvier's Law Dictionary, Rawles (3d Rev.) tit. "Estrays"; Lyman v. Gepson, 18 Pick. (Mass.) 422; Walters v. Glats, 29 Iowa, 439; Kinney v. Roe, 70 Iowa, 509, 30 N. W. 776; Hardy v. Nye, 63 N. H. 612, 3 Atl. 631; Shepherd v. Hawley, 4 Or. 206. The state of California, from almost the inception of its legislative history, began the enactment of statutes having reference to animals which were estrays or were found wandering at large upon the highways or upon the lands of other persons than those of their owners. These were in the main special statutes varying in their application according to the varying state of development of the particular regions during the period of their emergence from pastoral into agricultural or horticultural conditions. The earliest act concerning estrays was adopted in 1851. Stats. 1851, p. 299. This act excepted from its operation a goodly number of the counties of the state, which in so far as they were settled at all, were chiefly pastoral. The act did not purport to define the term "estrays" but apparently adopted the common-law definition of that term, since the act made no provision for notice to nonowners, but, on the contrary, expressly required that the owner or owners of animals must be unknown. This act was from time to time amended or revised, retaining however, its essential features affecting the meaning of the term "estrays" by being given application to different sections of the state which were to be included or excepted from its operation according to their varying conditions, until the year 1897, when a new and general act relating to estrays was adopted (Stats. 1897, p. 198), and made applicable to the counties of the state generally. By the terms of section 9 of said act all other acts and parts of acts relating to estrays were expressly repealed. This act apparently gives to the term "estrays" as employed therein its common-law meaning of wandering animals whose ownership was unknown. Four years later this act was supplanted by the act of 1901 (Stats. 1901, p. 603), which act, however, in its original form undertook to work no change in the meaning of the term "estrays," as employed therein. The act of 1901 was, however, amended in 1907, in an important respect. Stats. 1907, p. 132. The amendment then adopted provided that in the event the owner's mark or print upon the animal had been recorded or the owner of the animal or person in charge thereof was known to the finder, he should be notified of the fact that the animal had been impounded, and where it was confined. The act of 1901 was again amended in an important particular in 1909 (St. 1909, p. 1079) by the insertion of, for the first time in the history of our state legislation on the subject, a definition of the word "estray" as follows:

"Sec. 2. The word 'estray' as used in this act is intended to include all domestic animals that have strayed upon, or been found upon,

lands other than those of their owner, or the public domain, or lands whose owner (or to which the person in possession thereof) has consented, may be passed over, or allowed to be entered on, by such animal."

The act as thus amended remained in force until the year 1915, when it was again amended by the substitution of an entirely new set of sections for those embodied in the original act of 1901 and of its said amendment in 1909, and from which substituted sections the definition of the term "estrays" as above quoted was omitted, and the term was apparently used in its original signification, with the exception that under the act of 1915, in order to constitute animals, estrays, it was not necessary that the ownership of such animals should be unknown to the person finding and impounding such animal. Stats. 1915, pp. 636, 637. In other respects the term "estrays" retains its original significance as having reference to animals found wandering at large outside of the premises and beyond the restraint of their owner. This would seem to be made clear by a consideration of the case of Thompson v. Corpstein, 52 Cal. 536, which concerned the application of certain statutes to the running at large of the stock on the highways of Santa Clara county. The act of March 18, 1874, entitled "An act concerning roads and highways in the county of Santa Clara," provided in section 37 thereof for the taking up by roadmasters of animals found pasturing or running at large upon the public highways in violation of an act entitled "An act to amend an act concerning estrays and animals found running at large in the county of Santa Clara, passed April 27, 1863, and which amendatory act was approved March 27, 1872." Stats. 1873–74, pp. 453–464; Stats. 1863, p. 581; Stats. 1871–72, p. 580. In applying these several statutes to the case then at bar, the Supreme Court held that animals being driven along the highway in charge of a herder were not estrays or animals running at large within the meaning of said acts; and that this was true even though the herder had for the moment fallen asleep, and to that extent released his vigilance over said animals. In the case of Spect v. Arnold, 52 Cal. 455, a quite similar question was presented to the court in construing an ordinance of the town of Colusa, providing that it should be unlawful for certain designated kinds of cattle, including sheep, to run at large upon the streets, alleys, or public grounds of said town. The marshal of the town undertook to seize and impound the band of sheep which he claimed were running at large in violation of the ordinance. In an action brought to recover possession of the sheep by the owner thereof the undisputed evidence showed that the sheep were at the time in charge of a herder. The court held that they were not to be classed as animals running at large so as to be impounded under the terms of said ordinance. These two cases are in harmony with the doctrine declared in other jurisdictions, to the effect that animals are not to be classed as estrays or as animals running at large within the meaning of the distraint statutes when such animals are in charge of a herder. Roberts v. Barnes, 27 Wis. 422; Weber v. Hartman, 7 Colo. 13, 1 Pac. 230, 49 Am. Rep. 339; Shepherd v. Hawley, 4 Or. 206; Beeson v. Tice, 17 Ind. App. 78, 45 N. E. 612, 46 N. E. 154; Howrigen v. Bakersfield, 79 Vt. 249, 64 Atl. 1130, 9 Ann. Cas. 282, 286, and notes. These authorities would seem to have application to the facts of the case at bar, and to have justified the finding of the trial court that the animals in question were not estrays at the time they were attempted to be taken and impounded by the defendant herein. Further light might be thrown upon this subject by a consideration of the evolution of the fence law statutes of this state as interestingly reviewed by Mr. Justice Hart in the case of Blevins v. Mullally, 22 Cal. App. 519, 135 Pac. 307, and as further considered in the case of Davis v. Blasingame, 40 Cal. App. 458, 181 Pac. 104, which latter case had special reference to the application of certain of these statutes to the county of Fresno. The case of Montezuma Imp. Co. v. Simmerly, 181 Cal. 722, 189 Pac. 100, was also a case involving the continued trespassing of stock upon the plaintiffs' premises as giving ground for an injunction to enjoin such trespasses. None of these cases, however, involve the application of the estray laws, and we do not deem it necessary to go into a consideration of the statutes to which they refer, for the reason that in the instant case the defendant's sole claim of right to impound the plaintiffs' sheep is rested by both his pleadings and proof upon the claim that the plaintiffs' animals were estrays and were subject to be impounded by him under the estray laws of California; and for the further reason that there is at present no law upon our statute books permitting the impounding of trespassing animals which are not estrays, with the exception of those statutes which were expressly continued in force as to certain counties, by the terms of section 10 of the act of 1915, and which statutes have no reference or application to the county of Fresno. This being so, the foregoing authorities sufficiently justify the findings and conclusion of the trial court that under the facts as proven these animals were not, at the time of their taking by the defendant, estrays.

Judgment affirmed.

I concur: TYLER, P. J.

(60 Cal. App. 798)

**YRACEBURN et al. v. CAPE. (Civ. 4195.)**

(District Court of Appeal, First District, Division 1. California. Jan. 5, 1923.)

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Replevin by William Yraceburn and another against J. C. Cape. Judgment for plaintiffs, and defendant appeals. Affirmed.

Fulstone & Rogers, of Fresno, for appellant.
W. D. Crichton, of Fresno, for respondents.

PER CURIAM. The facts of the case being in the main identical with those in the case of Yraceburn v. Cape (No. 4196, this day decided) 212 Pac. 938, upon the authority of that decision the judgment herein is affirmed.

---

(60 Cal. App. 297)

**ABRAMS v. DAUGHERTY, Commissioner of Corporations. (Civ. 4423.)**

(District Court of Appeal, First District, Division 2, California. Dec. 28, 1922.)

**1. Licenses ⟸38—Broker entitled to notice before corporation commissioner can revoke certificate; "day in court."**

In view of the rule that no one shall be personally bound until he has had his "day in court," meaning until he has been duly cited to appear and has been afforded an opportunity to be heard, even in the absence of any provision therefor in Corporate Securities Act 1917, a broker is entitled to a notice and hearing before the commissioner can revoke his certificate; though such hearing is contemplated by the act which authorizes revocation only when the commissioner "shall find" that the broker was guilty of one of the grounds specified in section 6.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Day in Court.]

**2. Constitutional law ⟸318—Due process requires that notice to show cause why broker's certificate should not be revoked must state facts showing breach within statute.**

The corporation commissioner has no authority to revoke a broker's certificate under Corporate Securities Act 1917, where the notice to show cause did not state facts showing that the broker had committed some breach within the act, not because the act requires the filing of charges, but because the constitutional guaranty of due process requires that the broker be allowed to appear and defend and rules of procedure demand that he be given such notice of the charge as will enable him to defend.

**3. Licenses ⟸38—Notice to show cause why certificate should not be revoked held insufficient to give jurisdiction.**

In a proceeding under Corporate Securities Act 1917 to revoke a broker's certificate, a notice to show cause which contained no charges and nothing from which broker could ascertain what he would be required to defend was insufficient to give the corporation commissioner jurisdiction either to suspend or revoke the certificate.

**4. Licenses ⟸38—Finding in proceeding to revoke certificate that broker had engaged, or was about to engage, in fraudulent transaction, not sustained.**

In a proceeding under Corporate Securities Act 1917 to revoke a broker's certificate, evidence *held* not to sustain a finding that he had engaged, or was about to engage, in a fraudulent transaction.

**5. Fraud ⟸50—Presumption against fraud.**

The presumption is always against fraud.

**6. Fraud ⟸58(1)—Clear evidence required.**

One who seeks relief from fraud must prove it by clear and satisfactory evidence; a mere suspicion not being sufficient.

**7. Licenses ⟸38—Presumption against fraud available to broker in proceeding to revoke his certificate.**

The presumption against fraud is available to broker charged therewith in a proceeding to revoke his certificate, and it can be overcome only by clear and satisfactory proof.

**8. Licenses ⟸38—Corporation commissioner can suspend certificate only when jurisdiction of broker is obtained.**

If it may be assumed under Corporate Securities Act 1917 that the power of the corporation commissioner to suspend a broker's certificate is to be implied from the grant of power of revocation, such power may be exercised pending a hearing of charges only when the commissioner has obtained jurisdiction to proceed with a hearing.

Proceedings under the Corporate Securities Act to revoke the certificate of Alexander R. Abrams, a broker. Edwin M. Daugherty, as Commissioner of Corporations, ordered the certificate suspended temporarily, and said Abrams brings certiorari. Order annulled.

Roy A. Bronson, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for respondent.

NOURSE, J. This is a proceeding in certiorari to review the action of the respondent as commissioner of corporations of the state of California in temporarily suspending the certificate authorizing petitioner to act as a broker under the provisions of the Corporate Securities Act of 1917 (Stats. 1917, p. 673). The respondent has filed a return, which, in addition to a large amount of extraneous and immaterial matter, contains a copy of a notice to the petitioner to show cause why his certificate should not be revoked, a transcript of certain evidence taken before the commissioner in response to said notice, and a copy of the order of suspension. The notice of hearing was mailed to the petitioner herein and was in the words and figures following:

"You are hereby notified to appear at this office at 2:30 p. m., on Friday, September 29, 1922, to show cause why your broker's certificate should not be revoked."

At the time set an attorney appeared for the petitioner, and at his request the hearing was continued until the following day. At that time, the attorney again being present, testimony was taken by the deputy commissioner of a witness who claimed that he had purchased stock of the Coast Tire & Rubber Company upon representations made by selling agents of the petitioner herein that said stock would soon increase in value and that a dividend thereon would soon be paid. This witness further testified that he had been for some time prior thereto a stockholder in the Coast Tire & Rubber Company, had received several reports of the financial condition from the officers of the company, had visited its plant, and that he did not believe everything that the salesmen had stated to him, but doubted their representations that the stock would increase in value and that a dividend would soon be paid. He also testified that the agents represented to him that if he became dissatisfied with his purchase the petitioner herein would sell his stock at market and that he had requested the petitioner to do so, but had been unable to obtain from the petitioner any satisfactory reply as to whether such sale would be made. Upon this evidence the commissioner executed the order temporarily suspending the petitioner's certificate to act as a broker. This order was made on October 3, 1922, and, it is alleged, is still outstanding.

Respondent concedes that the only grounds upon which he may revoke a license or certificate issued under the act are those contained in section 6 of the act. That is to say, that before the commissioner could justify a revocation of the license it was necessary that he should find that the petitioner: (a) Was of bad business repute; (b) had violated some provision of the act; or (c) had engaged or was about to engage in a fraudulent transaction. It is also conceded that this court may examine the evidence taken by the commissioner in order to ascertain whether the commissioner exceeded his authority in making the order.

The commissioner did not make any finding of any nature, but from an examination of the evidence it is apparent that his action was based upon the ground designated "c" above, because no competent evidence was produced to support either grounds "a" or "b." An attempt was made to have the witness testify as to the business reputation of the petitioner, but the witness disqualified himself from giving such testimony. Treating the case then as one in which the broker was charged as having engaged in or being about to engage in a fraudulent transaction, it is necessary to consider whether the petitioner was accorded the due process of law to which he was entitled before an order of revocation could be made.

The statute is silent upon the matter of the procedure to be followed in cases of this kind, except that it does require the commissioner to find the broker guilty of one of the three designated causes. In Bannerman v. Boyle, 160 Cal. 197, 205, 116 Pac. 732, the Supreme Court, in considering the provisions of the San Francisco charter authorizing the mayor to remove certain officers "for cause," held that, in the absence of clear statutory authority, such power of removal could not be exercised until "notice has been given to the officer of the charges made against him and he has been given an opportunity to be heard in his defense." The charter did not fix any mode of procedure and did not specify any grounds for removal. It merely authorized the mayor to remove "for cause," and the court held (at page 206 of 160 Cal., at page 735 of 116 Pac.) that "the words 'for cause,' without more, imply good cause; the existence of some fact which would constitute a reasonable cause for the removal." To the same effect is Welch v. Ware, 161 Cal. 641, 119 Pac. 1080, where the court had under consideration the provisions of section 4149b of the Political Code which authorized the removal of a fish and game warden "for intemperance, neglect of duty, or other good and sufficient reasons." It was argued that the language "good and sufficient reasons" authorized the board of supervisors to remove the warden summarily and without charges filed or a hearing thereon; but the court held that the case was controlled by Bannerman v. Boyle, supra, and that there was no essential difference between the Code section and the provisions of the charter authorizing a removal "for cause." It was said that—

"Under such provision of the Code the respondent could only be legally removed after an opportunity to be heard on charges preferred against him."

In these cases, as in the statute under consideration, there was no provision for a notice and hearing before the action was taken. In this respect the statute differs from the medical practice act (Stats. 1913, p. 722, § 14, amended St. 1921, p. 1009), the real estate brokers' act (Stats. 1919, p. 1252, § 12), and similar acts which specifically require the filing of formal charges and a hearing thereon before a license can be revoked. But the silence of the statute in this respect is of no importance if the right to act as a broker is a property right of which the holder may not be deprived without due process of law.

In Hewitt v. Board of Medical Examiners, 148 Cal. 590, 592, 84 Pac. 39, 40 (3 L. R. A. [N. S.] 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750), the Supreme Court says:

"The right to practice medicine is, like the right to practice any other profession, a valuable property right, in which, under the Constitution and laws of the state, one is entitled to be protected and secured."

In Suckow v. Alderson, 182 Cal. 247, 249, 187 Pac. 965, 966, in referring to this principle, the court say:

"The Fourteenth Amendment to the Constitution of the United States provides that no person shall be deprived of life, liberty, or property, without due process of law. Article 1, § 1, of the Constitution of California, provides that all men have certain inalienable rights, among them being those of enjoying liberty and possessing and protecting property, and section 13 thereof provides that no person shall be deprived of life, liberty, or property without due process of law. The deprivation of such right without due process of law would be a violation of these provisions. The meaning of this is that no one can be deprived thereof without notice and an opportunity for a hearing before some tribunal authorized to determine the question."

To the same effect is Brecheen v. Riley, 187 Cal. 121, 124, 200 Pac. 1042, 1044, where the court, having the real estate brokers' act under consideration, say:

"It is firmly established that it is the right of every person to pursue any lawful business or vocation he may select, subject to such legal restrictions and regulations as the proper governmental authority may impose for the protection and safety of society, and that such right is valuable and must be protected and secured, and cannot be taken from those who possess it, without 'due process of law.'"

In Schomig v. Keiser (Cal. Sup.) 209 Pac. 550, 551, while considering the same act, the court say:

"The portion of the act which authorizes the real estate commissioner to forfeit the license of a broker or salesman and take it away from him is highly penal in its nature, and should not be construed to include anything which is not embraced within its terms."

In Hovey v. Elliott, 167 U. S. 409, 418, 17 Sup. Ct. 841, 844 (42 L. Ed. 215) it is said:

"It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, *until he has been duly cited to appear, and has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered." (Italics ours.)

[1] Applying the rule to this case, it would follow that, even in the absence of any provision in the statute, a broker is entitled to a notice and hearing before the commissioner can revoke his certificate. Such a hearing is plainly contemplated by the act which authorizes revocation only in the event that the commissioner "shall find" that the broker is guilty of one of the three grounds of revocation specified. A "finding" of the existence of certain facts presupposes some hearing of evidence tending to prove such facts.

"The judicial function is to decide on the property or rights of the citizen (Robinson v. Board of Supervisors, 16 Cal. 210; Imperial W. Co. v. Board of Supervisors, 162 Cal. 18 [120 Pac. 780]; 11 Cor. Jur. 122); to declare the law and define the rights of the parties under it (Frasher v. Rader, 124 Cal. 134 [56 Pac. 797]); to determine what shall be adjudged or decreed between the parties (Rhode Island v. Massachusetts, 37 U. S. 718 [9 L. Ed. 1233; see, also, Rose's U. S. Notes]); to decide with whom is the right of the case (People v. Board of Supervisors, 122 Cal. 421 [55 Pac. 131]); to ascertain existing rights or establish a title or to determine the rights of the controversy between the parties (Title, etc., Co. v. Kerrigan, 150 Cal. 320 [119 Am. St. Rep. 199, 8 L. R. A. (N. S.) 682, 88 Pac. 356]). The determination that plaintiff was guilty and that his right to practice should be suspended comes clearly within the scope of these definitions." Suckow v. Alderson, 182 Cal. 247, 250, 187 Pac. 965, 966.

The very basis of a judicial or quasi judicial hearing at which property rights are determined presupposes some sort of process by which the interested party is put upon his notice as to the time, place, and nature of the hearing. Where the statute requires the filing of charges and notice of the hearing thereon, it has been uniformly held that the one accused must be given such notice of the nature of the charge against him as will enable him to formulate a defense. Dyment v. Board of Med. Examiners (Cal. App.) 207 Pac. 409, 411, and cases there cited. That case involved a construction of section 14 of the Medical Practice Act as amended in 1917 (Stats. 1917, p. 109). The section provides in part:

"Whenever any holder of a certificate herein provided for is guilty of unprofessional conduct, as the same is defined in this act, * * * or whenever a certificate has been procured by fraud or misrepresentation * * * it shall be the duty of said board * * * to revoke his certificate."

The same section provides that no certificate shall be revoked unless the holder has been cited to appear and answer to a sworn complaint. In the Dyment Case a complaint was filed charging that the physician had procured his certificate through fraud and misrepresentation. It was this complaint which the District Court of Appeal held to be insufficient to give the board jurisdiction of the hearing. In denying a petition to transfer the case to the Supreme Court, the latter court approved this ruling of the District Court of Appeal and held further that, even though the insufficiency of the complaint was not attacked prior to the hearing before

the board, the proceedings should be set aside in certiorari upon the ground that the board did not have jurisdiction to make the order. The language of the Supreme Court on the question of the insufficiency of the complaint is particularly applicable to the present case:

"It contains no specific allegations of fact, but merely states that he 'procured by fraud and misrepresentation a certificate to practice medicine.' Such method of charging fraud has always been held insufficient; the specific facts must be stated. (9 Ency. of Pl. & Prac. 686; 31 Cyc. 55.)" (Cal. App.) 207 Pac. 409, 412.

[2] Applying the rule to the present case, it follows that, even though an attorney appeared for petitioner at the time noticed, the commissioner would not have jurisdiction to make the order if the complaint or notice did not state facts showing that the petitioner had committed some breach within the purview of the act. This is so, not because the statute requires the filing of charges against the broker, but because the constitutional guaranty of due process of law requires that he be allowed to appear and defend, and the established rules of procedure demand that the accused shall be given "such notice of the nature of the charge against him as will enable him to formulate a defense." Dyment v. Board of Medical Examiners (Cal. App.) 207 Pac. 409, 411. The rule is particularly applicable here for two reasons: (1) The proceeding is "highly penal in its nature" (Schomig v. Keiser [Cal. Sup.] 209 Pac. 550); and (2) the only conceivable ground of revocation was based upon fraud and misrepresentation, and the accused should have been notified of the facts constituting the fraud or misrepresentation (Dyment v. Board of Med. Examiners [Cal. App.] 207 Pac. 409, 412).

[3] The notice mailed to the petitioner was merely an order to show cause why his certificate should not be revoked. It contained no charges of any nature and nothing from which he could ascertain what he would be required to defend. It was therefore insufficient to give the commissioner any jurisdiction to either suspend or revoke the certificate.

[4-7] In addition to this, assuming, as we must, that the commissioner's action was based upon the ground that petitioner "has engaged, or is about to engage in any fraudulent transaction," a review of the evidence fails to support the finding. The only evidence which the commissioner could consider was that taken at the hearing in the presence of petitioner's counsel. This consisted of the testimony of one witness to the effect that he had purchased certain shares of corporate stock through petitioner's agents and upon their representations that the stock would increase in value, would soon pay a dividend, and that petitioner would sell the stock at market on demand of the witness. There was no evidence that these representations were false or that the witness relied upon them. There was no evidence that the petitioner knew that the representations were made, or that, if made, they were false. There was no evidence that the agents who made the representations knew, or had reason to know, that they were false or fraudulent. There was no evidence that the petitioner had engaged in or that he was about to engage in a fraudulent transaction. "The presumption is always against fraud. This presumption approximates in strength that of innocence of crime. Truett v. Onderdonk, 120 Cal. 581, 588, 53 Pac. 26. One who seeks relief from fraud must allege it and prove it by clear and satisfactory evidence. A mere suspicion of fraud is not sufficient." Everett v. Standard Acc. Ins. Co., 45 Cal. App. 332 338, 187 Pac. 996, 998. This presumption was available to the petitioner in this proceeding and could be overcome only by clear and satisfactory proof. If we may assume that the commissioner found fraud, the evidence was insufficient to support the finding. If the finding was based upon either of the other grounds specified in the statute, there was no evidence at all to support the finding.

[8] The petitioner argues with considerable force that the commissioner had no power to suspend his certificate because such power is not expressly conferred by the statute. The commissioner contends that the power to suspend is incidental to the power to revoke and is to be implied from the grant of the power of revocation; and that the power of suspension should be exercised pending a hearing of the charges and a determination of the question whether the certificate should be revoked. Similar statutes examined expressly confer such power. If we may assume that it is to be implied from the grant of the power of revocation, it nevertheless may be exercised only when the commissioner has obtained jurisdiction to proceed with a hearing and determination of that question. If this were not so, the commissioner could, as has been done in this case, order a temporary suspension and continue the order indefinitely, thus depriving the broker of his right to do business without any legal process whatever.

Other points raised do not require consideration.

The order is annulled.

We concur: LANGDON, P. J.; STURTEVANT, J.

60 Cal. App. 309

## CHANAN SINGH et al. v. CROSS et al.
(Civ. 4367.)

(District Court of Appeal, First District, Division 2, California. Dec. 29, 1922. Hearing Denied by Supreme Court Feb. 26, 1923.)

**1. Waters and water courses ⟸158½(1) — Testimony held to show leased land was ready for irrigation about May 1st.**

In an action for breach of a landlord's agreement to furnish water for leased land sufficient to raise a crop of rice, a finding that the premises were ready for irrigation about May 1st was supported by testimony by plaintiff that he had sown the rice the first part of May and his statement on cross-examination that he sowed it on the 1st day of May.

**2. Landlord and tenant ⟸103(3)—Lease held to give tenant reasonable time to exercise option after right approved.**

Where the lease gave the tenant the option of terminating it if it was impracticable for the landlord to commence supplying water on April 25th, but did not specify the time within which the option must be exercised, the option accrued on the day fixed, but the tenant had a reasonable time thereafter within which to exercise it, under Civ. Code, § 1657.

**3. Landlord and tenant ⟸103(3)—Reasonable time within which to exercise option to surrender lease is question of fact.**

Whether a tenant had a reasonable time in which to exercise his option to surrender a lease after the landlord had failed to furnish water for irrigation depends upon the particular circumstances, and is a question of fact.

**4. Landlord and tenant ⟸112½, New, vol. 9A Key-No. Series — Evidence held to sustain finding option to surrender was exercised by tenants within reasonable time after landlord's default.**

Evidence that a landlord failed to furnish irrigation water as agreed on April 25th, but that he requested the tenants to remain on the premises, and promised to furnish water within a short time, continually repeating the promise until it became evident on June 4th that the water could not be furnished in time to make a crop, and that the land would have been valueless to another lessee without water, so that the landlords lost no right to re-lease the premises, *held* to sustain a finding that the exercise by the tenants of their option to surrender the premises on June 4th was within a reasonable time.

**5. Waters and water courses ⟸158½(1) — Lease held to entitle tenants to expenditures up to date of surrender; "cost of work."**

Where a lease gave the tenants the option to surrender the premises if water was not furnished by April 25th, and the lessor agreed thereupon to pay the lessees the cost of the work already done by them, the lessees were entitled, not only to the cost of the work done before the date specified, but to the cost of all work done by them prior to the giving of notice of the exercise of their option, which was the time to which the word "thereupon" referred.

**6. Landlord and tenant ⟸94(6)—Insufficiency of oral notice of surrender is immaterial.**

It is immaterial that an oral notice by tenants of the exercise of their option to surrender the lease was insufficient under the lease, and that the landlords had not waived their right to written notice, where a written notice was served four days after the oral notice was given, which was within a reasonable time for the exercise of the option.

**7. Evidence ⟸467—Waiver may be shown by circumstances.**

Waiver may be shown by parol evidence, and proof of express language is not necessary, but it may be shown by circumstances or a course of acts or conduct.

**8. Waters and water courses ⟸158½(1)—On failure to furnish water cost of seed sown is part of "cost of work" done by tenants before surrender.**

Where the lease gave the tenants the option to surrender it if the landlords failed to furnish water for irrigation within the time agreed, and required the landlords to repay to the tenants the cost of work done by them in preparing to raise a crop of rice, the cost of work was not limited to the actual cost of labor performed upon the land, but included the cost of the rice seed sown.

**9. Landlord and tenant ⟸109(2)—Option to surrender for fixed price is valid.**

Even though a provision in the lease giving the tenants the right to surrender the premises if irrigating water was not furnished, and requiring the landlords in that event to repay to the tenants the cost of work done by them, did not fall within the exception created by Civ. Code, § 1671, permitting the parties to a contract to agree upon an amount which shall be presumed to be the amount of damages sustained when from the nature of the case it would be difficult to fix the actual damages, that provision can be sustained as one giving the tenants an option to surrender and recover an agreed sum.

**10. Waters and water courses ⟸158½(1) — Rent paid in advance is recoverable as part of the cost of work by tenants.**

Where a lease gave the tenants an option to surrender the premises if irrigating water was not furnished, and required the landlords to repay the cost of the work done on the land, the tenants, on exercising their option to surrender the premises, could recover the rent theretofore paid by them in advance, since the payment of that rent was a condition precedent to the performance of any work upon the land.

**11. Waters and water courses ⟸158½(1) — Wages of men kept in readiness to irrigate land held part of cost of work.**

Where landlords failed to furnish water for irrigation at the time specified, but kept conditionally promising the tenants to furnish the water within a short time, the tenants were entitled, on exercising their option for the landlords' failure to furnish the water and to recover the cost of the work performed by them, to recover the wages paid by them to employees whom they kept upon the land in readiness to

perform work thereon when the water should be received.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Chanan Singh and others against P. B. Cross, and others, individually and as copartners doing business under the firm name and style of the Provident Irrigation Syndicate. Judgment for plaintiffs, and defendants appeal. Affirmed.

Bacigalupi & Elkus, of San Francisco, and Frank Freeman, of Willows, for appellants.

Albert Jacoby, of San Francisco, for respondents.

LANGDON, P. J. This is an appeal from a judgment for $4,000 against the defendants P. B. Cross, Joseph Carlson, Alden Anderson, and Howard M. Payne in an action to recover damages alleged to have been caused to plaintiffs by reason of the breach by said defendants of an agreement for the leasing of certain lands in the county of Colusa, state of California.

The controversy arises over the construction of this lease, which covered a period of two years, and in which plaintiffs were the lessees and appellants the lessors of a tract of land in Colusa county, Cal. The lessees agreed to pay a certain rental and to prepare the land for the planting of rice and to plant rice upon the same, and to do all irrigating, weeding, harvesting, sacking, threshing, and hauling of the rice. The lessor promised

"to furnish water at his own cost and expense in an amount usual in said locality for maturing rice that may then be planted upon said premises, and agreed that said water shall be made available for use not later than the 25th day of April of each year of the term hereby created and to be furnished continuously during the season. In the event it is impracticable to commence the supply of water by the 25th day of April, 1918, then the lessee shall have the option of terminating this lease, and in the event that they exercise their option of so terminating the lease, they shall serve written notice upon the lessor notifying him of their election so to do. The lessor agrees thereupon to pay to the lessees the cost of the work already done by the lessees, and in addition thereto ten per cent. of said cost, which the lessees agree to accept in full payment and satisfaction of all damages, demands and rights."

The trial court found that the lease had been made by the parties as set out in the pleadings; that pursuant to its terms the plaintiffs had entered upon the premises as lessees thereof, and within proper season and in accordance with the proper manner of raising, cultivating, and maturing rice, and in a good and farmerlike manner prepared all of the land and performed all necessary development work upon said land to effect an efficient and proper handling of a rice crop thereon, during the seasons described in the lease, and did immediately sow the same to rice, and the said described lands and premises were, about the 1st day of May, 1918, properly prepared and within due and proper season and in accordance with the local custom of raising rice in the locality of said premises and were ready and in condition to receive irrigation water at that time.

The findings further recite that the plaintiffs were rice farmers of long experience; that in order to mature a rice crop upon said lands it was necessary that the same be supplied with an adequate amount of irrigation water in due and proper season; that on or about May 1, 1918, the plaintiffs demanded of said P. B. Cross, acting for himself and the said codefendants, a supply of irrigation waters to be delivered upon said lands, but at that time and at all times subsequent thereto defendants failed and neglected to furnish a sufficient, adequate, or any quantity of water for the purpose of irrigating said lands, except an amount to partially and inefficiently and inadequately supply about 10 acres of said premises; that continuously, since about the 1st of May, 1918, to and including the 4th day of June, 1918, plaintiffs did from time to time demand of said defendants that they deliver to them to and upon said lands and premises a quantity of irrigation water sufficient to irrigate said lands so as to enable plaintiffs to grow and mature a crop of rice thereon; that from about May 1, 1918, plaintiffs demanded from time to time of defendants irrigation waters, and defendants promised plaintiffs to deliver to them such waters according to the requirements of said lease, but at all times failed to do so in an adequate or in any quantity sufficient to mature a rice crop thereon; that at many times between the latter part of April, 1918, and the 5th day of June, 1918, plaintiffs demanded the receipt of irrigation waters upon said premises for said purposes, and the said P. B. Cross, for himself and his codefendants, by promises and inducements prevailed upon plaintiffs from time to time to await the delivery of water until defendants completed the construction of certain laterals and ditches running to the lands of plaintiffs, and that by said promises and inducements and overtures made by said defendants to said plaintiffs, to the effect that water would be delivered immediately to said plaintiffs, said plaintiffs were induced and prevailed upon to defer and postpone the termination of said lease from time to time until the 4th day of June, 1918; that on the said 4th day of June, 1918, at Willows, Cal., and after plaintiffs had done and performed the matters and things on said lands hereinbefore set forth, and as is in said lease provided, and in all other respects fully performed the said lease pursuant to its terms, and after said defendants had failed and neglected to

carry out the terms and conditions of said lease contract with reference to furnishing or supplying an adequate, proper, and sufficient supply of water to and upon said lands as aforesaid, and after plaintiffs had been prevailed upon, as aforesaid, to defer any acts with respect to the termination of said lease, plaintiffs verbally notified defendant P. B. Cross, acting for himself and his codefendants, that they did then and there terminate the said lease on account of defendants' failure to furnish a supply of water as aforesaid, and plaintiffs did then and there demand of defendant P. B. Cross, acting as aforesaid, the moneys expended by plaintiffs upon said lands and premises in the cost of work and development thereof, together with 10 per cent. of said moneys, and the said P. B. Cross, acting for himself and as aforesaid, did then and there demand of plaintiffs that they forthwith furnish to him a full and complete statement of their said expenditures and costs incurred up to and including the said 4th day of June, 1918, and did then and there agree to repay to said plaintiffs such moneys expended as aforesaid, together with 10 per cent. damages as provided for in said lease, and plaintiffs did prepare and submit such a statement to defendants on or about June 4, 1918, and said defendants failed, neglected, and refused to pay the same; that said statement showed an expenditure of $4,405.54 by plaintiffs. Thereafter, and on or about June 5, 1918, at Willows, Cal., the said P. B. Cross, acting for himself and as aforesaid requested said plaintiffs to defer the termination of the said lease until July 15, 1918, and, in the event the said defendants failed to supply the proper and necessary irrigation waters by said July 15, 1918, that the said defendants would then pay to said plaintiffs the moneys expended by them as aforesaid, together with the 10 per cent. provided for by said lease, and said defendants did further request said plaintiffs to remain upon said premises and apply the said waters when the same would be available about July 15, 1918, to the said lands prepared by plaintiffs, all of which the said plaintiffs did then and there refuse to do, placing no further reliance on defendants' promises.

Plaintiffs then went to San Francisco and sought advice, and on or about the 8th day of June, 1918, and through their attorney at San Francisco, plaintiffs executed and served upon said defendant P. B. Cross, acting for himself and as aforesaid, an additional and further notice in writing of the termination of said lease; that said notices were given in due season, and in time to permit a crop of rice to be thereafter grown on said land, provided water could be thereafter supplied thereto. The said notices of termination of said lease, given by plaintiffs as aforesaid, to said defendant P. B. Cross, acting for himself and as aforesaid, were so given and served within a reasonable time, and pursuant to the terms of said lease agreement. During all the times that plaintiffs were engaged in preparing said lands and doing the work aforesaid, and up to the 5th day of June, 1918, the said defendant P. B. Cross and the agents and employees of said defendants were in, on, or about the said described premises.

[1] Before considering the law applicable to the facts as found by the trial court and recited herein, it seems expedient to consider the objections of the appellant that some of these findings are not sustained by the evidence. Particular objection is made to the finding that the premises were ready for irrigation water "about the 1st day of May, 1918." Appellants state in their brief that "the undisputed evidence is that the land was not even then sown to rice." In making this statement the appellants have overlooked the testimony of the plaintiff Chanan Singh, who stated several times that he had sown the rice the "first part of May." He repeated this upon cross-examination, and added the further definite statement: "I sowed the rice on the 1st day of May." This testimony is sufficient to sustain the finding of the court to which appellants object. The findings to the effect that the plaintiffs were induced to continue upon the land from time to time by reason of certain promises of the defendants are sustained by the testimony of the plaintiff Chanan Singh, and also by the testimony of his attorney, who discussed the matter with the defendant Cross.

[2] Before considering the finding that the plaintiffs exercised, within a reasonable time, their right to terminate the lease, we shall discuss the objection of appellants that the lease did not give to plaintiffs a reasonable time within which to exercise such option. This question, appellants concede is the main issue in the case. The lessor agreed that water would be "made available for use not later than the 25th day of April of each year for the term hereby created and to be furnished continuously during the season." It was further agreed that—

> "In the event that it is impracticable to commence the supply of water by the 25th of April, 1918, then the lessees shall have the option of terminating this lease."

[3, 4] No date is specified at which such option must be exercised. It is apparent that the right to exercise the option accrued to the plaintiffs on April 25th, when the water was not furnished. No date being specified within which said option should be exercised, the plaintiffs would have a reasonable time within which to exercise the same. Section 1657, Civ. Code. Appellants also object to the finding that the option was exercised by the plaintiffs within a reasonable time. The question as to what is a reasonable time for

the performance of an act under a contract fixing no time for such performance depends upon the nature of the contract and the particular circumstances. It was a question of fact for the court in the present case. The circumstance that the defendants continually promised plaintiffs that water would be furnished is material. Such promises would make it reasonable for the plaintiffs to wait, in good faith, from day to day. Furthermore, the defendants were not damaged by the delay. The court has found that the land was properly prepared and sowed with rice. The defendants were unable to furnish water until after June 1st. The land was valueless without water, as no crop could be raised. Defendants, therefore, would have been unable to rent the land to any one. As plaintiffs were working upon the land in anticipation of a crop, up to the time they terminated their lease, defendants' only loss occurs by reason of their own failure to furnish water. Had plaintiffs terminated the lease earlier, other lessees on the land could have done no more toward raising a crop in the absence of water for irrigation. It was at the request of the defendants that plaintiffs continued on the land, working on the same and expecting water from day to day. If defendants never reaped any benefit from this work, it was because of their failure to supply water. When it became evident that the water would be too late to assure plaintiffs a crop, they exercised their option to recover their expenditures and terminate the lease. Under all the circumstances in evidence, particularly the requests of defendants, as narrated by Chanan Singh, that plaintiffs allow them a little more time to furnish water, and the additional circumstance that defendants could have been in no better position with regard to raising a crop on the land had plaintiff abandoned the land earlier, we think the finding of the court that the option was exercised within a reasonable time was a proper one.

[5] Appellants contend that the trial court erred in considering evidence of work done upon the land after April 25th and up until the time of the notice of termination of the lease. Appellants' position upon this question is that, regardless of what might be a reasonable time in which to exercise the option, under the terms of the lease, the obligation of the lessors was fixed and limited by the situation of the parties on the day the option accrued—April 25th. In other words, it is contended that the lessors were only obligated to pay for work done up to April 25th, and, although the plaintiffs might have a reasonable time thereafter within which to exercise their option, they must discontinue work upon the land during that time, or do such work without hope of being compensated therefor, although defendants were requesting them to continue their work. It must be admitted that this question is one that is not free from difficulties, but we are of the opinion that, in regard to this matter, the contract is susceptible of the interpretation placed upon it by the trial court. It provides:

"In the event that it is impracticable to commence the supply of water by the 25th of April, 1918, then the lessees shall have the option of terminating this lease, and in the event that they exercise their option (within a reasonable time) of so terminating the lease, they shall serve written notice upon the lessor, notifying him of their election so to do. The lessor agrees *thereupon* (upon the service of such notice) to pay to the lessees the cost of the work *already done* by the lessees."

The language inserted by us in parenthesis in the above quotation seems to us to be the sense of the provision, and to warrant the interpretation placed by the trial court upon the instrument. Conceding that the plaintiffs had a reasonable time within which to exercise their option to terminate the lease and to give notice thereof, it would seem to follow that the word "thereupon" refers back to the time of service of such notice, and the words "work already done" refer to work done at the time of such notice and payment.

[6] Appellants urge that the evidence does not show a waiver of written notice of termination, and therefore the oral notification of June 4th was insufficient. Even though this be conceded, it would not avail appellants, for it was found that within four days thereafter plaintiff served upon defendants a written notice of termination, and it was found that this written notice was served within a reasonable time.

[7] The testimony in the record to which appellants object on the ground that it varied by parol a written agreement was not admitted for that purpose. It was admissible for other reasons. Some of it was directed to ascertaining what was a reasonable time for the exercise of the option, and inquiry which was proper because no time was specified for this act. A large part of such testimony was also admissible upon the question of whether or not the provision for written notice had been waived. The trial court found that it had been waived. Waiver may be shown by parol. Proof of express language is not necessary, but a waiver may be shown by circumstances or a course of acts or conduct. Knarston v. Man. L. Ins. Co., 124 Cal. 74, 56 Pac. 773; Frank & Co. v. New Amsterdam Co., 175 Cal. 293, 165 Pac. 927; Faris v. Amer. Natl. Ins. Co., 44 Cal. App. 48, 185 Pac. 1035. Appellants have discussed the evidence at some length in an effort to prove that a waiver was not shown. The question is a nice one, but is not decisive in the present case, nor necessary to be deter-

mined herein, for the reason that the plaintiffs' case does not rest, necessarily, upon a waiver of the written notice, it having been found, as hereinbefore stated, that the written notice was given four days after the oral one and within a reasonable time.

[8] Appellants' objection that the judgment should not include the price of the seed used on the land, but merely the actual cost of labor performed is without merit. The portion of the contract under which recovery was had is:

"The lessor agrees thereupon to pay to the lessees the cost of the work already done by the lessees, and in addition thereto ten per cent. of said cost, which the lessees agree to accept in full payment and satisfaction of all damages, demands and rights."

"The cost of the work," assuredly, includes the cost of all items which enter into such work. The board of the men doing the work, repairs to the machinery employed, are all items that enter into the cost of the work (Betts v. Orton, 34 Cal. App. 397, 167 Pac. 1147), and likewise, we think, the cost of the seed which was planted with the labor for which reimbursement was to be made.

The appellants' contention that the rent should not be included in the judgment under the provision for repayment of cost of work presents a close question. But before discussing that phase of the case, it seems pertinent to consider the validity of the entire clause upon which plaintiffs' recovery was based, because a considerable portion of the appellants' brief was devoted to that question.

[9] This action was brought to recover damages under the express provisions of the contract, by which the parties agreed that, in the event of a breach by the lessors of their covenant to furnish water in time, they would pay to the lessees the cost of the work already done by the lessees, and, in addition thereto, 10 per cent. of said cost, which the lessees agreed to accept in full payment and satisfaction of all damages, demands, and rights. Appellants urge that this provision of the contract does not fall within the exception created by section 1671 of the Civil Code, permitting the parties to a contract to agree therein upon an amount which shall be presumed to be the amount of damages sustained by a breach thereof when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damages; and that, even if it does fall within the exception above referred to, plaintiffs have not alleged or proved that the facts in this case were such as to bring the case within the operation of section 1671, Civil Code. Appellants, however, do concede that this provision of the contract is enforceable as an option given to the plaintiffs on the happening of a certain condition, namely, the failure of the defendants to furnish water within a specified time, and they cite cases as follows: Wilson v. Graham, 14 Tex. 222; 13 C. J. 608, § 640; Foxley v. Rich, 35 Utah, 162, 179, 99 Pac. 666; Jackson v. Beers, 14 Cal. 189, 193.

It seems immaterial, therefore, whether the provision be sustained as one for liquidated damages or as a provision granting to the plaintiffs an option. The provision is one that will be enforced by the courts, the plaintiffs have relied upon it, and have recovered thereunder.

[10] We shall now return to a consideration of appellants' contention that the amount of the rent paid by the lessees should not have been recovered by them. Examining the entire contract to ascertain the intention of the parties and the construction put upon the words "cost of the work" by them, we find in paragraph 12 of the lease a provision that in the event the lessor makes a sale of the land before the rice has been planted thereon and after the land has been prepared or partially prepared for planting, the lessor will pay to the lessees "the cost of the work" in preparing said land. Could it be seriously contended that it was the intention of the parties that upon a sale of the land the rent paid in advance should be retained by the lessors? Would not the words "cost of work" be given a sufficiently liberal construction to include the rent? We think so, and we can see no reason why the same broad construction should not be given to the same expression in paragraph 18 of the lease. That the lessees were to lose the rent paid in advance, notwithstanding the fact that the cost of the work, plus 10 per cent. was to be paid them upon breach of the contract by the lessor, is so unthinkable, unreasonable, unjust, and inequitable that no court would believe that such was the intent of the parties, and we are impelled to give the expression "cost of work" a meaning broad enough to include the rent.

It was said in Hayne v. San Francisco, 174 Cal. at page 189, 162 Pac. at page 627, in defining the phrase "cost and expenses," and considering allowances made to owners of abutting property for damages caused by the construction of a tunnel:

"We think the phrase should be given a broader meaning. The grant of power to cause the construction of the tunnel, of itself, implies a grant of sufficient incidental powers to accomplish that object. The Constitution (section 14, art. I) requires the payment of all damages to abutting owners before such tunnel can be constructed. The payment thereof would be one of the necessary expenses of accomplishing the result desired. It is true it would not be a part of the expense of actual construction. The right thus paid for would not technically be a part of the material for the construction of the tunnel, but it is none the less an expense essential to such construction. The making of plans and surveys which

precede the construction creates no material which goes into the work, but the cost thereof is uniformly understood to be an expense of the work. We think the payment of damages made imperative by the Constitution is as much an expense or cost of the tunnel as the expense of preliminary surveys and plans, and that the charter gives the power to include it in the assessment."

So, in the instant case, before any work could be done upon the land, the rent was a necessary cost to the lessees, just as the preliminary surveys and plans for checking and leveling the land were necessary costs before a scraperful of dirt was moved. As was said in the case of Hayne v. San Francisco, supra:

"Each case must depend upon its own context and upon the object and purpose to be accomplished and the effect of the narrower or broader meaning upon such object, which considerations here point to the more liberal construction above stated."

[11] Appellants contend that the judgment violates the stipulation of the parties as to the cost of preparing the land. The agreed price of preparing the land was $13 an acre. There were 160 acres, making a total of $2,080. The rental paid was $960. These sums, plus 10 per cent., would make a possible total of $3,340. The judgment was for $4,000, an excess of $660, which is accounted for by the fact that the record contains testimony that after the rice was all planted (May 1, 1918), men were kept constantly upon the property until it was surrendered to defendant (about June 5, 1918) to be in readiness to receive the water should it be furnished as promised by the defendants. This was a necessary and proper expense in connection with the work of raising a crop. The plaintiff, Chanan Singh, testified that, after May 1st, he kept four men working on the land every day putting in water gates, building up and reinforcing the levees where they were weak and low, and similar work. For the services of these men, $5 a day each was charged, and the statement of expenses offered in evidence shows an item of $620 for the wages of these men in May, and $50 for the wages of two men for the first five days of June. As the trial court very pertinently remarked, it was reasonable and necessary for these men to be so employed while they were waiting from day to day to receive the water and apply it to the rice. This being true, it was proper for the plaintiffs to recover the amount expended for this service, and when allowance is made for this sum, it appears that the judgment is not excessive.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

60 Cal. App. 322

## BABOO SINGH et al. v. CROSS et al.
(Civ. 4366.)

(District Court of Appeal, First District, Division 2, California. Dec. 29, 1922. Hearing Denied by Supreme Court Feb. 26, 1923.)

**Landlord and tenant ⟸103(3)—Supply of part of water as agreed by landlord does not defeat tenants' right to surrender.**

Where a lease covered 1,200 acres of land, which the tenants had sown to rice in accordance with their agreement, the fact that the landlords furnished water inadequately to irrigate about 250 acres, and that the tenants received and applied the water relying upon the landlords' promise from time to time that the rest would be furnished, does not defeat the right of the tenants to surrender the premises under the option given them by the lease for the landlords' failure to furnish water.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Baboo Singh and others against P. B. Cross and others, individually and as copartners under the firm name and style of the Provident Irrigation Syndicate. Judgment for plaintiffs, and defendants appeal. Affirmed.

Bacigalupi & Elkus, of San Francisco, and Frank Freeman, of Willows, for appellants.

Albert Jacoby, of San Francisco, for respondents.

LANGDON, P. J. This is an appeal from a judgment for $16,000 against the defendants P. B. Cross, Joseph Carlson, Alden Anderson, and Howard M. Payne, in an action to recover damages alleged to have been caused to plaintiffs by reason of the breach by said defendants of an agreement for the leasing of a tract of land containing over 1,200 acres, in the county of Colusa, state of California.

The lease involved here is identical in many respects with the one considered by this court in the opinion filed this day in the case of Chanan Singh et al. v. Cross et al. (No. 4367) 212 Pac. 946; the points of difference between the two leases being that in the present case the lease was dated February 2d, while in the Chanan Singh Case it was dated April 5, 1918, and under the lease in the present case, water was to be supplied by defendants by April 15th, while in the Chanan Singh lease it was agreed that it should be supplied by April 25, 1918.

The evidence in the instant case is substantially the same in all essential particulars as that offered in the case of Chanan Singh et al. v. Cross et al., supra, and the findings in

the two cases are substantially the same. Under such circumstances it is unnecessary to discuss again herein the matters determined by the opinion in the case of Chanan Singh et al. v. Cross et al., supra. As to all matters discussed therein that opinion is controlling here.

One point is urged by appellants in the present case which was not presented in the Chanan Singh Case. It is that about May 11, 1918, plaintiffs received water enough to irrigate a part of their land, and applied such water and attempted to irrigate a portion of the land. The trial court found that the "defendants failed and neglected to furnish to and upon said lands and premises a sufficient, adequate or any quantity of water for the purpose of irrigating said lands and premises as aforesaid, or at all, except an amount or quantity to partially and inefficiently and inadequately supply about 250 acres of said premises." Defendants' obligation was to "furnish water * * * in an amount usual in said locality for maturing rice that may then be planted upon said premises." The plaintiffs had 1,200 acres planted, according to the testimony of Baboo Singh and the findings of the court. Defendants did not fulfill their contract by supplying an amount of water inadequate to irrigate one-fifth of that area. The fact that plaintiffs applied the water they received cannot militate against their rights. As in the case of Chanan Singh et al. v. Cross, the defendants promised the plaintiffs from time to time that water would be supplied and the plaintiffs, apparently in good faith, delayed exercising their option and continued to apply their labor to the land in the hope that defendants would meet their obligations.

As to the contention of appellants that the judgment violates the stipulation of the parties as to the cost of preparing the land for rice, it is only necessary to point out that the plaintiff testified that 1,250 acres of land had been so prepared. It was stipulated that the cost of preparing the land and supplying the seed would be $13 per acre. At this stipulated figure the cost of preparation of the land would be $16,250. The contract provided for an additional 10 per cent. upon this amount, making a possible total of $17,875. The judgment of the court is within this amount, being for $16,000.

There are no other matters urged by appellants which are not covered by the opinion in the case of Chanan Singh et al. v. Cross et al., supra.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

60 Cal. App. 324

## HERNAM SINGH et al. v. CROSS et al.
(Civ. 4368, S. F. 10039.)

(District Court of Appeal, First District, Division 2, California. Dec. 29, 1922. Hearing Denied by Supreme Court Feb. 28, 1923.)

**1. Appeal and error ⟹1152, 1170(12)—Judgment for deceased plaintiff not reversible error, and may be amended on appeal.**

In an action by several partners, one of whom died before trial and before the judgment was rendered, the fact that the judgment was subsequently rendered in favor of that deceased partner without the substitution of his executors for him does not render the judgment void, but the mistake is capable of correction, and does not require a reversal under Code Civ. Proc. § 475.

On Hearing in Supreme Court.

**2. Abatement and revival ⟹71—Judgment for partners, rendered after death of one without substituting his representatives, need not be reversed.**

In an action by partners, judgment for the original plaintiffs, rendered after the death of one of the partners without substitution of the personal representatives of that partner, need not be reversed, in view of the fact that the surviving partners were entitled to settle up the affairs of the copartnership under Code Civ. Proc. § 1585.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Hernam Singh and others against P. B. Cross and others, individually and as copartners under the firm name and style of the Provident Irrigation Syndicate. Judgment for plaintiffs, and defendants appeal. Affirmed.

Bacigalupi & Elkus, of San Francisco, and Frank Freeman, of Willows, for appellants.

Albert Jacoby, of San Francisco, for respondents.

LANGDON, P. J. This appeal by the defendants from a judgment against them for $9,000 involves the same matters argued by appellants in the cases of Chanan Singh et al. v. Cross et al. (No. 4367) 212 Pac. 946, and Baboo Singh et al. v. Cross et al. (No. 4366), 212 Pac. 951, and considered by this court in opinions filed in said cases this day. The lease involved in the instant case is substantially the same, and the evidence is substantially the same as in the two cases mentioned, and the reasoning of said cases is applicable here.

The one additional point made in the present case is the objection that the judgment should not have run in favor of the plaintiff Jawala Singh, because of this death subsequent to the commencement of the action.

The action was commenced in August, 1918. In October, 1918, Jawala Singh died. Suggestion of said death was made in open court, and counsel stated that the administrator of the estate of deceased would be substituted. No substitution appears to have been made, however, and on August 10, 1920, judgment was entered for the plaintiffs, including Jawala Singh.

Subsequently, and on September 30, 1921, it appears from the statement of counsel, an order of substitution was made, but such order is not a part of the record presented to us. However, while the case was pending before this court, an order was duly and regularly made by this court and filed herein, substituting for the plaintiff and respondent Jawala Singh, D. C. Tucker, the administrator of his estate.

[1] The case of Sanborn v. Cunningham, 4 Cal. Unrep. 95, 33 Pac. 894, appears to be in point here. There, as in the present case, the plaintiffs were partners, and one of them died before judgment was entered. Through inadvertence, the judgment was entered in the name of deceased, instead of in the name of his executors. It was said:

"The verdict and judgment were entitled 'Charles Ford, A. A. Morey and J. S. Menasco, partners trading under the firm name of Charles Ford & Co.' as the plaintiffs, overlooking the change made by the death of Ford, and the substitution of his executors, which had been made by order of court. It is contended by appellants that the verdict and judgment are void for this reason. The mistake is capable of correction, and does not require a reversal of the judgment. Code Civ. Proc. § 475."

As in the two companion cases mentioned, appellants contend that the judgment is excessive. The amount of land involved is 493 acres. At the stipulated cost of $13 an acre for preparing and seeding the land, the cost of preparation would be $6,409, which, together with the rental paid of $2,975 and the 10 per cent. allowed by the contract, would warrant a judgment in excess of the amount of the present judgment, which was for $9,000.

The judgment is amended by substituting for the plaintiff Jawala Singh, D. C. Tucker, administrator of the estate of Jawala Singh, deceased, and as so amended it is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [2] In the application for transfer to this court, no complaint is made of the decision with reference to the effect of the death of one of the partners before judgment. Nevertheless, we deem it proper, in denying the petition for rehearing, to call attention to the fact that the surviving partners were entitled to settle up the affairs of the copartnership. C. C. P. § 1585.

The petition is denied.

All concur.

---

60 Cal. App. 395

## CITY OF SOUTH SAN FRANCISCO v. SANTA CLARA VALLEY LAND CO. et al.
(Civ. 4407; S. F. 10174.)

(District Court of Appeal, First District, Division 1, California. Jan. 9, 1923. Hearing Denied by Supreme Court March 8, 1923.)

**1. Appeal and error ⊂=544(2)—Appeal on judgment roll held to attack only sufficiency of complaint or findings.**

A contention, on appeal on the judgment roll alone from a judgment foreclosing a street improvement lien, that the board of trustees had acquired no jurisdiction to order the improvement, must be predicated either upon the insufficiency of the complaint to state facts essential to confer jurisdiction upon the board, or of the findings to support the averments of the complaint and to sustain the judgment.

**2. Municipal corporations ⊂=567(1)—Complaint to foreclose lien for street improvements held sufficient.**

A complaint to foreclose a street improvement lien, which complies with the requirements of Street Improvement Act 1911, as amended in 1915 (St. 1915, p. 1469) § 27, that in such complaint it is sufficient to allege briefly that the city council ordered the work, the performance of the work under the contract, the making of the assessment, the issuing of the warrant and certificate, and the making of the diagram, the assessment against the particular parcel owned by defendant, and refusal of defendant to pay on demand, and which in addition alleged that a board of trustees duly adopted the resolution of intention, and each and every other of the several orders and proceedings in the making of the improvement and the creating of the liens, so as to comply with the requirements of Code Civ. Proc. § 456, the relation to the pleading of determinations of boards and officers was sufficient to sustain the judgment foreclosing the lien.

**3. Appeal and error ⊂=907(3)—Evidence presumed to sustain complaint on defendants' appeal on judgment roll.**

Where the appeal from a judgment foreclosing a street improvement lien was taken on the judgment roll alone, the presumption is that the allegations of the complaint were sustained by evidence showing the facts which conferred jurisdiction upon the board of trustees to make the improvement and to create the liens therefor.

**4. Municipal corporations ⊂=569—Findings held to sustain judgment foreclosing street improvement lien.**

Where the complaint for foreclosure of a street improvement lien was sufficient under the Street Improvement Act of 1911, as amend-

ed in 1915 (St. 1915, p. 1469, § 27), and also under Code Civ. Proc. § 456, findings of fact which followed the material averments of the complaint are sufficient.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by City of South San Francisco against the Santa Clara Valley Land Company and another to foreclose street assessment liens. Judgment for plaintiff, and defendants appeal. Affirmed.

McKannay & Hunt, of San Francisco, for appellants.

J. W. Coleberd, of South San Francisco, for respondent.

Heller, Ehrman, White & McAuliffe and Charles W. Cobb, all of San Francisco, amici curiæ.

RICHARDS, J. This action was brought by the plaintiff for the foreclosure of certain street assessment liens upon the properties of the defendant, Santa Clara Valley Land Company, situate within the corporate limits of the city of South San Francisco. The complaint alleges the corporate character of the parties to the action; alleges the due adoption on May 1, 1916, by the board of trustees of said city of a resolution of intention to order certain improvement work to be done upon and along the streets of said city, describing in detail said work; alleges that on May 29, 1916, the said board of trustees by resolution duly made and adopted ordered said work to be done; alleges that in said resolution of intention, in the notices of passage thereof, in the resolution ordering said work, in the notice inviting sealed bids for the performance of said work, in the resolution awarding the contract therefor, in the notice of the award of said contract, in the warrant issued to the contractors, and in the notice of filing of the list of unpaid assessments, there was inserted the notice required by the Improvement Act of 1915 (St. 1915, p. 1464) with relation to serial bonds. The complaint further specifically alleges the award of the contract to the contractors and the full performance by them of the same; the filing of the diagram of the property affected; the approval of said diagram by the board of trustees and the record thereof; the making of the assessment by the superintendent of streets and the due recordation thereof, and the issuance of the warrant to the contractors; the making and levying of the assessments and the due demand for their payment; the return of the warrants showing such demand duly verified; the filing of the list of unpaid assessments and the due posting and publication of the notice of such filing; the resolution of the board of trustees determining the amounts unpaid upon said assessments and ordering the issuance of the serial bonds therefor; the resolution awarding and issuing said serial bonds to those entitled to the same; the fact that on January 5, 1920, a certain installment of said assessments became due and payable and were unpaid, with the interest and penalties thereon; the due adoption of the resolution and the foreclosure of the liens of said assessments upon the properties of said defendant affected thereby; the prayer for the foreclosure of said liens.

The defendants did not demur to this complaint, but filed their answer wherein the taking of the several steps in the course of making said improvement and of the levy of the assessments therefor as alleged in said complaint was admitted, the defendants' only denials having reference to the sufficiency of said proceedings to operate in the creation of said liens or of any liability on the part of said defendants arising out of the making and completion of said improvements. The cause was submitted to the court sitting without a jury upon a stipulation of the parties as to the facts, whereupon the court made and filed its findings of fact and conclusions of law finding specifically that the foregoing averments of the complaint were true, and further finding as conclusions of law therefrom that the said installments upon said assessments were due, payable, and unpaid, and that the plaintiff was entitled to a foreclosure of the lien thereof. The judgment followed, from which this appeal has been taken, and the cause is presented upon appeal upon the judgment roll alone.

[1, 2] The sole contention of appellants here is that the board of trustees of said city never acquired jurisdiction to proceed with said improvements, for the reason that the resolution of intention of the board of trustees of said city to order such improvement was never published, nor were the notices of said improvement posted along the line of the contemplated work of such improvement, as required by the statutes of 1911 as amended in 1915, under which said improvement was undertaken to be made. In view of the fact that this appeal is presented upon the judgment roll alone, the foregoing contention on the part of the appellants must be predicated either upon the insufficiency of the complaint in stating the essential facts necessary to confer jurisdiction upon the municipal body to make such improvement, or of the findings to support the averments of said complaint and to sustain said judgment. There is no merit in either of these contentions. The Street Improvement Act of 1911 (St. 1911, p. 730), as amended in 1915 (St. 1915, pp. 1469, 1470), under which the proceedings for the improvement in question were undertaken, provides in section 27 thereof for the institution of actions for the foreclosure of the liens

arising in the course of making said improvements, and in so doing proceeds to specify the essential allegations of the complaint in such foreclosure proceedings as follows:

"In a complaint in any such action it shall be held sufficient to allege briefly that the city council ordered the work, the performance of the work under the contract, the making of the assessment, the issuing of said warrant and certificate and the making of said diagram; that an assessment (naming the amount) was levied against that certain lot or parcel of land (describing the same), which, according to the information and belief of the plaintiff, is owned by the defendant; that payment of said assessment has been demanded in the time, form and manner prescribed in this act and that the same has not been paid."

[3] The complaint in question here complies with the requirements of the foregoing provision of the statute. It moreover alleges that the board of trustees of said city duly made and adopted the resolution of intention and each and every other of the several orders and proceedings of the said board in the course of making said improvement and creating said liens. It thus complied with the requirements of section 456 of the Code of Civil Procedure with relation to the pleading of judgments or other determinations of courts, boards, and officers. The allegations of the complaint in these regards were not controverted by the defendants in their answers, but had they been so the presumption upon this appeal would be that the facts conferring jurisdiction upon the board to make such improvements and to create the liens therefor sought to be foreclosed herein were fully proven, since this appeal is upon the judgment roll alone. The authorities are ample and uniform upholding the sufficiency of a complaint in the form of that assailed upon this appeal. Himmelman v. Danos, 35 Cal. 441; Pacific Paving Co. v. Bolton, 97 Cal. 8, 31 Pac. 625; Locke v. Cowan, 34 Cal. App. 581, 168 Pac. 387; Bienfield v. Van Ness, 176 Cal. 585, 169 Pac. 225; Los Angeles Paving Co. v. Los Angeles Foundry Co., 181 Cal. 685, 186 Pac. 593. The cases cited by appellants in support of their said contention have no application to the matter of pleading, which is the only matter here under consideration, but refer to the sufficiency of the proof of the jurisdictional facts in cases of this character, which is not at all involved in this appeal.

[4] As to the appellants' contention that the findings are insufficient to support the judgment, it is sufficient to state that the findings follow the material averments of the complaint. The stipulation of the parties as to the facts is not embodied in the transcript, but since the cause was submitted upon such stipulation it is fair to assume that the findings are in the language of such stipulation, and, if so, it follows that the parties have stipulated that every order of the board of trustees during the course of said improvement and of the creation of the assessment liens for the cost thereof was duly given, made and adopted; and it thence further follows that every act and thing required by the statute to be done and performed in order to give the board jurisdiction to make said orders was duly and regularly done and performed.

The final contention of the appellants, that the provision of the improvement act in question permitting simplified pleadings in actions of this character is unconstitutional, does not rise to the dignity of requiring refutation.

We find no merit in this appeal.

Judgment affirmed.

I concur: TYLER, P. J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for transfer addressed to this court is directed solely to the proposition that section 27 of the Street Improvement Act of 1911 (amended Stats. 1915, p. 1469–70) with reference to the form of complaint in an action of foreclosure of a street lien is unconstitutional because in violation of Const. art. 4, § 25, subd. 3 and subd. 33. This point is not necessary to the decision of the District Court of Appeal, and we withhold approval of the concluding paragraph of the opinion.

Petition denied.

WILBUR, C. J., and KERRIGAN, LENNON, MYERS, LAWLOR, and WASTE, JJ., concur.

---

60 Cal. App. 414

## SINGER v. BRUNS et al. (Civ. 4401.)

(District Court of Appeal, First District, Division 1, California. Jan. 11, 1923.)

**Municipal corporations ⇐706(6)—Negligence of motorman and truck driver sued by street car passenger held question of fact.**

In an action for damages by a street car passenger against the driver of a truck struck by the street car, evidence that the motorman upon approaching a crossing saw an automobile coming from one side and slowed down to let it pass in front of him, but, upon seeing it turn to the side unexpectedly without crossing, started his car suddenly and ran into a truck crossing from the opposite direction, *held*, that the question of defendant's negligence and the question whether the motorman by stopping his car led defendants to believe he would await their crossing, and whether a sudden speeding up of his car was negligence, were questions of fact, the determination of which by the trial court sitting without a jury was not reversible.

---

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by Kate Singer against J. H. Bruns, Elwyn Bruns, and another. From judgment for defendants, plaintiff appeals. Affirmed.

H. S. Henion and Ostrander & Carey, all of Oakland, for appellant.

Louis V. Crowley and Cooley, Crowley & Lachmund, all of San Francisco, for respondents.

RICHARDS, J. This is an appeal on behalf of the plaintiff from a judgment in favor of defendants J. H. Bruns and Elwyn Bruns in an action brought by the plaintiff to recover damages for personal injuries sustained in a collision between a street car of the defendant San Francisco-Oakland Terminal Railways, upon which the plaintiff was a passenger, and an auto truck being driven by the defendant Elwyn Bruns. After the commencement of the action, but before the trial thereof, it was upon the plaintiff's motion dismissed as to the defendant San Francisco-Oakland Terminal Railways, but was continued and tried as against the defendants Bruns before the court sitting without a jury. Upon the submission of the cause the trial court made its findings of fact and conclusions of law, wherein and whereby it found that the collision occurred by reason of the careless and negligent manner in which the street car was operated by the employees of the San Francisco-Oakland Terminal Railways; and that it was untrue that the defendants Bruns, or either of them, were careless or negligent in the operation of their said auto truck, but on the contrary it was true that the said defendants Bruns were operating and driving the same in a careful and prudent manner at the time of said collision. As a conclusion of law from the foregoing findings of fact the court found that the plaintiff was not entitled to recover as against the defendants Bruns and gave its judgment accordingly in favor of said defendants. The plaintiff prosecutes this appeal from said judgment.

The evidence with respect to the circumstances under which the collision in question occurred is quite conflicting, and it would serve no useful purpose to restate such evidence with a view merely to disclosing the particulars in which such conflict exists. It will be sufficient to state that there was substantial evidence presented to the trial court showing that the collision in question occurred on the 6th day of March, 1920, at the intersection of Fallon and Eighth streets in the city of Oakland. The San Francisco-Oakland Terminal Railways, a corporation, was at the time operating an east-bound street car on and along the southerly track of its system on Eighth street, and the plaintiff was a passenger upon said car. The defendants Bruns, Elwyn Bruns driving, were operating an automobile truck on Fallon street, going in a northerly direction at or near the point of said intersection. The speed of said truck was by a governor limited to 13 miles an hour. It was heavily laden and was proceeding at the time at about the speed of 7 miles an hour. As the truck approached Eighth street and as the car going easterly on Eighth street drew near the intersection of the two streets, a lighter truck, traveling faster, came into view on Fallon street, moving southerly toward Eighth as though to cross the street in front of the car. The motorman on the car was watching this south-bound automobile and, apparently thinking it was about to cross Eighth street in front of his car, brought it almost, if not entirely, to a stop. The south-bound automobile did not cross Eighth street, but suddenly swerved to the west and turned into Eighth street. The defendant Elwyn Bruns seeing the street car coming, apparently, to a standstill, continued on his way across Eighth street, but when almost upon the tracks observed that the motorman on the car, who had been watching the movements of the lighter automobile and was not, apparently, observing the movement of the auto truck or its advance across the street, suddenly caused the car to pick up speed. The driver of the auto truck, seeing this unexpected action on the part of the car, endeavored to avoid a collision by turning sharply to the right; but the car struck the auto truck on its left side and by the impact the plaintiff sustained her injuries. From these facts there is substantial evidence to sustain the trial court's finding that the agents of the railway corporation in charge of the car were negligent and that the defendants Bruns were not. This case requires no elaborate discussion of the principles of law involved, since the question of negligence was, upon the disputed evidence in the case, a question of fact and not a question of law. Whether the defendants Bruns were entitled, under the circumstances of the instant situation, to believe that the car of the railway corporation had come or was about to come to a standstill in order to allow the two vehicles, which were traveling in opposite directions on Fallon street and were each approaching the track, to cross before the car proceeded on its way, was a question of fact for the trial court to determine, and with that determination we cannot interfere. Whether or not the motorman upon the car had, by his conduct in bringing his car practically to a standstill, led the defendants Bruns to a reasonable belief that he would await their crossing in front of his car, and whether or not his conduct in speeding up his car while they were thus proceeding was or was not negligence on his part, were also, in view of the conflicting evidence in the case, questions of fact which it was the sole function of the trial court to deter-

mine. The cases cited by the appellant have no application to such a disputed state of facts as is presented in this record, and it is not, therefore, necessary to review them in detail. We find no reason for disturbing the findings and conclusions of the trial court.

The judgment is affirmed.

I concur: TYLER, P. J.

---

60 Cal. App. 439

## PEOPLE ex rel. CLARK v. MILK PRODUCERS' ASS'N OF CENTRAL CALIFORNIA, Inc. (Civ. 2514.)

(District Court of Appeals, Third District, California. Jan. 12, 1923.)

**1. Appeal and error ⟸917(1)—Complaint on appeal, after sustaining demurrer, must be taken as true.**

Allegations of the complaint must be taken as true on an appeal, after demurrer has been sustained.

**2. Monopolies ⟸26(1)—Quo warranto ⟸19—When will lie against corporation.**

Where a corporation usurps powers which its articles of incorporation and the law do not permit it to exercise, and violates the statute defining and prohibiting certain trusts in restraint of trade, quo warranto proceedings will lie.

**3. Quo warranto ⟸34—Cannot be instituted or controlled by individual; intervention by individual permissible.**

A suit in quo warranto cannot be filed or the people's interest therein controlled, by an individual, though, if such a suit is once instituted, intervention by a private person in certain cases is permissible.

**4. Quo warranto ⟸34—Held properly instituted by state, notwithstanding relator was private individual.**

Quo warranto proceedings against corporation, instituted under Civ. Code, § 653z, which provides, "The right of a corporation * * * to continue its business may be inquired into by quo warranto proceedings at the suit of the Attorney General, but not otherwise," wherein the complaint recited that the people, on the information and complaint of the relator, complained and alleged, and which stated the relator was a citizen, a resident, a taxpayer, and affected by defendant's practices, as a result of which she had suffered a pecuniary loss, *held* properly instituted by the state, notwithstanding the relator was private individual.

**5. Quo warranto ⟸44—Attorney General has some discretion in passing on complaints of public wrong before commencing quo warranto proceedings.**

The Attorney General has some discretion in passing on complaints of public wrong, and ought not to bring quo warranto proceedings, where the reasons therefor are trivial or to repress some private wrong.

**6. Quo warranto ⟸1—When proceeding commenced becomes public action, whether on evidence furnished Attorney General by others or obtained by his own inquiry.**

When a quo warranto proceeding has been commenced, it must be regarded as a public action, regardless of whether the information on which the Attorney General proceeded was furnished him by others or obtained by his own inquiry.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Quo warranto proceedings by the People, on the relation of Carrie A. Clark, against the Milk Producers' Association of Central California, Inc. From a judgment for defendant, plaintiff appeals. Reversed.

U. S. Webb, Atty. Gen., and Leon French, Deputy Atty. Gen. (John W. Preston, Hartley F. Peart, and Albert H. Elliot, all of San Francisco, of counsel), for appellant.

Peck, Bunker & Cole, Archibald M. Johnson, and A. A. De Ligne, all of San Francisco, for respondent.

ANDERSON, Justice pro tem. This is an appeal from a judgment dismissing an action after demurrer sustained to the complaint, sustained without leave to amend. The demurrer was both general and special. With it was submitted a motion to strike out, which was granted by the trial court upon the same theory upon which it sustained the demurrer. Appellant urges that the court erred in granting the motion to strike out and in sustaining the demurrer without leave to amend.

The action is in quo warranto, directed against defendant, Milk Producers' Association of Central California. Defendant, as disclosed by the complaint, is a nonprofit co-operative corporation, organized under sections 653b to 653zb of the Civil Code. The complaint was upon the relation of Carrie A. Clark, a private party. Respondent's brief concedes that, if the complaint could have been filed upon the relation of a private party, there is a statement therein of a cause of action capable of amendment, and that the motion to strike out should have been denied, and that leave to amend should have been granted. The motion to strike out was directed to all those parts of the complaint which showed the action was instituted upon information and complaint of the relator, Carrie A. Clark.

The main theory of the demurrer was that the complaint stated no cause of action, because of the averments showing that it was filed upon the relation of a private party. The trial court struck out all portions of the complaint which showed the connection of Carrie A. Clark with the action. It ruled that, under the statute particularly applicable to corporations of the character of de-

fendant, the action could not be instituted or maintained, except at the instance of the Attorney General, acting without a relator, and, as the complaint showed the action was upon the relation of a private party, the complaint was not capable of amendment, and that the action should be dismissed.

[1, 2] The theory of the complaint, as shown by its allegations (which, for the purposes of this appeal, must be taken as true under the general rule applicable to demurrers to complaints), is that the defendant corporation has abused its corporate franchise, has usurped, and is now usurping, important powers which its articles of incorporation and the law do not permit it to exercise, and has violated and is now violating the statute defining and prohibiting certain trusts in restraint of trade. Quo warranto, of course, lies in such cases. People v. Merchants' Protective Corporation (Cal. Sup.) 209 Pac. 3630.

[3] The complaint does not in any way show that the relator is the true plaintiff. Our law, differing from that of some other states, does not permit a suit in quo warranto to be filed by a private individual, or, so far as the interests of the people are concerned, to be controlled by a private individual. If the suit is once instituted an intervention by a private person is evidently under certain conditions permissible. People v. Campbell, 138 Cal. 11, 70 Pac. 918. But, notwithstanding there is a relator, the action is by the people. People v. Reclamation District No. 108, 169 Cal. 786, 147 Pac. 1176.

[4] The complaint in this case designates the people as the plaintiff; it is the people who complain; the wrongs complained of are of public concern; the prayer is that defendant be excluded from all the corporate right, that it be dissolved, and that its franchise be revoked and canceled. The only connection of the relator with the case is shown by the opening of the complaint, in which it is recited that the people, upon information and complaint of relator, do complain and allege, and by the statements, in paragraph VI of the complaint, that relator is a citizen, a resident, a taxpayer, and one of the consuming public affected by defendant's practices, and that as a result she has suffered a pecuniary loss, the amount of which is not stated.

Counsel for respondent do not dispute the appropriateness of the statement in paragraph 1835 of Spelling on Injunction (2d Ed.), reading as follows:

"The authorities are somewhat conflicting as to the right and proper functions of relators, but the better practice and that prevailing in most of the states is that the relators perform no different or more important office in any case than that of an informer or prosecuting witness in an ordinary criminal or penal action, and that the state's attorney has full power of control over the prosecution, both as to instituting it and conducting it."

The addition of the relator's name to the complaint did not make this a private action. This, we think, is clearly stated by our Supreme Court, as follows:

"The proceeding is by information by the Attorney General. When the proceeding is in the interest of private persons, in whole or in part, they are said to be by relation, and under the provisions of the Code the relator may be required to give security for costs. The information, however (that is, the complaint), is signed and filed by the Attorney General as attorney, and doubtless as attorney he has control of the action. I know of no such distinction as that made by counsel and attributed to the late Attorney General. If the proceeding is one in which a private person can have no interest, the proceeding is not properly by relation. But the Attorney General had the power to institute the proceeding, and in either form it is by him. If unnecessarily he has added that it is by relation of a named person, that does no harm. It does not convert the proceeding into a private action." People v. Sutter Street Railway Co., 117 Cal. at page 612, 49 Pac. 737.

The motion to strike out was granted, and the demurrer sustained, and the action dismissed because of the provisions of section 653z of the Civil Code, reading as follows:

"The right of a corporation, claiming to be organized and incorporated and carrying on its business under this title, to do and to continue its business, may be inquired into by quo warranto proceedings at the suit of the Attorney General, but not otherwise."

But for all practical purposes this suit is the suit of the Attorney General. This is clearly so of every case in quo warranto, where the grievance is public, or public as well as private. It certainly is a matter of public concern that a corporation, under the color or guise of a nonprofit concern, is usurping the functions of an ordinary corporation by employing its capital to engage in business for a profit, and is combining with others in the illegal restraint of trade. Such a corporation is not only usurping a franchise in violation of the quasi contract from which it derives its power from the state, but, in violating the law, it is exercising a power which the state denies to all persons. The illegal practices complained of are by the complaint made a feature of the business conducted for a profit—a kind of business which defendant has no right to engage in.

It is not questioned but that the complaint contains accusations of the kind referred to. The learned judge of the trial court, in his opinion which is made a part of the printed record on appeal, specifically refrains from ruling that the complaint would have been incapable of amendment had it originated altogether with the Attorney General, and, as hereinbefore indicated, respondent's brief concedes that the dismissal was erroneous, if the fact that it was upon the relation of a private individual did not make it totally null.

To hold that such a complaint as was filed in this case should, in effect be stricken from the files, because it appears that the arm of the law moved as a result of information obtained, or partly obtained, from a private person, would be to regard form more highly than substance. If the argument were sound, then in all fairness to the defendant he ought, if the action disclosed the name of no relator, be permitted to make inquiry for the purpose of ascertaining whether the action was not really instigated by a complaint of a private person addressed to the Attorney General. In substance there would be no difference between the assumed situation and the one here presented.

[5, 6] We think that, as has been indicated in some of the cases, the Attorney General has some discretion in passing upon complaints of public wrong (Lamb v. Webb, 151 Cal. 451, 91 Pac. 102, 646); that he ought not to sue where the reasons urged for the beginning of an action in quo warranto are trivial, or the purpose is to redress some grievance which is altogether private; but that when, upon due consideration of substantial evidence before him, whether furnished by others or obtained by his own inquiry, he has filed a complaint in quo warranto over his own signature, the action thereby begun is, in this state, to be regarded as a public action, prosecuted by the Attorney General, for the people. The presumption was that official duty was performed in the filing of the complaint in this case. The complaint presented, and not the personal element involved in its filing, is the important thing.

We do not think that the words "and not otherwise," contained in the Code section, were intended to get apart and distinguish the suit referred to as something materially different from what the law had known. The language used was like language used in other laws—and in the decided cases merely to emphasize the point that collateral inquiry may not be made in private suits as to whether a corporation has violated its franchise in performing a particular act. The prohibition is added that the right of corporations, such as the defendant, to continue to do business may not be inquired into, except by a quo warranto proceeding at the suit of the Attorney General and not otherwise. The entire statement as to the remedies is really nothing more than statutory declaration of the public nature of the quo warranto proceeding referred to. The words "and not otherwise" add emphasis to what was in reality already expressed, but this is the ordinary phraseology used for such purpose. The words do not, with any considerable degree of clearness, reflect the idea that a quo warranto proceeding, which is very public in its nature, should fail because the people's complaint reveals a relator.

We think that the rulings of the trial court were erroneous, and that the judgment should be reversed.

It is so ordered.

We concur: FINCH, P. J.; BURNETT, J.

---

60 Cal. App. 401

## RICHARDSON v. SOUTHERN PAC. CO. et al.
(Civ. 4395.)

(District Court of Appeal, First District, Division 1, California. Jan. 10, 1923. Hearing Denied by Supreme Court March 8, 1923.)

**Master and servant ⟸288(13)—Assumption of risk by lineman injured by breaking of telegraph pole held question for jury.**

Where plaintiff, an experienced telegraph lineman, ordered to ascend a pole, called his foreman's attention to surface rot at the foot of the pole, but the foreman assured him that the pole was all right, and plaintiff was injured by the breaking of the pole because of rot at its core, *held*, that plaintiff had not assumed the risk as a matter of law.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by W. E. Richardson against the Southern Pacific Company and Walker D. Hines, Agent, United States Railroad Administration, to recover for personal injuries. Judgment for plaintiff and defendant Agent appeals. Affirmed.

W. I. Gilbert, of Los Angeles, R. G. Hildebrand, and W. V. Herrin, both of San Francisco, and L. E. Johnston, and H. L. Johnston, both of Napa, for appellant.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for respondent.

RICHARDS, J. This appeal is from a judgment in the plaintiff's favor in an action for damages for personal injuries sustained by the plaintiff, a lineman of the Southern Pacific Company, while the railroad of such corporation was being operated under the direction and control of the Director General of railroads of the United States. Subsequent to the inception of the action it was dismissed as to the Southern Pacific Company, but continued as against the Director General. The facts of the case are practically undisputed, and are briefly as follows:

In the early part of February, 1918, the plaintiff, who was an experienced lineman, entered the employ of the railroad corporation in that capacity. On February 6, 1918, he was ordered by the foreman of the division to which he had been assigned to accompany him, with certain other members of the crew, to Rutherford, Napa county. Prior to going to Rutherford the foreman had received from the superintendent's office written instructions concerning the work to be done

there, which instructions, accompanied by a blueprint, directed the removal of three certain poles from the place where they had been standing to a nearby new location, as shown upon said blueprint. These instructions contained the history of the poles, and the foreman understood at the time he received such instructions that the engineering department of the corporation had preceded himself and his crew a few days before to said place to lay out the work to be done there. The foreman also knew that the corporation maintained a system of inspection of poles under which, from time to time, the poles along its railroad lines were gone over for the purpose of determining whether they were sound or unsound, and that poles thus inspected and found to be unsound were marked by the making of a cross upon them, indicating their unsoundness. The poles in question here contained no such marking. The plaintiff was not informed as to these facts or as to the contents of the instructions which the foreman had received, nor was he or the fellow employees of his crew, other than the foreman, advised as to the character of the work to be done at the point indicated prior to their arrival there. Upon reaching the scene the foreman informed them that one corner pole and certain others near the railroad station were to be removed and set back a short distance, and that the work was to be done without interfering with the wires or telegraph service. Upon being so informed the plaintiff suggested to the foreman that "We ought to have our pike poles along," to which the foreman replied, "We have not got them; we will have to set them up without pike poles." He then directed the plaintiff to make a hole at the side of the corner pole, which was the first to be removed, while the foreman and other linemen were engaged digging a hole a few feet away in which to reset said pole. The plaintiff dug a hole alongside of said pole about 1½ or two feet deep, and while doing so noticed that there appeared to be some ground rot affecting the surface of the pole where it appeared to have been underground, to which he called the foreman's attention, who came over, and, using a bar or shovel, scraped the ground rot down from the post to determine whether it affected the interior of the pole. Finding, apparently, that it was a surface rot, the foreman told the plaintiff that the pole was all right, and ordered him to get his belt lines and tools and go up the pole and untie the wires so that the pole could be removed. This was the first information that the plaintiff had that he was expected to climb the pole, but he then proceeded to procure his equipment and ascend the pole. Having released one of the wires from the pole the plaintiff suggested to the foreman that a temporary guy wire be run to help support and steady the pole when the remaining wire should be released. This met with the foreman's approval, and such wire was run according to the plaintiff's suggestion. He then released the remaining wire, when the pole broke, precipitating him to the ground, whereby he sustained the injuries complained of in this action. The pole was found to be internally in a rotten and decayed condition, to which condition its breakage and fall was due.

The plaintiff in his complaint herein alleged that the said pole which he was required to ascend was rotten, unsound, and defective, which condition was unknown to plaintiff, but was known to his employer, or could have been discovered and known by it through the exercise of ordinary care and vigilance, and that his fall and injuries were caused by the said rotten, unsound, and defective condition of said pole. The answer of the defendant puts in issue the main allegations of the plaintiff's complaint regarding the unsound condition of said pole or that the defendant knew or ought reasonably to have known the same, or that the plaintiff's fall and injuries were the result of any negligence on the part of the defendant in that regard.

By way of separate answer and defense the defendant averred that the plaintiff was at the time he ascended said pole an experienced lineman, and that the injuries, if any, sustained by him arose from the risks incident to the employment in which he was engaged; that the plaintiff knew, or by the exercise of ordinary care on his part should have known, of whatever danger there was incident to his work on and around said pole, and that said pole was likely to or might fall with him, when he ascended the same, and that he then and there assumed the risk of being injured in and about said work, and that any injuries sustained by him arose from his assumption of said risk, and were not due to any negligence on the part of his said employer.

The cause was tried before a jury. At the close of the plaintiff's case the defendant moved for a nonsuit, which the trial court denied. A motion for a directed verdict in the defendant's favor was also denied. At the conclusion of the evidence, and in the course of the submission of the cause to the jury, the defendant requested certain instructions reflecting their theory of the law of the case, which the court refused to give other than in a modified form. The defendant assigns error on the part of the trial court in its refusal to give and its modification of said instructions, but offers neither argument nor authority in favor of said assignment of error except as the same may be embraced in the discussion of the question of the plaintiff's assumption of risk. The case upon appeal may therefore be considered in the single aspect as to whether, under all the circum-

stances of the case as above briefly set forth, the plaintiff can be held as a matter of law to have assumed the risk of the unsoundness and possible fall of the pole when he ascended it, as a risk which was incident to his employment. If so, the defendant's motion for a nonsuit should have been sustained, and the motion for a directed verdict granted; if not, if the question of the plaintiff's assumption of risk was, under all of the circumstances of the case, proper to be submitted to the jury, then the verdict of the jury and judgment based thereon should be sustained.

We are satisfied that the authorities do not support the appellant's contention that the plaintiff, under the circumstances of this case as above set forth, should be held as a matter of law to have assumed the risk of the pole in question breaking, and of his consequent fall and injury, so as to prevent any recovery on his part in this case. The plaintiff, while an experienced lineman, was an employee of the corporation, acting under the authority and direction of a foreman in the doing of whatever work he was assigned to do. He had no previous knowledge of the location or character of the particular work to be done at Rutherford prior to his arrival on the scene. He had, therefore, no knowledge of any unsoundness of the pole or poles to be removed and to be reset there. Upon being informed by his foreman as to the nature of the work then immediately to be done, he had the right to assume that the poles to be removed and reset were sound, otherwise they would not have been suitable for use in the new location. Being under the direction of a foreman, he had a right to rely upon the performance by his employer and by his foreman of the duty resting upon his employer, whom the foreman there immediately represented, of supplying reasonably safe appliances and a reasonably safe place to work. There is nothing in the evidence herein or in the experience of this particular foreman to indicate that poles of the character of those in question here are dangerous for linemen to ascend if sound, or that this plaintiff in ascending said pole under the existing circumstances, would have been in any danger if said pole had been sound. The work which the plaintiff was directed to do at the base of said pole revealed certain signs of ground rot, which seemed to be external, but which the plaintiff called the foreman's attention to for his investigation and determination as to the effect of this external ground rot upon the soundness of the pole. This episode revealed the precise legal relation between the plaintiff as lineman and his foreman in charge of the work. The foreman had a right to rely, and apparently did rely, upon the latter to investigate and determine every fact essential to the provision of a safe place for him to work, and the foreman recognized and undertook to perform this duty in his investigation of the ground rot to which his attention had thus been directed, declaring after such investigation "the pole was all right." Other than this superficial defect there was nothing about said pole to indicate that it was rotten at the core. The defect to which its later fall and plaintiff's injuries were due was not an obvious defect, and we are aware of no rule of law which requires an employee, in the absence of any knowledge as to latent defects or of any facts which would reasonably put him upon inquiry, to conduct an investigation on his own account as to the existence of latent defects in the place or appliances which have been provided by his employer for the doing of his assigned work. The rule upon this general subject was well stated by Mr. Justice Lorigan in the case of Brown v. Sharp-Hauser Contracting Co., 159 Cal. 89, 112 Pac. 874, in the following terms:

"It is the duty of an employer to furnish a reasonably safe place in which the employee may perform the work in which he is engaged, and to use ordinary care to keep the place reasonably safe so that the employee may not be exposed to danger. It is true that the employer is not an insurer of the safety of the employee. The measure of his obligation is to use ordinary care in seeing that the place where the work is being done is safe in the first instance, and to employ the same degree of care in continuing to keep it safe. No liability is cast upon the employer to indemnify an employee for injuries which are the ordinary risks of the business in which he is employed. Where a person undertakes to work in a place where conditions of danger are liable to occur in the ordinary prosecution of the work; where he has knowledge of such dangers, or his facilities for seeing or discovering them are just as good as those of his employer, and he undertakes the employment, or continues in the work with the knowledge or opportunity for ascertaining those dangers, he is in law deemed to assume the perils incident to the employment, and cannot look to the employer for indemnification for injuries resulting therefrom. But this rule of assumption of risk has no application where the dangers are not obvious; where they are known to the employer and not to the employee, or where, in the exercise of ordinary care the conditions of peril might have been discovered and removed by the employer."

That the foregoing rule has special application to cases where the employee is engaged in doing work under the immediate direction of a foreman the authorities all agree. A quite recent and instructive case upon this subject is that of Bradford v. City of St. Joseph (Mo. App.) 214 S. W. 281, in certain incidents of its essential aspects identical with the case at bar, and wherein the Supreme Court of Missouri held that, when a foreman orders a lineman to climb a pole, it is the duty of the foreman, and not of the lineman, to inspect the pole in order to ascertain its condition as to soundness and safety; and that a lineman in obeying such direction cannot be held to have assumed

risks which were not obvious, and of which he had no knowledge. Another instructive case touching the same subject and similar in its facts to the case at bar is that of Coal & Coke Ry. Co. v. Deal, 231 Fed. 604, 145 C. C. A. 490, wherein it was held that a lineman working under a foreman was entitled to rely upon the assurance of his foreman that there was no danger in the service which he was required to perform, and could not be deemed to have assumed the risk incident to his employment in obeying the orders of his master. This case is further instructive and decisive upon another feature of the case before us. The evidence herein discloses that, when the plaintiff was first informed as to the particular work to be done in the way of removing and resetting the poles in question he suggested to the foreman that "We ought to have our pike poles along;" to which the foreman replied, "We haven't got them; we will have to set them up without pike poles." The appellant insists that this evidence shows that the plaintiff was aware of the dangers attending the work, and hence assumed the risk incident thereto; but the court in the case last above cited, dealing with a similar situation, said:

"It is well settled that where an employee requests an overseer or superintendent to furnish additional tools or appliances in order to insure his safety, and the overseer or superintendent refuses to comply with such request but assures the employee that there is no danger in the service which he is required to perform, the employee, under such circumstances, will not be deemed to have assumed the risk incident to his employment."

The case last above cited was one arising under the federal Employer's Liability Act, by which it is conceded this case is also governed, and it is therein held that there is an implied obligation of the master, under his contract with those whom he employs, to use due care in supplying and maintaining suitable instrumentalities for the performance of the work or duty which he requires of them, and he is liable for damages occasioned by a neglect or omission to fulfill this obligation, whether it arises from his own want of care or that of his agents to whom he intrusts the duty, citing Seaboard A. L. Ry. Co. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1916C, 1, Ann. Cas. 1915B, 475.

The cases cited by the appellant in support of his contention herein when examined are all found to relate to the assumption of risk where the danger is obvious or where the risks are the ordinary and known risks inherent in the nature of the work. The cases thus cited having special reference to linemen and other work of climbing poles are either cases where the linemen in doing the particular work to which in each case they were assigned were not under a foreman but were themselves charged with the duty of testing the safety of the particular poles to be ascended or else they were cases where the work to be done was that of removing poles known to be defective, and which were being replaced for that reason. Cases of this character have no application to the facts of the case at bar. The appellant in his closing brief concedes that "the pole was in a rotten and decayed condition; otherwise it would not have broken." The evidence fully discloses that this rotten and decayed condition of the pole was within the interior of the pole, and was covered and concealed by its outside shell, and was such as would not be disclosed by an exterior or superficial inspection of the pole. It could not in reason be claimed that this plaintiff, before climbing the pole, apparently sound, and which would not have fallen unless latently rotten, could be required to make such inner investigation as would be necessary to determine that the pole was sound at the heart. The duty of such investigation rested upon the employer or his agents in charge of the work. The foreman in this particular case was in a superior position in point of both knowledge and authority over the lineman. He had received the written history of the pole from his superior before proceeding with the work, he knew that it was the custom and duty of his employer to maintain and conduct a regular system of inspection of the poles of the corporation. He also was advised that the engineering department had only a few days before visited the scene and laid out the work to be done. He had, and he exercised, the authority to order this lineman to ascend this pole. The plaintiff had a right to rely upon the possession of this superior knowledge on the part of his foreman, and upon the fact that the latter's order and direction to climb the pole was based upon his assurance arising from his superior knowledge and position that "the pole was all right." He cannot, therefore, be held to have assumed a risk incident to a condition which was not obvious, but was unknown to him, and which he was assured by his foreman did not exist.

The judgment is affirmed.

I concur: TYLER, P. J.

WEST KEY NUMBER SYSTEM

NATIONAL UNIVERSITY LIBRARY
3 1786 10046 8542

NATIONAL UNIVERSITY
LIBRARY
SAN DIEGO

NON CIRCULATING